



The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change

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ABSTRACT

The international refugee regime has certainly evolved over the past 65 years, but fundamental challenges remain. On the one hand, an international organization (UNHCR – strictly speaking, a subsidiary organ of the UN General Assembly) with a global mandate to provide protection and seek solutions operates within a widely ratified treaty framework, together with a 98 Member State Executive Committee. On the other hand, notwithstanding the 2003 decision to put UNHCR on a permanent footing (‘until the refugee problem is solved’), the system overall continues very much as if it and the problems of displacement were still temporary. International cooperation is still largely *ad hoc* and unstructured; funding depends on voluntary contributions; the mechanisms for early warning, conflict prevention, and mediation are insufficient; and viable safe havens as alternatives to displacement are rarely considered, let alone initiated. More significantly, displacement-related challenges are compounded by States’ reluctance to ‘internationalize’ key aspects of the movement of people, with a view to the better and more humane management of migration. This paper proposes some structural changes to bring the international protection mandate into the 21st Century; in particular, the General Assembly should revise UNHCR’s 1950 Statute, not only to reflect its current responsibilities for refugees, internally displaced persons, and the stateless, and to reform the funding base, but also to extend its mandate to migrants without protection. No new treaty or organization is called for and international obligations would remain unchanged. However, working with such an experienced operational partner in the field, States would be free to develop a complementary legal or standards base on migration matters, which, currently, are commonly contested and obstructed by the lack of international cooperation.

1 . BACKGROUND AND AGENDA

On 13 January 2000, United States Ambassador Richard C Holbrooke wound up a meeting of the UN Security Council by noting the Council’s grave concern that alarmingly

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high numbers of refugees and internally displaced persons (IDPs) in Africa were not receiving sufficient protection and assistance; that while refugees were protected under treaty, the internally displaced benefited from no such comprehensive regime; and that such norms as existed were not fully implemented, even though, internally, the United Nations was trying to promote ‘an effective collective response’.¹

Two months later, Ambassador Holbrooke returned to the issue of ‘in-country refugees’, in a speech at the Cardozo Law School. He highlighted the ‘geographic accident’ of crossing an international border, which would determine whether you were a refugee or simply ‘internally displaced’. He emphasized the lack of any real difference between the two – each was uprooted, each seeking shelter and safety. Moreover, and here he drew on what he had seen and learned of displacement in Angola, there was inadequate coordination and no clear lead agency with overall responsibility for every aspect of this complicated problem, particularly protection.

Sixteen years later, some progress has been made. The 1998 ‘Guiding Principles on Internal Displacement’² have been widely integrated into institutional practice and in legal instruments, such as those adopted for the Great Lakes in 2006³ and at Kampala in 2009.⁴ Within the UN, the Inter-Agency Standing Committee has allocated responsibility for the protection of conflict-generated IDPs to a cluster chaired by the Office of the United Nations High Commissioner for Refugees (UNHCR) (the lead agency concept having proven unsuitable in practice),⁵ and UNHCR also chairs the clusters on

This is a revised version of a paper presented to the Richard C Holbrooke Forum on ‘The Global Migration Crisis: Its Challenges to the United States, Europe and Global Order’, 3–6 Feb 2016, Washington DC. The author is grateful to the organizers, to Dr Berit Ebert, Sarah Mie Nass and the American Academy in Berlin, to the Brookings Institution, which hosted the event, and, in particular, to the co-chairs, Harold Hongju Koh, Michael Ignatieff, and Nader Mousavizadeh, for providing a stimulating, inter-disciplinary environment in which to consider, debate, and reflect on one of the most challenging issues of today and the years to come. The report of the meeting is available online: <<http://www.americanacademy.de/home/program/past/global-migration-crisis-0>>.

¹ UN Press Release, SC/6783, 13 Jan 2000.

² United Nations Commission on Human Rights, ‘Guiding Principles on Internal Displacement’: UN doc E/CN.4/1998/53/Add.2, 11 Feb 1998; and, generally, on international standards applicable to internally displaced persons, see Office of the United Nations High Commissioner for Human Rights (UNHCR) <<http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx>>.

³ Walter Kälin, ‘The Great Lakes Protocol on Internally Displaced Persons: Responses and Challenges’ <<http://www.brookings.edu/research/speeches/2007/09/27-africa-kalin>>.

⁴ 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) <<http://www.au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>>. See also the work of the Internal Displacement Monitoring Centre <<http://www.internal-displacement.org/>>.

⁵ See Michael Pugh and S Alex Cunliffe, ‘The Lead Agency Concept in Humanitarian Assistance: The Case of the UNHCR’ (1997) 28 Security Dialogue 17; Guy S Goodwin-Gill, ‘Refugee Identity and Protection’s Fading Prospect’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 220.

emergency shelter, and camp coordination and camp management.⁶ Primary responsibility and authority remain with the Emergency Relief Coordinator, although Ambassador Holbrooke's view that the Office for the Coordination of Humanitarian Affairs (OCHA) lacked the authority and resources to drive the system appears still to hold good.

Considerable potential remains in the analysis underlying Ambassador Holbrooke's vision of displacement, and also scope for expanding it to the broader issues of movement between States. At that time, in his view, the coordination system for IDPs lacked three essentials: *accountability*, *predictability*, and *advocacy*. Today, much the same can be said with respect to many of those compelled to move in search of a livelihood, who are uprooted by circumstances beyond their control, and who are effectively without the protection of their own or any government. What is needed is a comprehensive, international response capacity, competent to deal with external and internal refugees, as well as with the forced or involuntary migrant without protection. This is crucial in the interests of effective management and humane solutions, and not just to erase 'bureaucratic and semantic distinctions' between those who do and those who do not cross borders, or between those who qualify as refugees in the sense of the 1951 Convention/1967 Protocol, and those who do not.

Such a system needs to be *predictable*, linked to both early warning and a clearly identifiable response mechanism for when migration and displacement emergencies occur. The 1986 Group of Governmental Experts on measures to avert new flows of refugees recommended that the Secretary-General make full use of the competences provided by the Charter, and ensure that relevant, timely, and fuller information was available within the Secretariat, that it was effectively analysed so as to provide early assessment of possible refugee flows, and that the information was disseminated to the competent United Nations organs, in consultation with the States directly concerned.⁷ Many States were opposed to the idea, but an Office for Research and the Collection of Information (ORCI) was set up in 1987, although it was ultimately short-lived. Given technological developments and the growth in NGO and civil society information gathering and dissemination, a UN office dedicated to collection and analysis may no longer be required.⁸ To be effective, however, the international humanitarian system cannot continue to be largely reactive and a more comprehensive approach to imminent crises is clearly necessary. Moreover, such an approach increasingly demands *accountability*, in that the agency or agencies involved, along with governments, must answer for their

⁶ See the Global Protection Cluster <<http://www.globalprotectioncluster.org/>>; also, IASC, 'Framework on Durable Solutions for Internally Displaced Persons' (2010) <<https://interagencystandingcommittee.org/geneva-iasc-events/documents/iasc-framework-durable-solutions-idps>>; and, generally, see <<https://interagencystandingcommittee.org/product-categories/cluster-approach>>.

⁷ Note by the Secretary-General, 'International Co-operation to Avert New Flows of Refugees': UN doc A/41/324, 13 May 1986, para 70.

⁸ Alex J Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Routledge 2011) ch 6: 'Early Warning' 130–33; Timour F Dmitrichev, 'Conceptual Approaches to Early Warning – Mechanisms and Methods: A View from the United Nations' (1991) IJRL 264. ORCI was wound up in 1992.

action or inaction.⁹ It must be *universal*, too, in that the displaced will receive assistance and protection regardless of location or specific circumstances, and within a regime backed by networks possessing the necessary resources and infrastructure. Finally, and in particular, such a mechanism must be *solutions-oriented*, competent, and supported by States in the collaborative work that is essential, if those displaced and without protection are to be able to take up or resume their lives in safety and dignity, and if the security concerns of States, broadly considered, are to be met.

2 . THE LI MITS TO EXISTING MANDATES

States have long resisted the ‘internationalization’ of migration at large, and the price has frequently been ineffective and inefficient management, on the one hand, and insecurity and human rights violations, on the other. No international agency is thus responsible for the protection of forced migrants and for working with governments to find solutions, or to improve arrangements for those who may not meet current criteria for assistance. Change is urgently needed, on both fronts. It is even more clear today that, as Ambassador Holbrooke argued in 2000, no State can rely on sovereignty to justify the abuse of its citizens and their direct or indirect displacement to other countries. Moreover, as the Security Council has acknowledged time and again, the flight of refugees and asylum seekers is a matter affecting international peace and security, while international migration is also a multi-dimensional phenomenon in the relations between States. A truly comprehensive approach will need to integrate both differences and commonalities, taking protection as the guiding principle and drawing together appropriate experience from the practice of international organizations and other relevant actors.

Over the years, the General Assembly has expressly affirmed that UNHCR’s mandate extends beyond the original terms set out in resolution 428 (V), adopted on 14 December 1950, and that it also includes stateless persons, the internally displaced, and others ‘of concern’. This does not mean that new obligations are imposed on States, additional to those to which they have consented by becoming party to treaties, or which are applicable under customary international law. There has always been a disjuncture, and a certain ‘creative’ tension, between the institutional responsibilities of UNHCR, the obligations of States, and States’ ‘sovereign’ interests – this is part of what makes international law a dynamic system. UNHCR’s mandate is currently limited to refugees and others ‘similarly situated’, to use a convenient short-hand, and the line remains drawn against the so-called voluntary migrant.¹⁰

The mandate of the International Organization for Migration (IOM), by contrast, has had an essentially operational focus since its inception, outside the United

⁹ See generally, Jan Wouters, Eva Brems, Stefaan Smis, and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010); also, Multilateral Organisation Performance Assessment Network (MOPAN), ‘United Nations High Commissioner for Refugees’ (2014) <<http://www.mopanonline.org/assessments/unhcr2014/index.htm>>.

¹⁰ ‘So-called’, because in practice it can be difficult to isolate reasons for movement as entirely or predominantly voluntary.

Nations, as the Inter-Governmental Committee for European Migration.¹¹ Article 1 of its 1987 Constitution emphasizes its purposes and functions as the organized transfer of migrants, refugees, and displaced persons; the provision of ‘migration services’, such as recruitment, language training and orientation activities; and providing a forum for States and others. Even if it seeks to advance protection in the general sense, collateral to its field operations, IOM has no mandate to protect or to promote solutions, and no role in treaty supervision, or in the development of migration law and standards. Article 1(3) of the Constitution specifically requires that it, ‘shall recognize the fact that control of standards of admission and the numbers to be admitted are matters within the domestic jurisdiction of States ...’. The organization thus lacks that standing in international law which would permit its direct engagement with States on the rights of the displaced.

However, the Special Rapporteur on the human rights of migrants, established by Commission of Human Rights resolution 1999/44,¹² does have such a protection mandate, ‘to examine ways and means to overcome the obstacles existing to the full and effective protection’ of migrants’ human rights. The Special Rapporteur’s functions are to gather information, make recommendations, and promote effective implementation of international norms. He or she can and does act on information received regarding alleged violations, undertakes country visits, and reports to the Human Rights Council on findings and recommendations. The Special Rapporteur reports also to the General Assembly, and recent studies have contributed to the now annual resolution on the protection of migrants.¹³ While not underestimating the effective advocacy role played by the Special Rapporteur, more could be achieved, over the medium and long term, if the goals of protection, promotion, and solutions were integrated into an effective and well-resourced institution.

A number of radical, institutional changes are thus called for, if the international system is to develop and maintain capacity to respond effectively to today’s population displacements, and to those which, inevitably, will follow. In addition to changes at the international level, regional institutions and practices also demand adjustment, as recent events have illustrated and commentary has observed.¹⁴

¹¹ Richard Perruchoud, ‘From the Intergovernmental Committee for European Migration to the International Organization for Migration’ (1989) 1 *IJRL* 501; Rieko Karatani, ‘How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins’ (2005) 17 *IJRL* 517; Lina Ventura (ed), *International ‘Migration Management’ in the Early Cold War: The Intergovernmental Committee for European Migration* (University of the Peloponnese 2015) <<http://mimio.uop.gr/site/?q=en/publications-collective-volume>>. IOM currently has a membership of 162 States <<http://www.iom.int>>.

¹² Adopted without a vote on 27 Apr 1999 and most recently renewed by Human Rights Council res 26/19, 26 June 2014 <<http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx>>.

¹³ See, eg, UNGA res 70/147, ‘Protection of migrants’, 17 Dec 2015, adopted without a vote. For the Special Rapporteur’s reports, see <<http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx>>.

¹⁴ Among others, see Guy S Goodwin-Gill, ‘The Mediterranean Papers: Athens, Naples, and Istanbul’ (2016) 28 *IJRL* 276.

3 . THE NECESSARY CHANGES, IN BRIEF

Some of the necessary changes are summarized below.

3.1 An institutional mandate

A new or very substantially revised Statute is required for UNHCR; UNHCR is a subsidiary organ of the General Assembly and rewriting its mandate is therefore within the remit of this body under article 22 of the UN Charter. Revision is needed, not only to do away with historical anomalies and redundancies, but also, more particularly, to reflect changes already made and to bring in new tasks that call for the application of UNHCR's protection and assistance experience. In short, the organization's mandate should expressly encompass refugees, stateless persons, the internally displaced, and migrants without or in need of protection. This revision, which is the principal proposal of the present paper, is further developed in the Annex below.

3.2 New funding arrangements

The bases for funding the protection and humanitarian assistance costs of population displacement require a major revision of the present system of voluntary contributions. There is a more or less constant budget, which comprises the known costs of existing refugee and displacement situations. Effective planning and financial management demand that this portion at least be guaranteed, for example, as payable from the budget of the General Assembly (a substantial revision, therefore, of paragraph 20 of UNHCR's current Statute). Emergencies may appropriately be the subject of appeals for funds, although subject to incorporation in the general budget if overall solutions are not forthcoming within, say, 18 months. This is clearly a matter for further, urgent inquiry.

3.3 Sanctions, frozen assets, and humanitarian relief

In relation to States that can be identified as responsible for refugee and forced migration and population displacement, the Security Council and/or States, acting through regional and related organizations, should employ their sanctions and asset-freezing competencies in such a way as to free up funds for humanitarian assistance to those displaced. There is much to be worked out in this area, for State assets may not be readily identifiable and tracing is not always easy. However, international experience with sanctions and measures to combat money laundering, corruption, and the financing of terrorism now provide more sophisticated tools and opportunities. Using such assets in this way would materially contribute to refugee protection and potentially discourage States from resort to conflict. The amount of money will obviously vary and in many cases the contribution may be largely symbolic, but such measures would help to square the circle of justice and to send a clear message to both States and individuals responsible for the policy and practice of displacement.¹⁵

¹⁵ See Guy S Goodwin-Gill and Selim Can Sazak, 'Footing the Bill: Refugee-Creating States' Responsibility to Pay' (*Foreign Affairs*, 29 July 2015) <<https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill>>; Selim Can Sazak, 'An Argument for Using Frozen Assets for Humanitarian Assistance in Refugee Situations' (Spring/Summer 2015) 68 *Journal of International Affairs* 305.

3.4 Safe or neutral zones

The competencies of the Security Council and the UN Secretary-General respectively should be revisited, with a view to determining how the option of ‘safe zones’ can be effectively operationalized. The idea is hardly new. After the fall of Barcelona on 26 January 1939, the Daladier Government of France proposed to Franco that a ‘neutral zone’ be established between the Principality of Andorra and the Mediterranean at Port Bou. As would many a tyrant or dictator, Franco declined, claiming that all those fleeing were prisoners of war anyway.¹⁶ On 27 January, France’s border with Spain was opened, initially to civilians, but then, on 5 February, without qualification, save that arms and much else was confiscated. Within a little over two weeks, France received some 475,000 refugees.¹⁷

The idea that such ‘zones’ could play a humanitarian role in equivalent situations of displacement has never gone away.¹⁸ For example, in a contested and later much disputed 1991 resolution, the Security Council requested that Iraq halt its attacks on the Kurdish people in northern Iraq and that Member States assist in humanitarian relief efforts. A relief and protection/security operation, backed by the use and threat of force, particularly enforcement of a no-fly zone, was in place from 1991 to 2003, although not without considerable opposition to its claimed legal justification.¹⁹

As Michael Ignatieff has remarked, the US ruled out safe zones for displaced civilians in Syria, because a safe zone, ‘is not safe without perimeter protection by combat capable ground troops and continuous air cover. No country has provided these grounds troops ... Meanwhile the Syrian civil war grinds on, rendering refugee return currently impossible’.²⁰ The message is in the final sentence: if there is no security against displacement by conflict, and if conditions in countries of first refuge fall short of providing assistance, livelihood, education, and at least some opportunity, then refugees will continue both to flee and to keep moving. That is the lesson of experience, after experience, after experience.

3.5 Regional measures: Europe

Europe’s idealized and optimistic common asylum system and its agenda for migration have failed to meet the challenges of recent years, whether it be the large numbers arriving

¹⁶ Evelyn Mesquida, *La Nueve, 24 août 1944: Ces républicains espagnols qui ont libéré Paris* (Le Cherche Midi 2011) 29.

¹⁷ René Grando, Jacques Quéral, Xavier Febrés, *Camps du mépris – des chemins de l’exil à ceux de la résistance 1939–1945* (Editions Trabucaire 1991) 20; Coralie Pailhes, ‘Un demi-million de réfugiés espagnols’ (Oct–Nov 2011) 196 *La revue française de généalogie* 19.

¹⁸ Karin Landgren, ‘Safety Zones and International Protection: A Dark Grey Area’ (1995) 7 *IJRL* 436.

¹⁹ Security Council res 688, 5 Apr 1991; see Peter Malanczuk, ‘The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War’ (1991) 2 *EJIL* 114; Nico Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council’ (1999) 3 *Max Planck UNYB* 59.

²⁰ Michael Ignatieff *et al*, ‘The United States and the Syrian Refugee Crisis: A Plan of Action’, Harvard Shorenstein Centre White Paper (Jan 2016) 7; also, Michael Ignatieff, ‘The Refugees & the New War’, *The New York Review of Books* (17 Dec 2015) 2, 8.

in search of refuge or opportunity, or the need for more effective arrangements on migration matters with non-EU States. The challenges themselves have also revealed major deficits in the EU's organizing principles of solidarity, cooperation, and mutual support.

Given the nature of the Union, what is needed, first, is a truly European response, in which 'Europe's refugees' would enjoy European asylum, European protection, and the rights and benefits accorded by European law. This would require, in turn, an EU institution, a *European Migration and Protection Agency* competent to fulfil and to implement collectively the individual obligations of Member States and the policy and protection goals of the EU. Here, the EU's border management agency, Frontex, and its likely successor, the European Border and Coast Guard,²¹ would have clear protection responsibilities, for example, in recording and identifying arriving, rescued, or intercepted asylum seekers and migrants, and facilitating their access to the appropriate reception and processing facility. Secondly, the EU's relations with sending and so-called transit States would need reformulating, so as to proceed on a basis of equality and equity.²²

It is too early to predict whether the Action Plan for Turkey will produce the results which the EU hopes for – fewer irregular border crossings – and whether it will enable refugees in Turkey to enjoy a reasonable life, to engage in decent work, and to see their children educated. It is also too early to predict whether the EU and its individual Member States will be able to respond internally and effectively to the needs and entitlements of those who have already arrived, to share responsibility reasonably and fairly, and to maintain fundamental principles, such as freedom of movement.²³

Potentially, the EU could have a positive impact, developing and implementing asylum and migration practices consistently with international law and obligation, and thereby offering a possible model for other regions. However, some of the actions, proposals, and rhetoric, if carried through, are likely to maintain the present dysfunctional system. In particular, the focus on 'inadmissibility' in the proposed revision of the Dublin system²⁴ will need the cooperation of third States in arrangements compliant

²¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, Strasbourg, 15 Dec 2015, COM(2015) 671 final, 2015/0310 (COD).

²² Goodwin-Gill (n 14).

²³ The EU Commission's Jan 2016 'Recommendation' for voluntary humanitarian admissions from Turkey emphasizes the need for a scheme which is rapid and efficient, voluntary and equitable, based on a standardized procedure which addresses, among others, identity, reasons for flight, security and medical concerns, vulnerability, and possible connections. It would potentially combine common or shared processing with participating States retaining the final say. Such a scheme would also aim to prevent 'secondary' movement within the EU, with entitlement to the rights attached to protection linked exclusively to the State of admission (on this point, see also art 11, 2001 EU Council Directive 2001/55/EC on Temporary Protection): Commission Recommendation of 11 Jan 2016 for a voluntary humanitarian admission scheme with Turkey, C(2015)9490 final.

²⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council 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 (recast) Brussels, 4 May 2016 COM(2016) 270 final 2016/0133 (COD).

with European and international law—something which the EU seems presently unable or unwilling to promote seriously and equitably.²⁵

4 . CONCLUSIONS, FOR NOW

Refugees and migrants will not stop moving within and between States, wherever desperation is the driving force and security or opportunity is needed. It can never be assumed that refugee or other situations of displacement are or ever will be ‘temporary’—experience, since at least the 1920s, has shown otherwise, although States remain loathe to admit the inevitability of such events. Nor can it be assumed that ‘spontaneous’ migration is just a blip in the relations between States, or on the road to international development. Already in the 1980s, the UN estimated that, given the likely growth in the number of those of working age, some 35–40 million jobs would be needed *every year* in the developing world as the 20th century drew to a close.²⁶ Thirty-five years later, the *2015 Revision of World Population Prospects* records a world population of 7.3 billion as at mid-2015,²⁷ with a further one billion expected over the next 15 years.²⁸ Within these raw statistics, the youth factor stands out, and the number of 10–24 year olds will likely reach 2 billion by 2050.²⁹ The global youth unemployment crisis is worsening and, in the least developed countries, about 15 million young people each year join a labour force where most of the workers face unemployment, under-employment, or vulnerable employment.³⁰

²⁵ See European Commission, Communication of 7 June 2016 on a ‘new’ concept of cooperation with third countries, the ‘Partnership Framework’. This anticipates the EU developing a mix of positive and negative incentives to be integrated into development aid, neighbourhood, trade, energy, and security policies, by way of which States cooperating with the EU on readmitting their citizens *and* third country nationals will be rewarded. See, however, European Parliament, ‘EU Cooperation with Third Countries in the Field of Migration’, Study for the LIBE Committee, doc PE 536.469, Oct 2015 <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU%282015%29536469_EN.pdf>.

²⁶ Antonio Golini and Corrado Bonifazi, ‘Demographic Trends and International Migration’ in Organisation for Economic Co-operation and Development, *The Future of Migration* (OECD 1987) 110, 135–36; Reginald Appleyard, ‘Conference Reports, “The Future of Migration”, Summary of Main Results in the Form of Possible Policy Options’ (1987) 21 *International Migration Review* 128.

²⁷ United Nations (UN), Department of Economic and Social Affairs, Population Division, ‘World Population Prospects: The 2015 Revision’ (UN 2015) <<http://esa.un.org/unpd/wpp/>>.

²⁸ The highest growth will be in Africa in the next 35 years, with the Least Developed Countries (LDCs)—27 are in Africa—leading the way. World population is projected to rise to 8.5 billion by 2030, 9.7 billion by 2050, and 11.2 billion by 2100. 48 countries are expected to see a decrease in population, with 11 facing a fall of more than 15%; Europe is projected to have a smaller population by 2030, down 4.3% overall.

²⁹ UNFPA, *State of World Population 2014: The Power of 1.8 Billion* (UN 2014) 2; by 2013, this age group made up 12% of the world’s estimated 232 million international migrants, *ibid* 7.

³⁰ *ibid* 34. Globally, 73.4 million young people were unemployed in 2013, with youth unemployment highest in North Africa and Western Asia: International Labour Organization, ‘Global Employment Trends for Youth 2013: A Generation at Risk’ (ILO); United Nations, *The Millennium Development Goals Report 2014* (UN 2014).

Behind these statistics, of course, there is a stark reality – too often ignored or underappreciated by those who call simplistically for more control, and who ignore what experience has long confirmed – that persistent inequality is a powerful generator of the movement of people between States. Just as conflict and the search for security and freedom from violence drive refugees, often ever onwards, so the desperate search for work and a decent livelihood motivates migration, most of it from one developing economy to another, but some of it, necessarily and inevitably, leading to Europe and other parts of the developed world.

Radical change is required, not only institutionally, but particularly in developed world attitudes. For there is no meaningful future in unilateralism, even regional unilateralism; effective cooperation in the better management of migration and displacement lies in States dealing with each other on the basis of equality and equity.³¹

There is and always has been a responsibility deficit in the refugee protection scheme initiated by the creation of UNHCR and the adoption of the 1951 Convention. States declined then to accept the UN Secretary-General's proposal on cooperation among States, which was essential in order to relieve the burden assumed by initial reception countries. He proposed a specific article, under which States, '... shall to the fullest extent possible relieve the burden... *inter alia*, by agreeing to receive a certain number of refugees in their territory ...'.³² But even this cautiously drafted provision did not find its way into the final text and, like a similar requirement that States give 'favourable consideration' to the admission of refugees, it was consigned to an uncertain and anomalous place as recommendation D in the Final Act adopted by the 1951 Conference of Plenipotentiaries.³³

Today bears witness to the costs of this failure, even as it is replicated, at least in part, in the EU's continuing struggle to give meaningful content to its treaty provisions on sincere cooperation, solidarity, and the fair sharing of responsibility.³⁴

ANNE X

UNHCR, revised and reformed

As a matter of urgency, UNHCR's mandate, as expressed in the Statute annexed to UN General Assembly resolution 428(V), 14 December 1950, and as developed in practice

³¹ For useful insights into what States can and cannot accept, see José Pina-Delgado, 'The Current International Legal Framework of Economic Migration Management – Challenges for Emerging Countries' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century: International Legal Aspects* (Hague Academy of International Law, Martinus Nijhoff 2015) 127; Sara Iglesias Sánchez, 'Migration Agreements between the European Union and Third States' also in Goodwin-Gill and Weckel (eds), 167; also, Sergio Carrera, Jean-Pierre Cassarino, Nora El Qadim, Mehdi Lahlou, and Leonhard den Hertog, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?', CEPS Paper in Liberty and Security in Europe, No 87 (Jan 2016).

³² *Ad Hoc* Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons, Memorandum by the Secretary-General: UN doc E/AC.32/2, 3 Jan 1950, Annex, Preliminary Draft Convention relating to the Status of Refugees (and Stateless Persons), art 3(2).

³³ 1951 Convention relating to the Status of Refugees: 189 UNTS 150; see also para 4 of the Preamble.

³⁴ Art 4(3), Treaty on European Union; arts 67, 78, 80, Treaty on the Functioning of the European Union.

and in subsequent resolutions,³⁵ should be formally revised to expressly include refugees, stateless persons, the internally displaced, and forced/involuntary migrants, as described below. This would offer the opportunity to update and revise the definition of refugees and stateless persons for UNHCR's operational purposes, to produce a Statute fit for purpose in the 21st century, and to integrate within a single agency the UN's understanding of the concepts of 'internally displaced person' and 'migrants without or in need of protection'.

Below are just a few of the proposed mandate changes which can be implemented by the General Assembly; as already noted, these would have an immediate impact on UNHCR's institutional responsibility and therefore in its relations with States, but would otherwise leave States free to develop, or not, a complementary legal and/or standards base, and to revise existing or initiate new international instruments in the light of experience.³⁶

UNHCR Statute, annexed to UNGA resolution 428(V) 14 December 1950	Proposed amendments	Comments
Paragraph 1	Paragraph 1	
The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions	The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees, <i>stateless persons, internally displaced persons and migrants</i> who fall within	These changes reflect the necessary formal amendments to the scope of UNHCR's mandate <i>ratione personae</i> , and take account of developments in practice since 1951. The reference to 'assistance' also takes account of UNHCR's evolution from a non-operational, legal protection agency to a major provider of humanitarian relief and

³⁵ See, among others, UNHCR, Division of International Protection, 'Note on the Mandate of the United Nations High Commissioner for Refugees and his Office' (UNHCR Geneva, Oct 2013).

³⁶ Revisiting the UNHCR Statute would incidentally provide an opportunity to revise those historical elements no longer relevant or applicable (such as paras 5, 6A(i), (ii), except cessation, and 13). It would also permit some re-thinking of UNHCR's protection and other activities in the light of practice (paras 8 and 9); confirmation of UNHCR's entitlement to appeal for funds (compare para 10); and substantial reform of UNHCR's funding (para 20—see above, part 3.2).

UNHCR Statute, annexed to UNGA resolution 428(V) 14 December 1950	Proposed amendments	Comments
for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.	<p>the scope of the present Statute. <i>Within the limits of the resources placed at the disposal of the Office, the High Commissioner shall provide such assistance to those within the scope of this Statute as may be necessary.</i></p> <p><i>The High Commissioner shall assist and cooperate with Governments and, as appropriate, with non-governmental organisations, in seeking durable solutions to the problems of those within the scope of the present Statute, including through voluntary repatriation, integration, settlement in third States, migration, return migration, and naturalization.</i></p>	<p>assistance in situations of forced displacement. Given the extension of the personal scope of UNHCR's mandate, it is also appropriate to extend the range of relevant solutions to cover the multi-dimensional character of movements today.</p>
Paragraph 6	Paragraph 6	
The competence of the High Commissioner shall extend to:	The competence of the High Commissioner shall extend to:	
Paragraph 6B	Paragraph 6	Paragraph 6A, with its references to refugees recognised under earlier arrangements and to the dateline of 1 January 1951 is now largely redundant and can be deleted.

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<p>Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable, or because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.</p>	<p>(1) Refugees, including any person who is outside the country of his or her nationality, or if he or she has no nationality, the country of their former habitual residence, because of well-founded fear of persecution by reason of race, religion, nationality, membership of a particular social group, gender, sexual orientation, or political opinion and is unable, or because of such fear, is unwilling to avail him- or herself of the protection of the government of the country of their nationality, or, having no nationality, to return to the country of their former habitual residence.</p>	<p>This first sub-paragraph essentially retains UNHCR's initial mandate for refugees having a well-founded fear of persecution; there is no reason to suppose that this will cease to be a driver of flight in search of asylum. The changes aim to incorporate non-gender specific language (and may be improved in that regard), while also including elements in refugees' fear of persecution which have been accepted in the practice of many States (particularly, gender and sexual orientation).</p>
	<p>(2) Refugees, including persons who there are substantial reasons to believe will be subject to torture, cruel or inhuman treatment or punishment if required to return to any country, including their country of nationality or origin.</p>	<p>The second category of refugees formally acknowledges the <i>non-refoulement</i> requirement of the 1984 UN Convention against Torture, and the complementary jurisprudence developed by treaty bodies, including the Human Rights Committee, the Inter-American Commission on Human Rights, and the European Court of Human Rights.</p>

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| <p>(3) <i>Refugees, including those who have fled or who are unable to return to their country of nationality or origin by reason of internal or international armed conflict, events seriously disturbing public order, generalised violence, or massive violations of human rights.</i></p> | <p>The third category of refugees takes account of regional developments in refugee definition and practice, including the 1969 OAU Convention, the 1984 Cartagena Declaration, and the EU's 2004 Qualification Directive (recast 2011).</p> |
| <p>(4) <i>Stateless persons as defined in the international instruments drawn up to make provision in respect of their status and for the reduction of statelessness, and who do not enjoy the protection of any government.</i></p> | <p>This takes account of the General Assembly's decision on UNHCR's responsibilities following the entry into force of the 1961 Convention on the Reduction of Statelessness, and of the development of UNHCR's mandate generally in this field. See UNGA resolutions 3274 (XXIX), 10 December 1974; 31/36, 30 November 1976; 49/169, 23 December 1994; and 50/152, 21 December 1995, UNHCR Executive Committee Conclusion No 78 (XLVI) – 1995.</p> |
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	<p>(5) <i>Internally displaced persons, being persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.</i></p> <p>(6) <i>Migrants, that is, persons who have moved or been moved, voluntarily or involuntarily, from one State to another, irrespective of their status and whether or not they have been smuggled or trafficked, who do not enjoy the protection of their State of nationality or origin, either because that State has refused them protection or is otherwise unable to provide such protection, or who do not enjoy the protection of any State.</i></p>	<p>This reflects the allocation of responsibilities to UNHCR by the Inter-Agency Coordinating Committee, and the evolving practice of UNHCR in the field. The definition or description of the internally displaced is modelled on the 1997 Guiding Principles on Internal Displacement.</p> <p>As noted in this brief paper and elsewhere, ‘irregular migration’ and so-called mixed movements are an important feature in the movements of people between States today, but no international agency is competent to provide protection and, together with governments, to assist in finding durable solutions consistent with international law.</p> <p>The first Special Rapporteur on the human rights of migrants noted that it is increasingly difficult, if not impossible, to distinguish between migrants by reference to their reasons</p>

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for moving.³⁷ She therefore proposed that regard be given to their particular protection needs, including whether they were outside their State of nationality, not subject to its legal protection and in the territory of another State; whether they enjoyed the legal recognition of rights inherent in the status of refugee, permanent resident, or naturalized person, as granted in the host State; and whether they enjoyed legal protection of fundamental rights by reason of other agreements.

³⁷ First Report by the Special Rapporteur, Gabriela Rodríguez Pizarro, on the human rights of migrants: UN doc E/CN.4/2000/82, 6 Jan 2000, para 30.