1 *Moving Borders, Refugee Protection, and Immigration Policy*

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Introduction

Migration law and the inclusion of noncitizens are often framed as a matter of nation-centered concepts of justice. But this framing is often rooted in concerns about the fair treatment of noncitizens who have become part of a national community while remaining irregular migrants without lawful status. In the United States, for example, these concerns have prompted the emergence of a civil rights framework as its version of a nation-centered approach to migration and the rights of migrants (Motomura, 2020: 460–479).

In recent years, two trends have cast doubt on whether a civil rights framework or any nation-centered justice system for assessing migration and the rights of migrants can be effective or complete. One trend is the externalization of borders and border controls. The second trend is the shift in political focus away from irregular migrants inside a country and toward newcomers fleeing international conflicts, civil wars, environmental degradation, poverty, and famine. These two trends have combined to intensify attention on the international system for protecting "refugees."

1 Refugee Protection

If migrants win recognition as refugees in destination countries, they gain favorable treatment under international and domestic law – typically a grant of asylum, durable residence, and access to citizenship. This widely accepted refugee exceptionalism (Carens, 2013: 194–199; Miller, 2016: 78; Walzer, 1983: 48–51) is the fragile core of a system that offers little or no protection to many of today's migrants, who leave their homes owing to dire conditions but are outside the legal definition of "refugee" (Hamlin, 2021: 1–9; Keyes, 2017: 138–147).

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This system arose in modern form soon after World War II. Many countries had turned away people who later perished in the Holocaust. These countries' responses led to the dominant refugee protection paradigm, including the foundational 1951 Geneva Convention Relating to the Status of Refugees. Its basic guarantee is *nonrefoulement* – the duty to not return people to persecution on account of nationality, race, religion, political opinion, or membership in a particular social group.[1]

This protection scheme reflected its origins in the chaos and suffering of postwar Europe, at the end of a cataclysmic conflict, and also as the continuation of geopolitical chasms that would persist much longer (Judt, 2005: 28–31; Long, 2015: 4–5). The 1951 Convention was originally limited to migrants displaced by "events occurring in Europe before 1 January 1951."[2] Signatory countries obligated themselves to protect refugees, but they remained free to refuse "economic" migrants (Karatani, 2005: 541; Long, 2013: 13–21). Predating much of modern human rights law, refugee protection emerged as an exception, not a challenge, to sovereign control of national borders (Chetail, 2014: 23–24, 39–40). Firmly rooted in Cold War politics, the system gave the United States and countries in Western Europe the latitude to recognize anyone who managed to flee the Soviet Union or its satellites as a refugee from Communism.

This legal structure is commonplace in the Global North, where countries brought refugee protection into domestic law in two types of schemes, both distinct from other migration regulation. An example of the first type is the US Refugee Admissions Program, which admits refugees from outside the country. The US president consults with Congress before setting an annual limit, subdivided among regions of the world. This number is much lower than the millions of people worldwide who might qualify, so selection criteria – including region, degree of threat, and US ties – are strict. Once admitted, refugees routinely become permanent residents, and many naturalize as citizens.

The second type of protection adopted into domestic law consists of asylum and related forms of protection that are available only at or inside the national border. In the United States, if an applicant

[1] See United Nations (1951: 189 U.N.T.S. 137).
[2] See United Nations High Commissioner for Refugees (UNHCR) (2010: Introductory Note); United Nations (1966: 606 U.N.T.S. 267).

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makes the required showing of persecution on account of enumerated grounds, government officials may exercise their discretion to grant asylum. Unlike refugee admissions, asylum grants are not limited in number. But like refugee admissions, asylum routinely leads individuals and their spouses and children to both permanent residence and citizenship. Some persons not granted asylum may still be protected by withholding of removal or the Convention Against Torture from return to a country where they face peril.[3] These protections have requirements and benefits that differ from asylum.

Applicants for both refugee admissions and asylum in the United States must meet the same statutory definition of refugee, which requires showing "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[4] But refugee admissions differ from asylum in both practice and politics. Refugee admissions are extremely selective. Until recently, the annual limit fluctuated between 70,000 and 100,000 (United Nations High Commissioner for Refugees [UNHCR], 2019). The Trump administration slashed it to 45,000 for 2018, then 30,000 for 2019, then 18,000 for 2020.[5] President Biden returned to prior practice by announcing an annual limit of 125,000 for 2022 and 2023,[6] but actual admissions have lagged under these limits in recent years (Migration Policy Institute, 2022).

A key political difference between overseas refugee programs and asylum is that disappointed applicants for refugee admission are far away and have little recourse, so governments retain substantial control. For asylum, however, governments must work much harder if they want to control who reaches their borders and applies.

[3] United Nations (1984: 1465 U.N.T.S. 85).

[4] See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012).

[5] See *Presidential Determination on Refugee Admissions for Fiscal Year 2020*, Pres. Determination No. 2020-04, 84 Fed. Reg. 65903 (November 29, 2019) *Presidential Determination on Refugee Admissions for Fiscal Year 2019*, Pres. Determination No. 2019-01, 83 Fed. Reg. 55091 (November 1, 2018) *Presidential Determination on Refugee Admissions for Fiscal Year 2018*, Pres. Determination No. 2017-13, 82 Fed. Reg. 49083 (September 29, 2017).

[6] See *Presidential Determination on Refugee Admissions for Fiscal Year 2023*, Pres. Determination No. 2022-25, 87 Fed. Reg. 60547 (October 6, 2022); *Presidential Determination on Refugee Admissions for Fiscal Year 2022*, Pres. Determination No. 2022-02, 86 Fed. Reg. 57227 (October 18, 2021).

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2 Exceptionalism under Pressure

The political sustainability of refugee exceptionalism is delicate. Enough people must see the number of asylum applicants as low enough to coexist with selective admissions for other migrants. This is not a matter of absolute numbers. Politics, including racial and religious perceptions, can fuel intense hostility toward asylum seekers from unfamiliar lands, even if few migrants actually arrive.

Domestic political viability can require that protection be viewed as an exceptional act of sovereign grace for extraordinary reasons, not as a matter of right that could undermine control over national borders (Aleinikoff & Zamore, 2019: 16; Martin, 1990: 1266–1270). As long as asylum is seen as exceptional, few will associate it with legalization or amnesty, even though asylum likewise gives lawful status to migrants who might be barred or expelled because they lack permission to stay (Motomura, 2014: 195–196).

The second precondition for refugee exceptionalism to be sustainable politically is confidence that "refugee" can be defined consistently and fairly. Protection is not supposed to be for voluntary migrants – thus not for "economic migrants" – but only for forced migrants, and then only for *some* forced migrants (McAdam, 2012: 98).[7] This line-drawing generally limits refugee protection to migrants forced to move by specific events, not by the cumulative effects of deteriorating conditions – such as climate change – that magnify the consequences of political dysfunction (Lister, 2014: 618).

Events have undermined these preconditions. Most forced migrants must make harrowing journeys before they reach distant places of refuge.[8] This fact has tempted the Global North to assume that countries closer to migrants' homes would host them indefinitely. But geographic insulation is unreliable. On the US–Mexico border, for example, the number of migrants arriving from El Salvador, Guatemala, and Honduras has increased dramatically since the mid-2010s (Fernandez & Ferman, 2019).

To be sure, the overall number of Central American migrants coming to the United States remains a small fraction of new arrivals.

[7] On climate migrants, see Michael W. Doyle (Chapter 9).
[8] On proximity as a factor in a destination country's obligations to protection toward forced migrants, see Dana Schmalz (Chapter 4).

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Surreptitious border crossings are much less frequent, and the US unauthorized population has declined (Bolter & Meissner, 2018). In Europe, migrants from the Middle East are far less numerous than the highs in 2015 (Nasr, 2019). But perceptions of threats to border security have been persistent in news cycles, and asylum seekers remain central to politics in destination countries (Kingsley, 2018). As more migrants arrive, politicians and media can make refugee "crises" loom large, even if what seems like unprecedented migration is not all that new, and is in fact long familiar in the Global South. As one commentator wrote, "the populist narrative on migration is number-proof" (Dalhuisen, 2019). Invented notions of crisis can amplify narratives of asylum claims as fabricated and asylum seekers as criminals, leading to demands for zero-tolerance responses (Zengerle, 2019).

3 Managing Refugee Protection

One response by governments to perceptions of unprecedented large-scale migration has been to limit the number of asylum seekers, taking advantage of the Refugee Convention's near-silence on how protection is implemented (FitzGerald, 2019: 41–251). One strategy shifts borders outward (Benhabib, 2020; Shachar, 2020b). The US Coast Guard has long kept Haitians and many Cubans away from US shores.[9] In the Mediterranean, the dominant strategy is to interdict migrants on boats before they reach Europe (Pianigiani, Horowitz, & Minder, 2018). Australia combines interdiction with long-term detention of asylum seekers in camps in Papua New Guinea and Nauru (Polakow-Suransky, 2017).

Governments adopt other strategies of migration control outside physical borders and on the soil of other countries (Zolberg, 2006: 110–113; 264–267). The United States enlists Mexico's help to impede the passage of Central American migrants to the United States. A 2016 agreement between the European Union and Turkey largely blocks Middle Eastern migrants from reaching Greece and other EU countries (Collett, 2016; European Council, 2015, 2016). Several EU countries have arranged with Libya, Niger, and other African countries to limit northward migration (Hooper, 2017) (European Union, 2018). Similar in effect are requirements that asylum seekers apply

[9] See Sale v. Haitian Ctrs. Council, 509 U.S. 155, 158–165 (1993).

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in the first "safe country" that they reach.[10] Governments reinforce safe-country requirements with visa restrictions and penalties on carriers to block direct travel, so that migrants must travel through other countries and seek protection there. The Trump administration issued a regulation to bar asylum applications from any migrants who traveled through other countries where they could have applied for asylum but did not.[11]

Other responses truncate the process for hearing asylum claims or limit where and how asylum seekers may apply. In the United States, asylum seekers at the border or ports of entry are generally subject to "expedited removal." This means they must, typically without a lawyer's help, navigate an interview to establish that they have a "credible fear of persecution" before they get a full asylum hearing.[12]

The Trump administration tried to deter asylum seekers by detaining them, bringing criminal charges for unlawful entry, and separating them from their children.[13] In 2018, the Trump administration tried unsuccessfully to require that asylum seekers apply only at ports of entry.[14] Starting in December 2018, the Trump "Remain in Mexico" policy forced many asylum seekers to wait in Mexico for long periods

[10] See *Safe Third Country Agreement Canada-U.S.*, December 5, 2002, T.I.A.S. No. 04-1229; Dublin II Regulation: Council Reg. (EC) No 343/2003 of February 18, 2003; Dublin III Regulation, Reg. (EU) No 604/2013 of the European Parliament and Council of the June 26, 2013. For further discussion, see Paul Linden-Retek (Chapter 3).

[11] The US Supreme Court stayed the district court preliminary injunction that would have blocked implementation. See Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019).

[12] On July 23, 2019, the Department of Homeland Security applied expedited removal to noncitizens anywhere in the United States who had not been admitted or paroled, unless they could show two years of prior continuous presence. See *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409 (July 23, 2019).

[13] See US Attorney General, *Attorney General Sessions Delivers Remarks Regarding the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018).

[14] See generally *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (November 9, 2018) (codified at 8 C.F.R. §§ 208, 1003, 1208 (2018)); *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, Proclamation No. 9822, 83 Fed. Reg. 57,661 (November 9, 2018). For the injunction blocking this policy, see East Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 779–80 (9th Cir. 2018), *stay denied*, 139 S. Ct. 782 (December 21, 2018).

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before their cases are heard in the United States.[15] In June 2022, the US Supreme Court found that the Biden administration has discretion to end the Remain in Mexico program, but as of late 2022 the challenge to the program was still pending in a federal district court.[16] The Trump administration also invoked a public health statute, Title 42, to cut off access to the asylum system for many forced migrants arriving at the southern border of the United States. In November 2022, a federal district court struck down that barrier as adopted improperly.[17]

Other efforts to limit asylum have narrowed the refugee definition. Big questions in asylum law are what counts as persecution, how much risk of persecution is required, when persecution is "on account of" protected grounds, and who is ineligible.[18] During the Trump administration, Attorney General Sessions issued a decision in 2018 that made it much harder to win asylum based on domestic violence or gang violence.[19] The Biden administration vacated this ruling,[20] but stricter requirements for asylum remain a tool for refugee skeptics.

Interdiction, remote borders, safe-country provisions, and limiting the refugee definition offer destination country governments ways to

[15] See *Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigration Servs., Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., Ronald D. Vitiello, Deputy Dir. & Senior Official Performing the Duties of Dir., U.S. Immigration & Customs Enf't, on Policy Guidance for Implementation of the Migrant Prot. Protocols* (January 25, 2019).

[16] See Biden v. Texas, 142 S. Ct. 2528 (2022). See also US Department of Homeland Security, *Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols* (Memorandum from R. Silvers to CBP, ICE, CIS) (December 2, 2021); US Department of Homeland Security, *Termination of the Migrant Protection Protocols* (Memorandum from A. Mayorkas to ICE, CBP, CIS Directors) (October 29, 2021).

[17] See Huisha-Huisha v. Mayorkas, 2022 WL 16948610 (D.D.C. November 15, 2022). *But cf.* Louisiana v. Centers for Disease Control, 2022 WL 1604901 (W.D. La. May 20, 2022) (invalidating Biden administration's rescission of Title 42 order).

[18] On crime-based ineligibility, see the Convention Relating to the Status of Refugees art. 33(2), July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954); INA §§ 208(b)(2)(A)(ii), (iii), 241(b)(3)(B)(ii), (iii), 8 U.S.C. §§ 1158(b)(2)(A)(ii), (iii), 1231(b)(3)(B)(ii), (iii) (2012). Past participation in persecution or national security concerns can also bar eligibility, see INA §§ 208(b)(2)(A)(i), (iv), 241(b)(3)(B)(i), (iv), 8 U.S.C. §§ 1158(b)(2)(A)(iv), 1231(b)(3)(B)(i), (iv) (2012).

[19] See Matter of A-B-, 27 I & N Dec. 316, 317, 320–323 (A.G. 2018).

[20] See Matter of A-B-, 28 I & N Dec. 307 (A.G. 2021).

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cast migrants' claims as beyond legal protections tied to physical presence on national territory. This makes it hard to mount challenges based on civil rights or any other legal framework that relies on some connection to the destination country.

These techniques to manage refugee protection are closely tied to a political strategy that links migrants to a soft altruism that – according to skeptics – must give way to "nation first" to ward off imagined foreign threats. The results are deeply troubling as governments avoid their obligations and act beyond the constraints that the international refugee protection scheme places on unilateral government action. The familiar result is indifferent or cruel treatment of desperate migrants.

4 Refugee Protection as Immigration Policy

Some observers criticize government limits on asylum as blunt instruments to shirk legal and humanitarian obligations (Chimni, 1998: 351). Others have defended measures to preserve the scarce political resource of asylum for the migrants in greatest need (Martin, 1991: 30). But the problem is a protection regime ill-suited to migration realities shaped by unsettled political conditions, civil wars, environment degradation, and other causes of forced migration. International and domestic law apply a binary scheme that distinguishes refugees from all other migrants, with life-and-death consequences. To be sure, some cases may be easy to put on the "refugee" end of the spectrum, and other cases more naturally fit the other end for people whose decision to migrate is not forced at all. But in the middle, the line between refugees and other migrants is exceedingly hard to draw, even if the line-drawing process were insulated from political pressure – which it is not. Forced migrants who do not qualify as refugees are still in dire straits, and government responses are typically ad hoc and politically precarious.

Under political pressure, refugee law falls back into the orbit of national immigration policies and politics. Other vehicles for protection that are usually understood as part of immigration law fill some of the gap. For example, Temporary Protected Status (TPS) complements asylum in the United States by protecting many migrants outside the refugee definition.[21] TPS allows some noncitizens to stay

[21] See INA § 244, 8 U.S.C. § 1254a (2012).

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if their countries are beset by war, disaster, or similar conditions (Keyes, 2017: 102–107). In 2022, the US government added Ethiopia, Myanmar, Syria, Venezuela, Cameroon, Afghanistan, Ukraine, South Sudan, and Sudan, increasing to fifteen the number of countries designated for TPS.

Debate over TPS reproduces core aspects of US immigration debates. Skeptics object to a de facto expansion of asylum (Jordan, 2018). Supporters emphasize TPS holders' community ties and contributions, echoing arguments for legalizing the undocumented (Keyes, 2017: 107–112; Motomura, 2014: 181–200). Because TPS fills part of the gap between refugee law and immigration law, the Trump administration's efforts to end TPS for several countries prompted migrants to apply for asylum and other paths to lawful status (Wilson, 2022).

In this way, TPS is like several other aspects of US immigration law that can help near-refugees – such as T visas for survivors of trafficking, U visas for victims of crimes, and Special Immigrant Juvenile Status (SIJS).[22] These legal vehicles allow noncitizens to acquire lawful status, and later lawful permanent residence, on humanitarian grounds. A related development is the emerging practice by the US government in 2022 to allow Ukrainians and then Venezuelans to apply in their home countries for permission to enter the United States – though not with formal admission, but instead through its "parole" authority. At the same time, the US government cut off access to asylum for Venezuelans arriving on the US–Mexico border.[23] The Central American Minors program is more limited in scope but similarly allows that decisions in home countries may lead to permission to enter the United States (Greenberg, 2021).

More generally, refugee law and immigration law are never far from each other. Many legal rules combine to fill some of the gap between them. Debates over forced migration follow patterns familiar from immigration law. National immigration policies and politics also pervade debates over asylum. Arguments for defining "refugee" more broadly draw persuasive power from US immigration law's perceived

[22] See INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2012); INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012); INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012).

[23] See *Implementation of a Parole Process for Venezuelans*, 87 Fed. Reg. 63507 (October 19, 2022); *Implementation of the Uniting for Ukraine Parole Process*, 87 Fed. Reg. 25040 (April 27, 2022).

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failures. For example, some asylum seekers have close relatives who are already in the United States without lawful status. If Congress had enacted any of the past decade's legalization proposals,[24] many asylum seekers could have joined their relatives via legalization. Though these legalization proposals failed, efforts to pass them fuel political pressure, grounded in overall immigration politics, to define refugee more broadly in the meantime.

Similarly, the perception that forced migrants fall into the gap between refugee law and immigration law can influence outcomes in close asylum cases. Applicants who meet threshold eligibility requirements must also convince an immigration judge or another US government official to grant asylum in the exercise of discretion.[25] Decisions may ultimately turn on subtle measures of worthiness.[26] Immigration judges may grant asylum to sympathetic applicants who might fit other avenues to lawful status – except that those routes require long waits. Skeptics criticize such grants as stretching the law and want to limit refugee admissions from outside the country (Rhodan, 2018). Rebuttals invoke a robust, welcoming nation-of-immigrants self-image. These blurred lines are consistent with the transformation of refugees into immigrants in the public imagination (Alperin & Batalova, 2018). In short, debates over immigration policy shape refugee protection.

5 Toward the Fair Treatment of Forced Migrants

Treating forced migrants fairly first requires careful thought about the gap between refugee law and immigration law. The gap is significant. TPS generally does not apply to migrants who arrive in the United States after dire conditions emerge in their home countries. If TPS is unavailable to forced migrants, other available paths to lawful status typically will not assess their degree of peril if they return to their original homes (Keyes, 2017: 107–112). Similarly, unsuccessful asylum seekers may try other paths to lawful status that disregard the harm at the core of their asylum claims.

[24] See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st Sess. (2013).
[25] See 8 C.F.R. § 208.14(a), (b) (2012).
[26] Decisions can parallel outcomes on discretionary relief from removal. Refugee admissions favor those with family in the United States, paralleling family immigration.

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Perhaps an approach based on national belonging – such as a civil rights framework – should guide protection for forced migrants who do not qualify as refugees. But a civil rights framework is awkwardly suited to assess the claims of new arrivals. Skeptics of immigration may cite this poor fit to argue that governments need not be constrained by the rules that operate inside national borders. But it would be a grave mistake to think that any country can dismiss people who reach its borders but fall outside admission categories and the refugee definition. Migrants will arrive and put political and cultural pressure on any country to find responses that are consistent with its foundational values.

These values do not compel taking in all newcomers. But it is essential to take the needs of forced migrants seriously. Some values will be grounded in humanitarian impulses that drive outrage at the consequences of hardline responses – children separated from parents, or toddlers drowned and washed up on Mediterranean shores or the banks of the Rio Grande. This reaction gains traction from basic ideas: that nation-states share some responsibility for human beings who are displaced and suffering, and that the total disregard of people based solely on their place of birth is an unacceptable affront to human dignity.

From this perspective, human rights can inform protection for forced migrants who do not qualify as refugees. Human rights law, only nascent when the Refugee Convention was adopted, has matured into a broad net of protections. Though human rights are still not directly enforceable in many countries, especially in the Global North, they can play a pivotal role as general principles that can help ascertain when forced migrants who do not qualify as refugees should still receive protection grounded in dignity (McAdam, 2007: 197).[27]

Taking the needs and human rights of forced migrants seriously is all the more urgent if migration is attributable to prior destination country involvement in forced migrants' home countries. Apart from whether such history creates obligations to accept forced migrants (Achiume, 2019: 1517) there will be substantial domestic and international pressure to respond thoughtfully. Essential is that the overall

[27] See Directive, 2011/95, 2011 O.J. (L337) 9 (EU); Aufenthaltsgesetz [AufenthG][Residence Act], Feb. 25, 2008, BCBL I at 162, last amended by Gesetz[G], August 15, 2019, BGBL I at 1307, § 25(2) (Ger.).

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treatment of migrants should reflect an intelligible rationale and serious efforts to apply legal rules fairly. Though ad hoc, discretionary approaches may sometimes be the best available options, sound decision-making cannot assume this is true. The risk is too great that decisions that are ad hoc or driven by political or opportunism can lead to cruel treatment and mask illegitimate discrimination.

A next step requires recognizing that responses to migration are badly hobbled if they rely on a sanguine belief that the line between refugees and other migrants is objective and immune to political sway, and then make that line hugely consequential (Benhabib, 2004: 137; Hamlin, 2021).[28] Instead, it is essential to see a broad spectrum of migrants with many gray areas and categories that are hybrid and fluid. Relatedly, it is crucial to see forced migrants not just as survivors in flight, but as multidimensional people who will shape the societies where they and their children and grandchildren settle.[29] Though these migrants have strong needs for protection, they also have a fuller role that includes many contributions, economic and otherwise (Long, 2015: 13–15).[30] Just as it is a mistake to draw a sharp line between refugees and other migrants, it is also essential to examine comprehensively each migrant's future in a society.

Germany, for example, offers forced migrants from Syria more than language instruction and other traditional integration programs. In partnership with the private sector, the German government has tried to draw migrants into apprenticeships that need new recruits, operating as employment-based immigrant admission categories would (Hockenos, 2018; Siems, 2015). Germany has also given unsuccessful asylum seekers from the Balkans special consideration for employment-based categories (Bither & Ziebarth, 2018: 10). Similarly, conditions in countries of origin should influence the design of legalization programs as well as decisions in individual cases involving cancellation of removal, SIJS, or relief for crime survivors. In general, decisions should not only consider the vulnerability of forced migrants, but also harmonize their treatment with other paths

[28] See, e.g., G.A. Res. 73/195, Preamble, Global Compact for Safe, Orderly and Regular Migration (December 19, 2018) ("[M]igrants and refugees are distinct groups governed by separate legal frameworks.");

[29] On viewing refugees as migrants, see Frédéric Mégret (Chapter 5).

[30] Viewing refugees as migrants, not as distinct from migrants, was more common before World War II.

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to lawful status.[31] Allowing the plight of forced migrants to influence a full range of decisions in their cases would relieve much of the pressure that currently distorts refugee law.

It is essential to assemble ad hoc vehicles such as TPS, T and U visas, and SIJS into a more integrated framework. Extending beyond separate schemes, this framework would reflect some recognition of migration-related human rights, such as the right to life, the right to security of the person, the right to resources for subsistence, and the right not to be persecuted. A useful model is the growing acceptance in the European Union of "subsidiary" or "complementary" protection for forced migrants who fall outside the "refugee" definition, as well as the newly activated Temporary Protection Directive.[32]

Another key issue is whether protection decisions should be made in individual cases or based on countries or regions. As long as individual cases are decided separately, resources must be committed to ensure that all decisions are careful, with competent legal counsel to keep decisions accurate in light of the facts and law. But separate inquiries might better yield to overall assessments of groups from troubled regions (Aleinikoff & Zamore, 2019; Keyes, 2017: 137–147). A group-based approach would reduce administrative costs and delays, and less will turn on luck and access to skilled advocates (Eagly & Shafer, 2015: 47–59). The best approach will vary by situation, but there is much room to improve.

Yet another core question is the nature of protection for forced migrants. Is it acceptable for protection to mean only temporary shelter? Is asylum sometimes not the best form of protection for migrants fleeing extreme poverty or environmental degradation? By offering limited protection that does not lead routinely to permanent residence and citizenship, would more people be protected? When is it wise to accept this trade-off and offer less to more people? When is it wise to offer help closer to their countries of origin? But when is that response just an excuse for the tragic and inexcusable failure to help people in need?

[31] See G.A. Res. 73/195, *supra* note 63, at ¶ 21.

[32] See Council Directive 2001/55/EC of July 20, 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof (applied to Ukraine, March 4, 2022).

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Nothing in what I write here is a call to end the essential protections that are based on the Refugee Convention. My plea is for broad agreement not only that those protections are available to too few forced migrants, but also for immigration law to develop new vehicles for admission that go beyond traditional family and employment categories to include forced migrants who do not qualify as "refugees."

I close by recognizing the limits of these thoughts on the fair treatment of forced migrants. Fair treatment depends ultimately on what can be done to address why people migrate, and why they return – or do not return – to their countries of origin. The fair treatment of forced migrants is unattainable without serious attention to these fundamental issues, which I address in other work (Motomura, 2020: 499–528).

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