

The Future Legal Management of Mass Migration

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I. Introduction

International refugee law is being tested as never before. The legal systems in place for asylum determination, resettlement, or repatriation, so-called “durable solutions” to refugee crises, are severely stressed and often overwhelmed. Commentators commonly cast refugee law and its procedures as relics of the post-World War II management of the migratory consequences of the Nazi persecutions—as conceived within a relatively homogeneous European culture, unfit to the challenges of contemporary migrations that now occur on a global scale.

Though the legal foundation for response to refugee migrations remains the Refugee Convention of 1951 (Refugee Convention), international refugee law appears to be increasingly irrelevant to what refugees do, and to what states do in response to refugee movements.¹ Migrants ignore the rules, charging across borders as best they can in desperate attempts to achieve security and better lives. National governments react by giving priority to deterrence strategies and tighter border control, as evidenced most dramatically today by the closing of the Balkan Route during the so-called “European Refugee Crisis” and “the wall” proposed for the U.S.-Mexico border. This is done not only through enhancements of national law, but also through new efforts to implement regional deals and bilateral deals on migration and border regulation.

International refugee law and the institution directly charged with its administration, the Office of the United Nations High Commissioner for Refugees (UNHCR), have evolved to adjust well beyond origins of the post-World War II context of the Nazi persecutions. And the UNHCR is only one among a mix of many international organizations that have evolved to deal with mass migration. Others include the International Migration Organization, informal networks such as The Intergovernmental Consultations on Migration, Asylum, and Refugees (IGC), and numerous non-governmental organizations (NGOs). The UNHCR, as the most prominent institutionalized administration, has grown to an agency of over 10,000 staff and administers a broad range of protective services, including

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1. Convention Relating to the Status of Refugees art. 33(1), *opened for signature* July 28, 1951, 189 U.N.T.S. 150.

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refugee camps, some containing hundreds of thousands of human beings.² UNHCR was not intended to be an operational humanitarian agency, but has adapted as necessary to try and fill the need. As for law, it is no longer only the Refugee Convention that governments and NGOs apply, but a hybrid comprised not just of refugee law, but also norms of humanitarian law concerning humane protection and human rights law directed to values of human dignity.

Inherent to legal response to mass migration, however, is a severe tension. On one side are the aspirations and imprecations of refugee law, human rights, and humanitarian law. On the other is national sovereignty and national political culture, wherein mass migration is increasingly perceived as threatening domestic order and constituting back-door avoidance of national control over immigration.

The following analysis argues that the Refugee Convention has been, and continues to be, serviceable in its fundamental design—that provides a viable framework for reconciling sovereignty with the imprecations of humanitarian and human rights norms. The essential thrust of the Convention is to reconcile sovereign interest with these normative standards. There is, indeed, despite the challenge, still virtually universal acknowledgement of the most fundamental rights enshrined in the Convention. The principle of non-refoulement³ and concomitant rights of asylum remain the normative framework on which states depend for legitimacy in response to mass influx. There is still consensus among states that supports the principles of non-refoulement and the right to asylum as universal and absolute, even to the extent that non-refoulement is claimed to be of the status of *jus cogens*.⁴ Refoulement, when it does occur, is invariably accompanied by protest as the referent norm for state conduct.⁵

2. *About Us*, UNHCR, <http://www.unrefugees.org/about-us/> (last accessed Feb. 5, 2018).

3. “Non-refoulement” refers to the hallmark principle of international refugee law, enshrined in the Refugee Convention, that no contracting state may *refouler* a refugee. To *refouler* a refugee means “expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 1, at art. 33(1). The Right to Asylum comes from Article 14 of the Universal Declaration of Human Rights, which states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 14 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

4. Cases from the European Court of Human Rights acknowledge as much. See *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97 (2012) (De Albuquerque, J. concurring), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-109231&filename=001-109231.pdf>; *Nada v. Switzerland*, 2012-V Eur. Ct. H.R. 213 (2012), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-113118&filename=001-113118.pdf>.

5. See *Poland, Bulgaria, Czech Republic, Hungary and Slovenia: Pushed Back at the Door*, EUR. COUNCIL ON REFUGEES AND EXILES (Jan. 27, 2017), <https://www.ecre.org/poland-bulgaria-czech-republic-hungary-and-slovenia-pushed-back-at-the-door/> and its associated report from five European Refugee Non-Governmental Organizations (“NGO”). Moreover, the international human rights community is wary of any fundamental reconstruction of the Convention for fear it would be retrograde for *non-refoulement*, if done in the current climate of

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But for refugee law to address contemporary mass migration, it must no doubt meet the challenges of a distinctly new dimension. That new dimension is the global confrontation of economic, cultural, and other previously contained disparities that now intersect in explosive reconfiguration of human beings on this planet. Approximately one in every 113 people will be involved in such migrations, per the June 2016 estimate of the UN High Commissioner for Refugees—upwards of 65,000,000 human beings.⁶ Multitudes of people migrate, fleeing political failure and war, the impacts of global warming, economic disparity, and global environmental degradation, generating tectonic tears that rip through the fabric of human communities.

Therefore, for refugee law to be relevant today, it must be an enterprise of designing anticipatory systems to accommodate disruptive population flow on a scale and kind never encountered. Today, even the principle of non-refoulement is being challenged. When the Refugee Convention came to be in 1951, there was little foreseeing the political, economic, and environmental drivers that today go well beyond personal persecution. Today, mass migrations include a mix of motivations; a migrant fleeing his country due to a “well-founded fear of persecution” certainly fits the definition in the Refugee Convention,⁷ but also migrants are fleeing because of economic and environmental forces and encounter state interests that vary broadly in their substance and intensity. Refugee law must now comprehend the entirety of this extraordinary mix.

The analytical need, therefore, is a lens, a refinement of perspective to understand and improve the legal management of mass migrations, wide enough to comprehend the scope of the challenge, but discerning enough to account for the inherent complexity and diversity of the problems and available response strategies. The objective of this paper is to provide that lens.

terrorism induced insecurity, and its companion psychoses, resurgent nationalism and xenophobia. See James C. Hathaway, *A Global Solution to a Global Refugee Crisis*, 1 EUROPEAN PAPERS 93, 93–99 (2016), available at <http://www.europeanpapers.eu/en/e-journal/global-solution-global-refugee-crisis>.

6. U.N. High Commissioner for Refugees, *Global Trends: Forced Displacement in 2015*, at 2 (June 20, 2016), www.unhcr.org/576408cd7.pdf (reporting that 65.3 million individuals worldwide were displaced by the end of 2015 because of persecution, conflict, generalized violence, and human rights abuses).

7. The Refugee Convention defines someone as a refugee as someone:

[W]ho owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Refugee Convention, *supra* note 1, at art. 1(A)(2).

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Today's challenge is not the Sisyphean task of establishing a fundamentally different international refugee law regime in today's fundamentally unreceptive political climate. The challenge is largely one of managerial skill and its legal implementation. The challenge is to harness sovereign interest and migrant choice, such that they are and may be, in current and future political winds, for the service of humanitarian, human rights, and other humane social objectives. Ultimately sovereignty rules, and any prescription for management of contemporary mass migration that fails to account for the concerns of state power and control is doomed to failure. It is the parallel and irreducible reality, though, that migrants will choose legal or illegal means depending on their own risks versus benefits assessments. Because migrants are human beings already *in extremis*, push-back through police repression of movement and other barriers to staunch the flow is prescription for failure. One way or another, people desperate for security will move. Risk and repression may stymie migration for economic motivations alone, but people will move if under serious threat. To the degree legal systems do not provide pathways to safety, including economic security, migrants will find their own way and are willing to risk great loss. We all see, in tragic scenes played out daily in global media, that failing to provide adequate legal process not only leads to the growth of smuggler networks and the attendant disastrous human trafficking and exploitation, but also alienation that feeds the scourge of contemporary terrorism.⁸

It is the argument here that success in management of mass migration depends most of all on maximal reconciliation of the two key dynamics of modern mass migration: migrant choice and state interest. Though the dynamics of migrant choice and state interest may appear at odds, and often are, the record of mass migration in our time demonstrates the critical significance of these considerations and illustrates that a successful response can only be achieved by working towards reconciling these often-conflicting interests.

8. Human smuggling into Europe, according to Europol-Interpol, generated five to six billion Euros in 2015. Europol & Interpol, *Migrant Smuggling Networks – Joint Europol-Interpol Report – Executive Summary*, at 8 (May 2016), https://www.europol.europa.eu/sites/default/files/publications/ep-ip_report_executive_summary.pdf. The EU received about 951,000 first time asylum applications in the first nine months of 2016, and the Overseas Development Institute (“ODI”) estimates that more than half arrived clandestinely. This indicates that strengthening border controls has not had a transformative impact other than increasing illegal entry and risk taking by migrants. Thomas Ruttig, *Afghan Exodus: Afghan Asylum Seekers in Europe (1)-The Changing Situation*, AFGHAN ANALYST NETWORK (Feb. 13, 2017), <https://www.afghanistan-analysts.org/afghan-exodus-afghan-asylum-seekers-in-europe-1-the-changing-situation>. As of December 14, 2016, 4,831 migrants died that calendar year compared with 3,771 in 2015. Helen Dempster, *Migration to Europe: Latest Statistics and New Trends*, ODI (Dec. 14, 2016), <https://www.odi.org/comment/10473-migration-europe-latest-statistics-and-new-trends>. Particularly of note, the EU-Turkey deal lowering the number of asylum seekers along the Balkan route has been countered by a dramatic increase in the number of migrants using the more dangerous Central Mediterranean routes, via Egypt or Libya by boat, during the same period. Nina N. Sørensen et al., *Europe and the Refugee Situation-Human Security*.

This paper will proceed with that demonstration. First it will examine, through the lens of state interest and migrant choice, the contemporary “European Refugee Crisis.” Then, that same lens will be applied to past principal mass migrations that elicited a collective response since the foundation of modern refugee law in 1951. Among these collective responses are the International Conference on Central American Refugees (The COREFCA Process) (1987-1995), the response to the refugee crisis of the Balkan Wars of the 1990s, The International Conferences on Assistance to Refugees in Africa (ICARA) (1981 and 1984), and the Comprehensive Plan of Action for Indochinese Refugees (The CPA) (1988-1996).

The thesis of this article—that the best reconciliation of migrant choice with state interest is what determines the degree of success in managing mass migration—does not deny the significance of humanitarian and human rights principles. But, the principles of human dignity are best envisioned as ends, not to be confused with the means for their realization. Historical experience confirms that neither concern for the indignity of migrant suffering nor altruism are the primary drivers of “durable solutions,” and that acknowledgment and respect for the realities of migrant choice and state interest is the best guide for management of mass migration.

There is a large body of literature accumulated in recent decades proposing various management schemes for dealing with mass migration. Yet, no comprehensive system has achieved implementation as a coherent and comprehensive international approach. The lack of success can largely be attributed to the failure of the various schemes to accommodate what migrants and governments chose to do in contrast to their perceived interests. Neither the instincts of repression nor altruism that play in governmental response succeed in overcoming that reality. It is, indeed, by examining the major episodes of mass migration under the lens of migrant choice and state interest—including the situation currently most on point, the so-called⁹ “European Crisis”—that the parameters for success, and for failure, can be best understood.

II. Denial of Refugee Choice and State Interest in The European Refugee Crisis

The European Refugee Crisis presents the most immediate and compelling demonstration that migrants under severe pressure will choose greater safety, social and cultural ties, and economic promise, whatever the threat their arrival in large numbers may present for the destination state. And as legal channels narrow or disappear, the more they will move beyond

9. The so-called “European Crisis” in that Europeans and others often see the crisis as “An American Refugee Crisis” resulting from the U.S. invasion of Iraq and the ironically so-called “Arab Spring” it engendered. See *generally Refugees*, THE ECONOMIST, June 25, 2011, at 109 (attributing many of the world’s refugees to America’s wars); Scott Anderson, *Fractured Lands*, N.Y. TIMES MAG., Aug. 14, 2016 (narrating the catastrophe of the Arab world since the Iraq invasion, leading to the refugee crisis).

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regulation and choose to cast their fate into what has become a multi-billion-dollar human smuggling industry.

It is true that in the post-WWII context, resettlement and refugee law was primarily about intra-European immigration and did not raise the issues of culture clash that embroil the current “European Crisis.” Governments of resettlement specifically recruited European immigrants, not only to achieve ethnic balance and skilled labor, but also as expression of moral obligation to care for the victims of the war in Europe. Human rights were center-stage, but in a common cultural context. Today, though there is surely much to be said for moral obligation incumbent on the United States and other states in relation to their role in generating conflict in the Middle East, any moral imperative is at best secondary to migrants choosing the imperative of survival in alien lands, and the interests of the governments, grappling with consequent social and economic instability.

To the extent state interest has played a role in the response by the European Union (EU), it has been largely manifest as downward harmonization, by way of restriction, exclusion, and diminishment of human rights. The evolution of the EU’s “Frontex” agency for border control and compacts with African and Middle-Eastern states to diminish the flow are among the most prominent aspects in the implementation of this decline.

But, the flow to Europe continues, though more and more clandestine, resulting in hundreds of thousands of refugees rejecting conditions of containment, boarding boats in dangerous seas, and otherwise making their way across land routes into Europe.¹⁰ Migrants under pressure for survival do not wait for the legal process and legally validated resettlement opportunities. They are moving not only through smuggling networks, but also are self-directed, using technological innovations to run around national governmental controls by means such as Facebook, GPS instruments, and other mobile technology.

The question, therefore, is how state interest and migrant choice may be better engaged so that migrants will instead choose legal means. Established refugee law sets only very broad parameters for legal means. There is no obligation under international refugee law for states to consider the preferences of an individual migrant, nor the interests of impacted states. Under applicable principles, when making a transfer,¹¹ a government must

10. The evidence is that the magnitude of the flow, while changing routings, is increasing, along with the related deaths of migrants at sea. In 2016, about 180,000 migrants crossed over to Europe through the Central Mediterranean route. By April 2017, arrivals increased 24 percent over the total for all of 2016. In 2016, 4,500 people died attempting the crossing, and that number was also exceeded by April 2017. The head of Frontex, the newly organized institutionalization of collective European frontier control, declared, “[w]e have never had so many vessels deployed to save lives and we have never had so many deaths.” Drew Hinshaw & Pietro Lombardi, *World News: Migrant Toll Rises as Quarrels Hinder Rescue*, WALL ST. J., Apr. 18, 2017, at A11.

11. The right to make a transfer is incorporated under Article 32 of the Refugee Convention. Refugee Convention, *supra* note 1, at art. 32.

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simply consider the risk of entry denial to the transferee state and the risk of refoulement, including whether basic rights as referenced under the Refugee Convention will be put at risk. Under EU law, asylum seekers have no right to choose the member state of relocation.¹² Although, there is a provision that member states should take into account integration prospects such as skills and other qualifications in determining an individual's relocation.¹³ Relocation procedures that include such a measure of asylum seeker preference are exceptions to the EU's standard "Dublin System" (Dublin System or Dublin Regulation) of refugee regulation, which does not normally allow for expression of individual preferences.¹⁴ The Dublin Regulation does not allow migrants to express preferences other than by meeting certain criteria such as family unification.¹⁵ There are elements of migrant choice in some national asylum systems, such as the criteria of family unification, that may be applied in asylum determination, temporary protection, or relocation. But, neither under EU law nor under international refugee law is there any mandate to consider migrant choice as a priority for consideration in asylum proceedings, temporary protection, or any legal process for relocation.

The legal scheme that the EU established for migration management has, indeed, consistently denied the significance of migrant choice. The European system, the Common European Asylum System (CEAS), is also designed to deny differentiated state interest. It allows for differentiation of governmental action only insofar that it determines which EU member state is responsible for examining an individual's application.¹⁶ The CEAS

12. See Council Decision 2015/1523, 2015 O.J. (L 239) 146 (EU) (establishing provisional measures in the area of international protection for the benefit of Italy and/or Greece) [hereinafter Relocation Decision]. Under the Relocation Decision, the applicant's consent is specifically excluded from consideration. This is an explicit derogation from the Asylum Fund Regulation which allows for the transfer of applicants for international protection between EU member states with asylum seekers' consent. See Regulation 516/2014, of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration, and Integration Fund, art. 7(2), 2014 O.J. (L 150) 168 [hereinafter the Asylum Fund Regulation].

13. Relocation Decision, *supra* note 12, at Recital 28.

14. Such measures constitute a derogation from Article 13(1) of the Dublin Regulation, which provides that the first Member State that an asylum seeker enters is responsible for their application. Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013 establishing 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 stateless person, art. 13(1), 2013 O.J. (L 180) 31 [hereinafter the Dublin Regulation].

15. Dublin Regulation, *supra* note 14, at art. 9.

16. The "Dublin System," beginning with the Dublin Convention in 1990, generally established that the Member State asylum applicant first entered would be the country responsible for an asylum claim. The Treaty of Amsterdam authorized the European Commission to legislate on asylum issues, which resulted in a series of directives aimed at harmonizing asylum procedures in Europe. The European Refugee Fund was created in 2000 for sharing costs of refugee hosting among Member States, and the Fund continued after 2014 as the "Asylum, Migration, and Integration Fund" (see Asylum Fund Regulation, *supra* note 12). Other programs and agencies were also established to achieve harmonization, such as the

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establishes that the state of first arrival determines the category of international protection that applies; in making this determination, the state reviews whether the “applicant is in possession of a valid residence document” (e.g., as a visa or residence permit) and ascertains whether the applicant has entered the EU irregularly or regularly.¹⁷ The asylum official of the state of first arrival also determines if the criteria for transferring the applicant to a safe third country (pursuant to the Asylum Procedures Directive) are satisfied.¹⁸ If it is concluded that the criteria for transfer to a safe third country does not apply, the asylum official may also consider whether the criteria for transferring the applicant to a first country of asylum apply.¹⁹ Both mechanisms are ways by which an EU member state can summarily deny an application for asylum, and both were used as justifications for the EU/Turkey/Greece deal that was declared in March 2016 to control the mass influx.²⁰

On May 4, 2016, the European Commission introduced a proposal to reform the current Dublin Regulation to create what is sometimes called a “Dublin IV.” The idea was to update the Dublin Regulation to alleviate the burden it placed on EU-border states such as Greece. It included the proposal to create a “reference key” that would allow border states to transfer their responsibilities to other EU member states when they were overloaded, based upon certain objective criteria, such as GDP and population.²¹

But, the overall thrust of the proposed changes was to further foreclose migrant choice and preclude any diversified recognition of state interest. The European Parliament declared, in reviewing the Dublin IV Proposal, that refugee preferences must be considered in the relocation and resettlement procedures for them to be successful.²² Yet, nowhere did the Dublin IV Proposal accommodate migrant choice. Moreover, the Dublin IV Proposal’s “reference key” did not allow states to express their preferences. The reference key enlists wholly objective criteria such as GDP

European Dactyloscopy (EuroDac) in 2003, for fingerprinting and border control; Frontex in 2005, for border control; and the European Asylum Support Office (EASO) in 2011, for implementing coherent asylum procedures.

17. Dublin Regulation, *supra* note 14, at art. 12-13.

18. Directive 2013/32/EU, of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, art. 33(c), 2013 O.J. (L 180) 60, 79 [hereinafter Procedures Directive].

19. Procedures Directive, *supra* note 18, at art. 33(b), 79.

20. European Commission Press Release MEMO/16/963, EU-Turkey Statement: Questions and Answers, (Mar. 19, 2016).

21. *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)*, art. 37, COM (2016) 270 final (May 4, 2016) [hereinafter the Dublin IV Proposal].

22. Francesco Maiani, *The Reform of the Dublin III Regulation*, at 34, EUR. PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT C—CITIZEN’S RIGHTS AND CONSTITUTIONAL AFFAIRS (June 2016).

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and population, and does not afford state variation beyond the option of paying an in-lieu fee of €250,000 for every asylum allocation it chooses to reject.

“Dublin IV” is replete with downward harmonization diminishing migrant choice, denying any individualization of the asylum application process. The proposal includes provisions that there “should” rather than “shall” be personal interviews and legal safeguards and the right to effective remedy for asylum applicants. This is notwithstanding that the Refugee Convention establishes a right to be heard in Article 32(2), and the right to an effective remedy under Article 16(1) (a right also guaranteed under the EU Charter of Fundamental Rights).²³ Dublin IV would also add a burden on the claimant to submit “all the elements and information relevant for determining the member state responsible” by a pre-determined deadline, a burden not feasible for most migrants who typically are without documentation due to their desperate flight.²⁴

The earlier European response to the massive flow of persons from Syria, Iraq, Afghanistan, and other traumatized geographies south of European borders ranged widely from the welcoming policies of Germany to the barbed fences of Hungary. Eventually, however, there did emerge a “common” response from the governments along the Balkan route of the migration flow. That response culminated in the EU/Turkey/Greece deal, tightening the European external border at the major European entry point of Turkey to Greece transit.²⁵

A principal innovation, thus, conjoined with “Dublin IV” became the so-called “hot-spot” model, exemplified by the EU/Turkey/Greece deal. The “hot-spot” model is to concentrate initial arrivals at one location with a prospect of either return or resettlement. Yet, it is a model that invites human rights abuse and has been widely denounced by a panoply of NGOs and other human rights organizations. Those who work hands-on with the mass migration have observed that the “hot-spots” have become de facto detention centers with processes so slow and unattractive they are essentially designed to incarcerate and deter further migration.²⁶ In particular, there has been compelling demonstrations that the overall human rights record of Turkey, in its treatment of migrants, cannot with any credibility be

23. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, art. 47, 2012 O.J. (C 326) 391.

24. *Explanatory Memorandum to the Dublin IV Proposal*, at 5, COM (2016) 270 Final (May 4, 2016).

25. Effective March 20, 2016, Turkey agreed to accept all irregular migrants crossing to Greece from Turkey and took steps to stop further migration. In return, the EU agreed to resettle one Syrian refugee in Turkey for every Syrian sent back. The resettlements would begin once irregular migration from Turkey ceased substantially. Further, the EU agreed to lift visa requirements for Turkish citizens by the end of June 2016, “re-energize” Turkey’s EU admissions process, disburse €3 billion to Turkey for housing refugees, and disburse another €3 billion by 2018. European Commission Memoranda MEMO/16/963, *supra* note 20.

26. See Amnesty Int’l, *No Safe Refuge: Asylum-Seekers and Refugees Denied Effective Protection in Turkey*, at 5, 19-29, AI Index EUR 44/3825/2016 (June 3, 2016) [hereinafter *No Safe Refuge*].

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characterized as that of a “safe third country.” Migrants have not only been subjected to physical abuse by Turkish police at Turkey’s borders, but also it is now well documented that migrants forced to return to Turkey as part of the EU-Turkey deal have been subjected to a range of human rights abuses (e.g. labor exploitation).²⁷

The EU/Turkey/Greece scheme was touted by the EU as consistent with applicable law and was officially declared not to constitute “mass expulsion.”²⁸ But, it was surely at odds with the requirements of international refugee law and with the rule of law as the juridical concept is defined for Europe. And the ultimate result, now on a massive scale, is the violation of the cardinal principle of international refugee law, non-refoulement (notwithstanding the governmental denials of illegality). The scheme not only effectually closed any open routes to Europe, but also it has facilitated avoidance of legal responsibility for the impacted governments. By focusing the European response on Turkey to Greek transit and by directing media attention to the European external border transit points, the question of legal responsibility was largely avoided (though it was de facto refoulement).

The EU/Turkey/Greece deal proved flawed under applicable refugee law and in its implementation. There has been only minor implementation of the deal’s proposed resettlement and return processes, though resettlement was touted as a principal element. As of May 3, 2017, after more than a year of implementation, only 1,895 of the many tens of thousands of migrants situated in Europe had been returned to Turkey under the scheme’s one-to-one mechanism.²⁹ Thus, from the perspective of human rights and humanitarian law, the result has been betrayal on a massive scale. The EU/Turkey/Greece deal transmuted Greece during 2016 from a main location for arrivals seeking protection to a venue for detention, with resettlement becoming a false promise for most of the migrants.

Today, news travels quickly within migrant communities who, like many other human communities, have access to cell phones and other modern communications technologies. Thus, the EU/Turkey/Greece deal was soon understood by migrants to offer little prospect of safe resettlement; consequently, even while EU officials proclaimed success, the number of new arrivals diminished.

In fact, the EU/Turkey/Greece deal was an attempt to influence migrant choice by deterrence without significantly enlarging any legal option. Its thesis was that increasing returns would drive the price and risk high enough

27. See Amnesty Int’l, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal* (Apr. 1, 2016); Amnesty Int’l, *supra* note 26.

28. The European Council declared as fundamental to the deal that return “will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.” Amnesty Int’l, *Turkey*, *supra* note 27.

29. See *Operational Implementation of the EU-Turkey Statement*, STATE WATCH, <http://www.statewatch.org/news/2017/sep/eu-com-eu-turkey-resett-returns.pdf> (last visited Nov. 10, 2017). See also European Commission Memorandum MEMO/16/963, *supra* note 20.

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to dissuade migrants from employing smugglers.³⁰ In the second progress report of the European Commission on the implementation of the EU/Turkey/Greece Agreement, the Commission asserted that “[t]he sharp decrease in the number of irregular migrants and asylum seekers crossing from Turkey into Greece is proof of the Statement’s [EU/Turkey/Greece deal’s] effectiveness—and in particular that the business model of smugglers can be broken.”³¹ The intended message to migrants was, therefore, that getting on a boat in Turkey and endangering one’s life in the process was not worth the risk. But, NGO examination of the arrivals before and after implementation of the agreement concluded that “[i]n sum, the EU-Turkey Agreement has no identifiable influence on the overall declining number of crossings in the Aegean.”³² The relevant numbers indicate it led to a temporary increase in the weeks before it was concluded, and there is no question it led to other increase in irregular movement.³³

The contradiction between what was done and what international refugee law requires is still there. The flaws in the European response simply came to fruition in the EU/Turkey/Greece deal. Before long, the illegality and consequent illegitimacy became a matter of debate and deep concern, as evidenced, for example, by the public withdrawal of UNHCR, the Norwegian Refugee Council, Oxfam, and Medecins Sans Frontiers from any participation in the morphing of so-called “hotspots” into de facto detention centers.³⁴

Indeed, the EU/Turkey/Greece deal failed fundamentally to comport with international refugee law and EU law. The governments involved made clear that the determination of persons who can apply for asylum is based on nationality. Eligibility has been restricted to persons who can establish, as country of origin, Syria, Iraq, or for a time, Afghanistan. The ostensible justification for nationality as a criterion is that these states of origin all are places of civil war and violence. But, turning refugee status on nationality alone ipso facto constitutes violation of international refugee law and EU law. EU primary law incorporates many aspects of international refugee law, such as non-refoulement, to be administered on an individualized

30. *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries Under the European Agenda on Migration*, at 6-7, COM (2016) 385 Final (June 7, 2016).

31. *Communication from the Commission to the European Parliament, the European Council and the Council Second Report on the progress made in the implementation of the EU-Turkey Statement*, at 2, COM (2016) 349 Final (June 15, 2016).

32. Thomas Spijkerboer, *Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?* OXFORD LAW FACULTY: BORDER CRIMINOLOGIES (Sept. 28, 2016), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>.

33. *Id.*

34. See *UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect*, U.N. HIGH COMMISSIONER FOR REFUGEES (Mar. 22, 2016), <http://www.unhcr.org/en-us/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>.

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basis.³⁵ EU primary law also embodies principles such as non-discrimination³⁶ and contains a prohibition on collective expulsion of aliens.³⁷ The EU law mandates an individualized examination of the circumstances of each applicant for international protection.³⁸ The EU qualification Directives for refugee status similarly provide for equal access to international protection.³⁹ Having refugee status recognition turn on any group identity, whether nationality, race, or any classification of ethnicity, is clearly prohibited. Non-discrimination in the management of mass migration is also fundamental under international refugee law. Article 3 of the Refugee Convention provides that the Convention will be applied to refugees “without discrimination as to race, religion, or country of origin.”⁴⁰

Thus, the individual right to be heard established in Article 32(2) of The Refugee Convention mandates the proper response to the real circumstances of mass influx, notwithstanding actual implementation of the “Dublin System” that determines EU migration management.⁴¹ The response, it is clear, must be individualized under the applicable law.

Individuals fleeing states where there is armed conflict may or may not satisfy the core requirement that justifies grant of asylum under the Refugee Convention.⁴² Moreover, within any of the favored classes based on state of origin, whether Syria, Iraq, Afghanistan, or any other state, there will be persons emigrating from areas that are relatively conflict-free. There will also be individuals from relatively conflict-free states where localized violence may constitute the most virulent persecution based on race or

35. Consolidated Version of the Treaty on the Functioning of the European Union of Oct. 26, 2012, art. 78, 2012 O.J. (C 326) 76 (EU) [hereinafter TFEU].

36. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Recitals 17 & 45, 2011 O.J. (L 337) [hereinafter Qualification Directive].

37. Charter of Fundamental Rights of the European Union, *supra* note 23, at art. 47; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than those Already Included in the Convention and in the First Protocol thereto, art. 5, *opened for signature* Sept. 16, 1963, C.E.T.S. 4.

38. Procedures Directive, *supra* note 18, at art. 10(3)(a).

39. Qualification Directive, *supra* note 36, at art. 32.

40. Refugee Convention, *supra* note 1, at art. 3.

41. For an in-depth analysis of these deficiencies, see Jenny Poon, *The EU Commission on ‘Dublin IV’: Sufficient Safeguards for Asylum Claimants?*, 5 ESIL REFLECTIONS, no. 9, 2016, at 1; *Europe Tries to Buy its Way Out of the Migration Crisis*, IRIN NEWS, June 30, 2016, <http://www.irinnews.org/analysis/2016/06/30/europe-tries-buy-its-way-out-migration-crisis>. Indeed, there are already indications that the proposal that payments to third countries for preventing migrations are “fine” is being both accepted and rejected by EU member states. Steve Peers, *The Orbanisation of EU Asylum Law: The Latest EU Asylum Proposals*, EU LAW ANALYSIS (May 6, 2016), <http://eulawanalysis.blogspot.com/2016/05/the-orbanisation-of-eu-asylum-law.html>.

42. The status of ‘refugee’ is determined on the basis of “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 1, at art. 1(2).

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religion, or local gang or tribal conflict. Accordingly, international law and EU law require the individualization of the determination of who is a refugee. The individual right to be heard simply reflects the undeniable reality of the necessarily individualized nature of refugee status, both legal and empirical. Thus, as the European Court of Human Rights has reiterated, through a long line of cases, that return of third country nationals requires an assessment of personal circumstances, and that any group identification alone, whether nationality or otherwise, does not satisfy the prohibition on collective expulsions in Article 4 of Protocol 4 to the European Charter of Human Rights.⁴³ The European Procedures Directives similarly specifically require individualized determination.⁴⁴

By turning eligibility on national origin, the current European system is in violation of the basic principle barring collective expulsion under both international refugee law and European law.⁴⁵ A refusal to acknowledge as legitimate applications for asylum, other than by individuals from certain pre-designated states, ipso facto constitutes collective expulsion.⁴⁶

Altogether then, the EU/Turkey/Greece deal and the “hotspot” model it has engendered amount to gross violation of the applicable international and EU standards. The current system cannot be saved because it is so fundamentally flawed, not only about the applicable law, but also institutionally for the EU. The deal, as an agreement of the EU with a third country, *i.e.*, Turkey, is contestable as a breach of Article 218 TFEU as bypassing necessary consultation with the European Parliament, raising the question of rule of law and democratic accountability. Moreover, even if the current state of affairs is regarded as only a series of measures by the different states that comprised the Balkan route and the EU/Turkey/Greece deal (the suggestion of the dealmakers in characterizing it as only a “statement” of policy),⁴⁷ the collusive behavior involved—in its ultimate consequence, being *de facto* refoulement—violates the most fundamental principle of international refugee law. Indeed, EU officials have been remarkably incautious in embracing infringement of non-refoulement. The

43. See Hirsi Jamaa, 2012-II Eur. Ct. H.R. 97 (2012) (De Albuquerque, J. concurring), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-109231&filename=001-109231.pdf>.

44. The directives guarantee an applicant’s right to retain effective legal aid, Procedures Directive, *supra* note 18, at art. 22(1); the right to appeal adverse decisions against them in a court or tribunal, *Id.* at art. 46(1)(a); the right to be granted a stay of any expulsion during appeal, *Id.* at art. 46(5); the right to be provided with free legal aid by member states during appeal, *Id.* at art. 20(1); and the right to be accessed by legal counsel, even if the applicant is being held in a closed area, *Id.* at art. 23(2).

45. Refugee Convention, *supra* note 1, at art. 31-33.

46. Collective expulsion occurs when a state processes migrants on a group identity basis that fails to afford opportunity to apply for individually determined international protection before sending irregular migrants to a country that may not be safe for them. *Hirsi Jamaa*, *supra* note 43, at 159–186.

47. See EU-Turkey Statement, *supra* note 31.

EU's Migration Chief has stated: “[a]sylum seekers need to know they can’t relocate themselves and that if they do so they will be sent back.”⁴⁸

So, also as an empirical matter, the legal flaws of the European response to its migrant crisis demonstrate a pervasive unwillingness to address, let alone reconcile, the key dynamics of migrant choice and the state interests involved. The current policies, notwithstanding present and proposed revisions, do not relieve the frontier states of their inability to meet the challenge with available resources and send a decisive message to the migrants that they are assuredly at risk if they seek legal channels.

III. Migrant Choice and State Interest in Four Major Mass Migrations

The history of attempts to manage mass migration also demonstrate that the quality of accommodation of separate state interest and migrant choice is what determines success or failure. We see this particularly evident, both in scope and significance, in four of the most compelling episodes that have occurred since the post-World War II refugee influx that was the original template for the Refugee Convention. These four episodes of mass migration were addressed by the international community via the following: (1) the International Conferences on Assistance to Refugees in Africa (1981 and 1984); (2) the International Conference on Central American Refugees (1987-1995); (3) the collective response to the refugee emergency generated by the wars in the former Yugoslavia in the 1990s; and (4) the Comprehensive Plan of Action for Indochinese Refugees (1988-1996).

Though each of these episodes could be described as ad hoc and regional, they have in common the generation of an international effort to achieve an international solution. Some of these efforts went so far as establishing the number of migrants that concerned governments should accept, migrant benefits, and uniformity of refugee status determination. Some went no further than the setting of joint objectives. But, as to each of these four major episodes of mass migration, to a lesser or greater degree, governments affected sought to achieve a collectivized international response, including integrating international administrative process and the evolving the role of the UNHCR. The results varied from success to failure. But, as to each such attempt, it is evident that it was the extent of the reconciliation of migrant choice and state interest that determined results. It is accordingly the principal lesson to instruct future management of the “European Crisis” and management of future mass migration that migrant choice and state interest must become, and remain, the principal focus.

48. Harriet Agerholm, *EU Says Member States Can Start Deporting Refugees and Migrants Back to Greece from March*, INDEPENDENT (Sept. 13, 2015), <http://www.independent.co.uk/news/world/europe-refugees-migrants-greece-march-a7462921.html>.

A. THE INTERNATIONAL CONFERENCES ON ASSISTANCE TO
REFUGEES IN AFRICA (1981 AND 1984)

The “ICARA” process undertaken to address African migrations in the 1980s is a story of comprehensive failure of migration management, particularly notable for its fundamental failure to engage state interest and migrant choice. The international effort achieved some degree of refugee relief and protection, but only as a matter of international charity, without significant achievement of mass migration management towards durable solutions.

Indeed, much of the deficiency of the international response in the African context of the early 1980s can be attributed to the failure to clearly identify state interest and program its engagement with migrant choice. The political context was surely challenging. It was one of diverse civil conflicts in Angola, Ethiopia, Sudan, Mozambique, Burundi, Chad, Uganda, and Zaire, generating migrant flow to neighboring states. In general, these conflicts represented not just localized governmental interests, but in geographies such as Angola and Ethiopia, much more importantly, proxy relations to Cold War interests as defined by the United States and the Soviet Union. The gross failure of migration management for the civil conflicts in Africa was a result of failure to engage the relevant political and migrant interests. Instead of capitalizing on the state interests that could serve to enhance migrant protection within an enterprise of broader political adjustment, as was done for the Central American and Indochinese mass migrations, this earlier international effort focused largely around a charity “burden sharing” model, which never came to significant fruition but degenerated into strategies of Cold War politics.

The charity model was adopted early on as the focus for management of the migrations generated by the conflicts in Africa. In the first of two one-off donor conferences held in Geneva (ICARA I was held in 1981 and ICARA II in 1984), the following objectives were declared: (1) to focus relief efforts on “the plight of refugees in Africa;” (2) to “mobilize assistance for refugees in Africa;” and (3) to help asylum countries endure the burden induced by the influx of refugees.⁴⁹ Though the emphasis shifted from short-term relief to development, altruism and its manifestation as charity remained the predominant mechanism intended to manage the African migrations. The compensation being called for was immediate relief and care for the suffering migrants, host governments, and governments of origin and development aid that would assist the migrants in their integration into host countries or their repatriation.

These objectives represented certain distinct coalitions of state interest but without much (if any) heed to refugee choice. The African governments’ motive for calling for the conference was to seek compensation for the “burden” imposed on the host communities, often at the expense of the native communities, generating domestic political blow-

49. G.A. Res. 35/42, at 182 (Nov. 25, 1980).

back for these governments. The potential donor governments, being called upon to mobilize resources and aid, were interested in resolution and being relieved of the cost of African migrant aid, such as by way of the durable solutions of integration in host countries and repatriation.⁵⁰

These were interests that might have been engaged for effective migration management, but the gaps between them were never bridged.⁵¹ A focus on migrant choice and state interest would have required a conditionality to overcome the disjunction of the state interests involved and to achieve their maximal resolution. Instead, the attempt to organize an international response was founded on the dubious premise that financial assistance to the governments generating the migrations and to the governments hosting migrants would naturally lead to durable solutions. It was a premise unconvincing to the potential donor governments who saw the process as generating “an open-ended claim on their resources.”⁵² The potential recipient governments, seeing this donor perception play out, were discouraged from thinking that aid for national development would ever be forthcoming in substantial measure. Consequently, support for effective migration management from any element of the state interests involved naturally eroded over the course of the ICARA process.

Migration management was not engineered as a key component of a diplomatic regional process. There was no conditionality between aid and durable solutions cognizant of migrant choice as for the Central American conflicts or the Indochinese migrations following the Vietnam war.⁵³ Migration management was not only not made part of political adjustment; migration was made to serve the conflict. Such migrant aid as was provided in the African context, for the most part, was earmarked along strictly Cold War strategic lines.⁵⁴ Funding was directed not to migrant choice and empowerment but to strategic objectives that ignored migrant choice; the interests of states of origin and host states insofar as these interests did not

50. “To the African countries of asylum, ICARA II was to be a burden-sharing conference to provide assistance to strengthen their social and economic infrastructure. To the donors, however, the conference provided a chance to achieve durable solutions to prevent future refugee problems and lead to the voluntary repatriation or permanent integration of refugees. Such durable solutions would ease the burden of funding care and maintenance on the international community.” ALEXANDER BETTS, PROTECTION BY PERSUASION: INTERNATIONAL COOPERATION IN THE REFUGEE REGIME 72 (2009) (quoting REFUGEES: A THIRD WORLD DILEMMA 49 (John R. Rogge ed. 1987); see also Barry Stein, *Durable Solutions for Developing Country Refugees*, 20 THE INT’L MIGRATION REV. (No. 2 Special Issue) 264, 273-74 (1986) (explaining the solutions discussed in ICARA II).

51. BETTS, *supra* note 50, at 53-77.

52. Barry Stein, *Regional Efforts to Address Refugee Problems* (Mar. 21, 1997), <https://msu.edu/course/pls/461/stein/isa-regional.htm>.

53. See *infra* Sections III.B and III.D.

54. It has been estimated that of the \$560 million dollars offered by donor states in ICARA I, the first pledging conference, only \$144 million was not earmarked for politically favored governments, and that very little remainder went to the most heavily impacted host states such as Ethiopia and other countries in the Horn of Africa. BETTS, *supra* note 50, at 57 (citing GIL LOESCHER, THE UNHCR AND WORLD POLITICS 227 (2001)).

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serve Cold War interests. Sovereign interest and migrant choice were engaged not with the priority to relieve the migrant crisis but as a lever of conflict. The United States in particular was eager to provide help insofar as the support aligned with its strategic interests, which it perceived as supporting anticommunist movements. Thus, substantial U.S. funding went to support Angolan refugees on the FNLA-UNITA side of the struggle against the MPLA and its Soviet sphere supporters, but not to Ethiopia (despite Ethiopia experiencing a serious refugee situation) because of Ethiopia's affiliation with Cuba and the USSR.

Perceiving migration management from a Cold War perspective, the potential donor Northern states were never convinced development assistance would result in durable solutions such as local integration. Most African states argued for repatriation and did not want to commit further infrastructure and services to migrants that could instead benefit their own populations.⁵⁵ These governments were not convinced that local integration would contribute to national development, and there was no conditionality of aid to persuade them to take the risk.

At the level of implementation of mass migration management, there was a profound failure to link state interests and migrant choice in a way that would overcome the skepticism and inertia. There were common interests of potential Northern donors and the Southern states and the migrants that could have been engaged through the provision of development and integration assistance. There was opportunity to relieve the costs, both human and financial, of long term protection.⁵⁶ But, these interests were never effectively linked through conditionality. Developmental aid and durable solutions could have been made mutually conditional to serve much of the refugee population but were not. Substantial aid for refugees was provided, not as conditional on durable solutions, but primarily as collateral to furthering transcendent foreign policy interests, such as the United States' policy of supporting exiled guerrilla movements. The moral arguments pressed by the African states and potential Northern donor states, which were persistently asserted by the UNHCR, OAU, and African governments more generally throughout the ICARA process, had little impact.⁵⁷ Migration management conceived as altruism alone, instead of reconciliation of state interest and migrant choice, culminated naturally in cynicism and defeat.

55. As the UNHCR officially reported the general perception, "the African countries tried to win funds for development projects under the guise of refugee emergency relief. They were more interested in being compensated for the burden of hosting refugees than they were in using these funds to promote local integration." *Id.*

56. BETTS, *supra* note 50, at 72.

57. *Id.* at 75.

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**B. THE INTERNATIONAL CONFERENCE ON CENTRAL AMERICAN
REFUGEES (1987-1995) (CIREFCA)**

The conflicts in Central America of the late 1980s and the resolution of the resulting mass migration into the 1990s (the process known as CIREFCA), was notably distinguished from the ICARA process in Africa. It was distinguished by its focus on, and reconciliation of, state interest and migrant choice through a broad-based conditionality. The Central American effort of managing migrant flow was made part of the wider regional peace process and post-conflict regional development wherein these two principal dynamics for success were thereby well-realized.⁵⁸

From the outset, migration management for Central America was characterized not as charity isolated from conflict resolution, but by the effort to define respective state interests and migrant options. In contrast to the ICARA approach for Africa of separate pledging conferences devoted to refugee protection, for CIREFCA the approach was to defer any formal fundraising until achieving conjunction of migrant choice in the form of options for protection, return, and resettlement, conjoined with the development priorities of the host countries and countries of origin. The process thereby gave all parties a significant stake in the goal of protection, as integrated with achieving the durable solutions of local integration, repatriation, and resettlement.

The conflicts in Central America resulted in the displacement of about 2,000,000 persons by the end of the 1980s, 150,000 of which were recognized as refugees by the UNHCR.⁵⁹ The international and collective response of the CIREFCA conferences on Central American refugees occurred from 1987 to 1995. The conferences were designed to help achieve peace and development among the countries in the region and interested outside powers, to integrate the needs of refugees, returnees, and the internally displaced, while also benefiting local communities.⁶⁰ A mix of national interests was skillfully exploited by the diplomats directing the process to achieve these objectives.

58. The Contadora Act for Peace and Cooperation of 1986 was a declaration of intent to promote democratization and to end armed conflict in Central America. The Esquipulas II Peace Accords subsequently embodied a more fully agreed peace initiative that stated an economic framework with measures to promote democratization and other programs to aid refugees. *See id.* at 80.

59. CIREFCA, *Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons*, CIREFCA 89/13/Rev.1 (May 30, 1989).

60. CIREFCA drew its legal legitimacy largely from Article 8 of Esquipulas II and its reference to displacement, and the CIREFCA Concerted Plan of Action being incorporated as a chapter on displacement in the broader post-conflict reconstruction initiative, the PEC, which focused on regional economic development. BETTS, *supra* note 50, at 80; *see also* UN High Commissioner for Refugees, *Returnee Aid and Development*, EVAL/RAD/15 (1994), <http://www.unhcr.org/en-us/research/evalreports/3bd40fb24/returnee-aid-and-development.html> (concerning the integration objective).

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This was done, first and foremost, by encouraging each state to define its own economic and development needs within a “Concerted Plan of Action” that provided a set of principles for migration management put forward by the UNHCR as conditions for states to receive funds through CIREFCA. Conditionality was established linkage by linkage as the governments involved joined in, culminating in a broadly inclusive conditionality for regional peace.⁶¹ CIREFCA thereby bore the fruit of projects and programs for refugee management that were for the most part fully funded and successful.⁶²

Essential within CIREFCA was a determined and consistent effort to maximize migrant choice in relation to the durable solutions of relocation or return. From the outset of the process, the commitments to conflict resolution and refugee management were treated as inextricably bound and mutually enhancing. Indeed, the CIREFCA process was seen by the UNHCR as “an instrument of political change” in that it afforded a basis for interstate consensus building around mass migration at the center of achieving security.⁶³

CIREFCA found legal foundation in the commitment of Article 8 of the Esquipulas II peace agreement, which defined a number of measures intended to promote national reconciliation, an end to hostilities, democratization, free elections, the termination of all assistance to irregular forces, negotiations on arms controls, and assistance to refugees.⁶⁴ Moreover, as to its legitimization, CIREFCA was subsequently incorporated

61. See CIREFCA, *Concerted Plan of Action: One Year of Progress and Prospects for the Future*, UNCHR Archives (June 27-28, 1990); see also BETTS, *supra* note 50, at 82-83. In complementary relationship to this approach, administratively, CIREFCA was set within a conjunction of institutions with broader objectives of achieving conflict resolution, including the Esquipulas Peace process for Central America and the Special Programme of Economic Cooperation for Central America that resulted from the Contadora Act for Peace and Cooperation in 1986 and the Arias Peace Plan. *Id.* at 79-80. The significance of CIREFCA in achieving this evolution and as a model for the future was well noted by the UN High Commissioner for Refugees, who declared, “CIREFCA has been a key formative experience in many respects, breaking new ground in . . . demonstrating the important linkages between solutions, the consolidation of peace and development.” *Id.* at 91 (quoting Sadako Ogata, *Introductory Statement by Mrs. Sadako Ogata*, UNHCR Fonds 11, Series 3, 391.86.5 (Jan. 28, 1994)).

62. This evaluation was confirmed by the UNHCR in its report on CIREFCA, declaring, “The success of the CIREFCA process has its foundation in development . . . a bridge thus needs to be built whereby the uprooted populations addressed in the CIREFCA initiatives are gradually incorporated into national development efforts.” BETTS, *supra* note 50, at 96-97 (quoting *Progress Report on the Implementation of the CIREFCA Plan of Action*, UNHCR Fonds 11, Series 3, 391.86.5 (June 1, 1990)).

63. Alexander Betts, *Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA 14* (UNHCR New Issues in Refugee Research Working Paper No. 120, 2006) (quoting Memorandum, UNHCR, CIREFCA Process External Evaluation, UNHCR Fonds 11, Series 3, 391.86.5 (Sept. 21, 1994)).

64. See *supra* note 60 and accompanying text.

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as the chapter on displacement in the plan for post-conflict reconstruction.⁶⁵ State interest for impacted states such as Nicaragua, Guatemala, El Salvador, and Mexico was engaged through conditionality by the promise of development aid that would also empower migrant choice of relocation or return. The resulting projects were varied in nature, but all were set within this same conditionality between aid and durable solutions. Thus, for example, development projects for Guatemala included health, education, and sanitation projects that would facilitate return and reintegration. For Nicaragua, development projects focused on rehabilitation and reintegration for returnees from Honduras. In Honduras, assistance was directed to migrant camps, pending returns to Guatemala and Nicaragua. In Costa Rica, projects were designed to achieve integration in local labor markets, along with educational and sanitation development. In Mexico, projects were devoted both to integration and repatriation.⁶⁶

Through the wide range of projects and their conditionality, refugees were engaged as agents of development and, also, security. Nicaraguan refugees had been seen as agents of the Contras, and Salvadoran and Guatemalan refugees as guerillas of the political left. Engaging them, instead, as agents of development and security therefore contributed to the national reconciliations required to achieve peace.⁶⁷ The conditionality of aid and migrant management also reinforced stakeholder interests in reintegration and resettlement, especially by way of improved development for the local populations impacted by the migrations.⁶⁸

Though aid through CIREFCA was made conditional on migration management, it was especially designed to maximize state interest by maximizing each government's "ownership" of the projects for its territory, both in terms of control of the projects and responsibility for their implementation and fruition. The preparatory work for the projects in each country was based on proposals made by the targeted governments

65. BETTS, *supra* note 50, at 81-82.

66. *See generally id.*, Betts, *supra* note 50, at 84-89.

67. "Massive flows of refugees might not only affect the domestic order and stability of receiving states, but may also jeopardize the political and social stability and economic development of entire regions, and thus endanger international peace and security. The solution to the problems of displacement is therefore a necessary part of the peace process in the region and it is not conceivable to achieve peace while ignoring the problems of refugees and other displaced persons." BETTS, *supra* note 50, at 105 (citing CIREFCA Juridical Committee, *Principles and Criteria for the Protection and Assistance of Refugees, Repatriation and Displaced Persons*, UNHCR Fonds 11, Series #, 391.86.3 HCR/Mex/0890 (1991)); *see generally id.* at 100-03, 105-06.

68. As noted for the Preparatory Meeting for CIREFCA, Guatemala, "All project proposals, whether aimed at refugees, returnees or displaced persons, include a component geared at redressing the adverse effects felt by the surrounding local population and . . . to improve their situation." This integrated approach is a substantial part of the strategy of progressively incorporating refugees or reintegrating returnees in the countries and constitutes a key of the Plan of Action and of achieving the objectives of CIREFCA in Guatemala. BETTS, *supra* note 50, at 107 (citing CIREFCA, *Report on the Preparatory Meeting for CIREFCA*, UNHCR Fonds 11 Series 3, 391.86.3 (Apr. 12-14 1989)).

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themselves. This ensured the expression and recognition of state interest to propel success for migration management. Furthermore, the critical matter of implementation was on terms developed by each government to maximize their interests, and hence, their cooperation.

The interests of the donor states—principally the states of the European Union—were understood, appreciated, and engaged. Certainly, the projection of European values, including altruism, was involved. But in terms of state interest, the pre-eminent consideration motivating European funding was that 20 percent of the regional trade affected by the Central American conflicts was at stake in the commercial relationships between the Central American states and the EU. The EU governments were accordingly drawn into the process by the promise of the conditionality of development and migrant management that would sustain and enlarge trade and investment with Central America through providing security and stability. The potential states of return and resettlement shared, of course, these same state interests in trade and investment benefits for the region. Indeed, for all parties the conditionality clarified that migrant management, as it affected security and stability, was an essential component of a regional peace process and the promise of economic benefit.

Especially illustrative of the critical importance of engagement of national interest in the management of mass migration was the fact that the United States, in the early stages of the CIREFCA process, was not supportive of management through prioritization of migrant choice. U.S. foreign policy was to support the migrant populations in narrowly defined strategic and security terms (as in Africa), distinguishing, for example, between anti-Sandinista and Contra-aligned groups with respect to the conflict in Nicaragua. But later, with the ending of the global Cold War and the change of government in Nicaragua in 1990, the United States became a principal donor through engagement of its strategic interest in supporting the peace deal and the newly elected government in Nicaragua.⁶⁹

As proven so dramatically in the European Refugee Crisis, migrant receiving countries ultimately determine their own immigration policies as expression of sovereignty. Though open to guidance, to lesser and greater degree, from regional organizations such as the EU or globally from the UNHCR, they strive in large measure to respond to their own national, political, and strategic considerations. This was certainly true of CIREFCA. The principal strategy was to develop political support by engaging the specific interests of the governments involved and to defer any financial emphasis, such as pledging, until that support was adequately secured.⁷⁰ That this prioritization of state interest over charity worked is best illustrated by the turn in U.S. strategic policy which resulted in \$422,300,000 in resources being made available to protect and care for the

69. BETTS, *supra* note 50, at 102-04.

70. *Id.* at 82-84.

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displaced, affording them choice in resettlement or return as one dynamic for achieving durable peace in Central America.⁷¹

As the result of its creative conditional linkage of state interest and migrant choice, CIREFCA has been widely judged a model for the cooperation of states in achieving durable solutions for the displaced. It has been universally acclaimed as such not only by the UNHCR, but by a United Nations General Assembly Resolution demonstrating the broad political consensus eventually achieved for its success.⁷²

**C. THE REFUGEE EMERGENCY GENERATED BY THE WARS IN THE
FORMER YUGOSLAVIA IN THE 1990s**

The migrations generated by the wars in the former Yugoslavia in the 1990s are especially notable as a failure of international migration management; despite numerous initiatives throughout the conflict and continuing meetings at various levels of international organization, nothing of significance was accomplished. This was because migration management was never effectively engaged with state interest and migrant choice.

Where refugees migrated was determined essentially by default, by the dynamics of war, and by where people fled to avoid the conflict. There was no collective scheme for large scale resettlement developed, although by 1993, about 600,000 migrants fleeing the conflict had entered the EU.⁷³ The only manifestation of international response on the ground was push-back in the form of action by EU member states separately imposing barriers to stem the flow, as by way of visa requirements.⁷⁴ Migrant choice operated as a primary dynamic; migrants entered where they chose, either before visa restrictions were imposed, or through irregular non-legal channels during the conflict, resulting in a grossly uneven distribution within the EU.⁷⁵ But, migrant choice was never integrated with the prevailing state interests. There was no such integration even for arrangements of international charity, as for the African migrations. Nor was there any integration with regional peace efforts as for Central America.

The explanation cannot simply be the seemingly intractable nature of the conflict until force was applied through NATO and peace achieved. Mass migration is naturally the product of seemingly intractable conflict, intractable until peace is achieved. It is conflict, of course, that is a principle driver, if not the principle driver, of mass migration.⁷⁶ That is true of all the

71. *Id.* at 87 (citing *CIREFCA Process: External Evaluation*, memo, 21 Sept. 1994, UNHCR Fonds 11, Series 3, 391.86.5, UNHCR Archives, (D. Chefeke to all SMC members)).

72. U.N. G.A. expressed, in the International Conference on Central American Refugees, "its conviction that . . . the process could serve as a valuable lesson to be applied to other regions of the world." G.A. Res. 48/117, at 4 (Sept. 21, 1994).

73. See Astri Suhrke, *Burden-sharing During Refugee Emergencies: The Logic of Collective versus National Action*, 11 J. OF REFUGEE STUD. 396, 407 (1998).

74. See *id.* at 407.

75. See *id.*

76. See *id.* at 402.

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historical episodes here recounted, though surely the more intractable the conflict, the greater the difficulty achieving refugee management.

But, what explains the gross failure in Yugoslavia at any level of the international institutional and legal resources invoked for management? The principal explanation is that the efforts to develop a collectivized response started and ended with a call for more “equitable distribution” of the refugees.⁷⁷ The multiple management initiatives were all premised on achieving ‘fairness’ amongst the governments targeted for migrant relocation.⁷⁸ But all such initiatives were still-born, never achieving any actual implementation. To the extent migrant protection was provided, it was at best by way of temporary protection where the migrants appeared.⁷⁹

Unlike the CIREFCA process instituted for Central America, there was no threshold effort to identify the state interests at stake that might have been managed for the benefit of the migrants. The early collective effort of informal Intergovernmental Consultations on Asylum and Immigration held by the European and North American states and Australia, and meetings held with the Bosnian, Croatian, Slovenian, and Hungarian officials, resulted in a proposal for sharing based on fixed quotas.⁸⁰ The quotas were to be calibrated to “absorption capacity” keyed to socio-economic factors.⁸¹ But, there was no state interest engaged to support absorption. Indeed, a principal concern was that a system of quotas would result in minimal offers of admission.⁸²

At a London 1992 meeting of European immigration ministers, a principle of coordinated action within “national capabilities” was promoted.⁸³ But, there was never any refinement of such national capabilities other than the general call for achieving equity between states in absorbing the flow.⁸⁴ State interest was perceived essentially as a matter of fairness between states. This was not a course to engage the economic and strategic national interests inherent in the genocidal break-up of the former Yugoslavia. The principal interests that were at stake in the break-up had little to do with “fairness.” Moreover, a collective call for equitable “burden sharing” generated the concern that there would be free riding by some governments that would seek the lowest level of commitment that could be offered without political embarrassment.⁸⁵ In practical effect, therefore, the most the EU was able to muster, given the reality of the migration flow, was affirmation of the principle of temporary protection and the vague

77. *See id.* at 408.

78. *See* Astri Suhrke, *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, 11 J. OF REFUGEE STUD. 398, 407 (1998).

79. *See id.* at 407.

80. *See id.*

81. *See id.*

82. *Id.* at 407; *see* discussion *infra* Section IV.A.1 (maintaining this is an endemic risk inherent in any fixed quota scheme dependent on adoption by sovereign states).

83. *See* Suhrka, *supra* note 78, at 407.

84. *See id.* at 407-09.

85. *See id.* at 408.

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prescription that EU members should admit in accordance with national capabilities.⁸⁶

By the mid-1990s, states impacted by the flow, led by Sweden and Austria, pressed for a plan for equitable distribution,⁸⁷ but this similarly did not engage the strategic interests at stake. For example, both France and UK had troops on the ground in the former Yugoslavia and argued that their troop contributions should be counted against refugee admissions.⁸⁸ This proposal, that might have been an entrée for integration with the broader peacekeeping interests, was not pursued. “Sharing” and “equity” remained the keywords for the European initiatives for migration management throughout the 1990s.⁸⁹ The UK and France, not perceiving their broader strategic interests in resolving the conflict to be served by the limited focus on achieving “equity” among states, and whose cooperation would be critical to a unified European response, effectively vetoed the limited process such as it was.⁹⁰ The failure to engage state interest more inclusively resulted in low intake countries such as the UK and France refusing to support a scheme capable of implementation to help the other governments most directly impacted by the flow.⁹¹ The European Union efforts culminated in a 1995 resolution⁹² that did not provide any formula for distribution. It was hortatory, calling for solidarity, equity, and harmonization of response, with nothing concrete being achieved to alter the unequal distribution determined by the migrants themselves.⁹³ The resolution in its final drafting eventually included the principle advanced by the UK and France that peace-keeping participation could be counted against refugee admission.⁹⁴ But no such scheme was ever adopted, and the injection of a broader recognition of state interest tied to peacekeeping never became joined with a migration management program going forward.⁹⁵

The project to develop a collective response, which started in 1992 in informal intergovernmental meetings, included through the 1990s a host of meetings involving the UNHCR, the EU Parliament, the EU Commission, European immigration ministers, the Conference on Security and Co-

86. *See id.*

87. *Id.* at 408-10.

88. *See id.* at 408-409.

89. Thus, for example, the European Parliament resolved in January 1994, that the European Commission should “draw up . . . an emergency plan for the reception of refugees which provides for them to be distributed evenly among the countries of the Community.” Resolution on the General Principles of a European Refugee Policy, 1994 O.J. (C 44) 109.

90. Suhrke, *supra* note 78, at 408-09.

91. *See id.* at 409.

92. *See* Council Resolution on Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, 1995 O.J. (C 262) 1 [hereinafter Council Resolution of 1995].

93. *See id.*; *see also* Suhrke, *supra* note 78, at 410.

94. *See id.*

95. *See* Suhrka, *supra* note 78, at 410.

operation in Europe, and the Council of Europe.⁹⁶ These efforts culminated in an EU Commission Resolution in 1997 that declared the option of adopting a collective decision-making framework to be “a common approach” for meeting future mass influx.⁹⁷ It was proposed to include some element of state interest in minimizing mal-distribution by assisting those states receiving a disproportionate number of migrants. The “common approach” proposed included harmonization of rights as a distributive device to encourage more even distribution of migrant flow, and in that regard, called for greater recognition of migrant choice.⁹⁸ But, there was no commitment other than to look forward to harmonization of rights, and to consider assistance for governments receiving a disproportionate number of refugees.⁹⁹ Whether to apply any collective procedure for future migrant management was left open for future determination on an ad hoc basis.¹⁰⁰ Moreover, and more importantly, there was no indication of treatment of migrant management within a broader process of conditional assistance to achieve peace. The mantra remained “equity” of distribution despite the repeated failures to achieve that objective. Any initiative for migration management was thereby effectively diverted from the fundamental need to achieve reconciliation of migrant choice and the sovereign interest within a broader peace process.

D. THE COMPREHENSIVE PLAN OF ACTION FOR INDOCHINESE
REFUGEES (1988-1996) (THE CPA)

The mass migration of Indochinese Refugees in the period 1988-1996 presented a conundrum of migrant choice and state interest equal to any. Its management was accordingly marked by both failures and successes, advance and retreat. But in the end, the determined effort to achieve a collective resolution did result in remarkable success. That success is exemplary of a determined and persistent course of maximizing state interest and migrant choice.

The aftermath of the Vietnam War presented the international community with a surge of migrants, human rights abuse, and lives at risk. The migrants launched themselves into rough seas on small boats, at risk not only of drowning, but also abuse by pirates, and increasingly, actual physical push-back from the states in the region. Even the states accommodating first arrivals soon refused to allow the “Indochinese boat people” access to land in their territory, a response not dissimilar to the current closing of the “Balkan route” and border enhancement such as Frontex for Europe.

As media images recorded deaths at sea, and the broader tragedy became apparent and undeniable, a collective response was generated. In July 1979,

^{96.} *See id.* at 407-11.

^{97.} *See id.* at 411.

^{98.} *See id.* at 412; *see also* Council Resolution of 1995, *supra* note 92, at para. 4.

^{99.} *See id.*

^{100.} Suhrke, *supra* note 78, at 406-12.

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the United Nations convened an international conference to meet the challenge of over one million people fleeing Vietnam, Cambodia, and Laos.¹⁰¹ The sixty-five governments attending agreed to commitments aiming for durable solutions.¹⁰² It was agreed that countries in the region as well as outside the region would offer resettlement places while countries of origin would discourage unauthorized departures and cooperate in an Orderly Departure Program (the ODP).¹⁰³ This program and its evolution ultimately served to provide resettlement for nearly two million Indochinese refugees.¹⁰⁴

By the 1980s, the ODP broke down under unceasing flow, resulting in resettlement constriction and countries of first asylum reverting to push-back, leaving about 150,000 migrants in detention centers without durable solution.¹⁰⁵ In May 1989, Malaysia began turning back boatloads of Vietnamese refugees,¹⁰⁶ and in 1986, Vietnam stopped interviewing applicants for U.S. departures, generating a surge of new illegal departures, resulting in Thailand sending back boats, and Indonesia and Hong Kong denying resettlement.¹⁰⁷

Considering the declining prospects for management of the flow, a second conference was convened by the UNHCR in 1989.¹⁰⁸ At this conference, a multiplicity of governments negotiated what was ultimately to provide successful resolution, the program known as the Comprehensive Plan of Action (CPA) for Indochinese Refugees.¹⁰⁹ The CPA was a three-sided agreement between the country of origin (primarily Vietnam), the first countries of asylum in the region (the ASEAN states and Hong Kong), and third countries of resettlement (led by the United States).¹¹⁰ Vietnam agreed to reintegrate boat people not found to be refugees, and the "first countries of asylum" agreed to admit all asylum seekers situated in their territory and to host a screening process to determine which of the migrants qualified as

101. See BETTS, *supra* note 58, at 112-13 (stating the agreement reached by the UNHCR in 1979 held long enough to resettle over one million Indochinese refugees); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, YALE LAW SCHOOL FACULTY SCHOLARSHIP SERIES, 255 (Paper 1694, 1997) at 256-57 (stating over 1.7 million Indochinese refugees were resettled between 1979 and 1989).

102. See Schuck, *supra* note 101, at 255.

103. See *id.*

104. See BETTS, *supra* note 50, at 112-13 (stating the agreement reached by the UNHCR in 1979 held long enough to resettle over one million Indochinese refugees); Schuck, *supra* note 101, at 256-57 (stating over 1.7 million Indochinese refugees were resettled between 1979 and 1989).

105. See East Asia and the Pacific, World Refugee Survey: 1991 in Review (1992), at 56, 61; Lawrence S. Eagleburger, U.S. Deputy Sec'y of State, Indochina Refugee Situation: Toward a Comprehensive Plan of Action, Address at the International Conference on Indochinese Refugees (June 13, 1989), in DEP'T ST. BULL., June 1989; see also BETTS, *supra* note 50, at 114.

106. See Schuck, *supra* note 101, at 257.

107. See *id.* at 257-58.

108. See *id.* at 258.

109. See *id.*

110. See *id.*

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“refugees.”¹¹¹ It would be a region-wide refugee status determination process, but in accordance with national legislation, and UNHCR training and oversight in internationally accepted practice.¹¹²

The screening process, as it played out, was plagued with human rights abuse. Arrivals were subject to refugee screening by local officials, and those screened out remained in holding centers for repatriation.¹¹³ There were protests, until, in 1996, Vietnam and the United States agreed to U.S. interviews before repatriation, and upon return to Vietnam, that those repatriated would be allowed to apply for U.S. resettlement.¹¹⁴

Implementation continued to run up against rights abuses and widespread critique for these abuses. The reality for many of the “boat people” was a form of forced, albeit mitigated, return to Vietnam—arguably *refoulement*.¹¹⁵ But, the agreement ultimately worked to clear the refugee camps and detention centers. As a detailed study has demonstrated, what ultimately made it work was that the CPA, while designed to achieve humanitarian objectives, adopted as the means to the ends of durable solutions, a creative conditionality of a wide range of state interests matched to the choices the migrants were making on the grounds that were aligned to this result.¹¹⁶

The state interest motivations were high and low, and much in-between. On the low side, it included Indonesia stimulating trade linked to the flow of remittances and corruption within the refugee status determination process. The CPA was also made attractive for regimes that needed to show improvement in their dismal human rights records, such as the Suharto regime in Cambodia and the Marcos regime in the Philippines.¹¹⁷ Vietnam, by supporting return and cooperating to reduce clandestine departures, sought to maximize support from the other nations for development assistance to promote the resource requirements of refugee return and integration, trade, and Vietnam’s global reengagement. Given decline of support from the Soviet Union and its increasingly problematic relationship

111. *See id.* at 259.

112. *See id.*

113. *See id.* at 258-59.

114. *See id.* at 259 (explaining that in early 1996 the U.S. and Vietnam agreed to a U.S. interview for the migrants before leaving camps and that they would go to their areas of origin while awaiting the interviews).

115. *See id.* at 264.

116. In creating and implementing the CPA, the risk of “free riding” was minimized by capitalizing on the specific interests of each state involved, and making realization of its interests conditional. It was key to the program that all states involved understood their conditional contribution was necessary to serve both their separate and collective interests. The mutually conditional character was recognized as fundamental in the UN General Assembly Resolution on the CPA, which stated that “the measures stipulated in the Comprehensive Plan of Action are interrelated and mutually reinforcing and should be implemented in their totality by all States concerned.” G.A. Res. 44/138, (Dec. 15, 1989). *See BETTS, supra* note 50, at 125-138 (full discussion of the state interests and trade-offs involved in the agreement).

117. *BETTS, supra* note 50, at 120-123.

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with China, Vietnam was seeking to foster new sources of trade and resources of development assistance from Europe and eventually the United States.

As U.S. relations with Vietnam improved, both the United States and Vietnam modified their positions on return, cooperation, and assistance. Concurrently, the United States also used the “boat people” issue to improve relations with the ASEAN nations in trade, oil resources, and strategic deployment of U.S. forces by way of military base enhancement in the Philippines and Thailand.¹¹⁸ The United States, by taking the lead on resettlement, was thereby serving its interest in regional security and the containment of communism in Southeast Asia. For U.S., domestic politics, this also suited the anti-communist agenda and garnered strong support from the Vietnamese diaspora in the United States.

For the states in the ASEAN region, the CPA afforded the means to achieve migration control, especially in relation to the political sensitivity of dangerous demographics, such as for Malaysia and Indonesia, where the proportion of ethnic Chinese was a concern for assuring social stability. Thailand, sharing a border with Cambodia, saw the CPA as relieving the destabilizing risk of Vietcong infiltrators among the migrants. Hong Kong saw the CPA as a means to mitigate the threat of higher density of migrants. For all the ASEAN states, there was also the interest in demonstrating the strength of regional alliance.¹¹⁹

The CPA, in accommodating not only the realities of state interest, but also migrant choice, managed motivations well beyond the definition of refugee. Indeed, the apparent unending waves of migrants included many migrants coming from North Vietnam seeking, primarily, economic opportunity. The CPA adopted in 1989 accordingly incorporated return as a principle solution, but along with a process for individual status determination, included further accommodation for those who refused to go back, by their inclusion for resettlement.¹²⁰ In recognition of the importance of migrant choice and cooperation, the UNHCR engaged in matching, insofar as practicable, the resettlement criteria of states with the preferences of the migrants. All this went beyond the legal criteria of international refugee law, including resettlement of both those fleeing North Vietnam for economic opportunity, and those fleeing South Vietnam in classic flight from persecution fitting the Convention definition of refugee.¹²¹

Thus, while conforming to International Refugee Law, the CPA was above all, a pragmatic process which elevated the maximization of migrant choice in relation to state interest. This was especially illustrated when there developed a crisis in the program in the mid-1990s over Vietnam’s reluctance to allow returns at a sufficient rate for reduction of clandestine departures. It reached a critical stage when the countries of asylum issued a

118. *Id.*, at 133-37.

119. *Id.* at 126.

120. *Id.* at 131

121. *Id.* at 125.

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joint statement threatening to abandon the fundamental principle of non-refoulement.¹²² Ironically, the United States and Vietnam initially took a similar position of opposing involuntary repatriation, though for different reasons, in opposition to the countries of asylum.¹²³ The formula finally achieved to resolve the crisis was not to call repatriation “forced” or “voluntary” while reaffirming the principle that those who were found to be refugees could not be sent back.

Operationally, a key aspect was the enhancement of migrant choice as the means to satisfy humanitarian and human rights objectives—non-refugees would be actively encouraged to return after three months of counseling. They would not be coerced, and respect for their rights would be monitored by the UNHCR upon their return to Vietnam. The U.S. government established large admission quotas reflecting its anti-communist agenda and legacy, urging other states to contribute financially and pressuring others to provide protection, keeping the affected states engaged and pressed to do more. But, the scheme left each government, in deference to their respective national interests, to define their share per their own intake criteria and procedures.

Though there were shortcomings in implementation, particularly as to prolonged detentions in Hong Kong, by 1991 the rate of returns significantly increased and the rate of new arrivals declined. This was answered by increased aid for Vietnam for development and trade until the CPA process ended in 1996, by which time all the boat people either resettled as refugees or reintegrated into Vietnam.¹²⁴

The CPA success was no doubt attributable to the conditionality of state interest engaged, along with the prioritization of migrant choice. The ASEAN states and Hong Kong provided asylum on condition that the U.S. and other states provided asylum, resettlement, and respected non-refoulement, and that Vietnam would cooperate for return in a protected status for those deemed to be non-refugees. But, beyond the formal conditionality of this deal between the governments, the entire process was de facto designed for conditionality on cooperation by the migrants themselves seeing advantage in the scheme. In sum, the principal durable solutions— asylum, resettlement, return, and integration—were all made conditional on a maximal reconciliation of state interest and migrant choice.

122. They declared, “in the event of failure to agree even on an intermediate solution to the VBP (Vietnamese boat people) problem, countries of temporary refuge must reserve the right to take such unilateral action as they deem necessary to safeguard their national interest, including the abandonment of temporary refuge.” *Joint Statement by Countries of Temporary Refuge*, May 16, 1990, Manila, UNHCR Fonds 11, Series 3, 391.89, UNHCR Archives.

123. BETTS, *supra* note 50, at 141.

124. See BETTS, *supra* note 50, at 119-20, 141-42.

IV. Guidance for the Future; Maximum Reconciliation of Migrant Choice and State Interest

A. INTERNATIONALIZATION OF MASS MIGRATION MANAGEMENT

In these major episodes of mass migration since adoption of the Refugee Convention, we see that positive international intervention has depended on the degree to which migrant choice and state interest were reconciled. Mass migration management accordingly depends upon a largely voluntary dynamic—however much international efforts purport to dictate solutions. It is, therefore, to be expected that attempts to engineer a mandatory comprehensive system, even such as by way of the legally binding Directives and Regulations of the EU,¹²⁵ are inclined to fail. State control of immigration no doubt is imperative for any design to work, given that national governments will not concede immigration control. And to the degree there is dependence on coercion of migrants to implement a mandatory system, it leads to dead ends instead of truly durable solutions. Thus, we have the tragic reality that most characterizes migrant management today—the confinement of hundreds of thousands of migrants in “temporary” camps in conditions of hopelessness.

It is also a lesson of international attempts to regulate mass migration that, to the extent any regulatory framework denies choice to migrants, migrants will avoid it and seek “irregular” non-legal means.¹²⁶ This in turn results in the growth of smuggler networks.¹²⁷ Thus, interdiction strategies in themselves, whether visa requirements, carrier sanctions, summary removal at borders, purported “safe country relocation” as currently designated for Turkey, or “readmission agreements” leading to chain refoulement, simply spur irregular movement.

These lessons should have provided guidance for management of the “European Refugee Crisis.” Instead, large portions of the flow have been incentivized to work around the controls, many of the migrants having simply “disappeared,” choosing to go elsewhere than governments and laws would send them, often forming new aggregations of unidentified urban poor in the countries of their chosen destination.¹²⁸

This is not only true of the recent European experience, but has been the course in other contexts where government has purported to manage mass migration without accounting for migrant choice. The immigration

125. Although both EU Regulations and EU Directives are binding on member states, regulations are self-executing. EU Directives, by contrast, set goals that all EU member states must achieve. However, in this case, implementation is done through domestic “implementing legislation” in each member state. See *Regulations, Directives, and Other Acts*, EUROPA, https://europa.eu/european-union/eu-law/legal-acts_en (last visited Nov. 10, 2017).

126. See e.g., Nektaria Stamouli, *Migrants in Greece Drop Off Grid*, WALL ST. J. (Dec. 7, 2016, 10:33 AM), <https://www.wsj.com/articles/migrants-in-greece-drop-off-grid-1481106606>.

127. See *id.*

128. See Stamouli, *supra* note 126 (noting the disappearance of 13,000 refugees of 63,000 migrants who were awaiting processing in Greece).

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controversy in the United States that so influenced recent elections, and a presidential campaign strategy of demonizing “illegal” immigrants, has not dramatically modified migrant choice.¹²⁹ Even where mass influx has been shaped by the special imposition of legal constraints, much or most of the population flow works around the limitations. This, for example, was the situation of the Salvadoran flow into the United States in the 1980s.¹³⁰ Though the migrants avoided deportation through Temporary Protection Status (TPS) granted on the assumption they would return to El Salvador when the security situation improved, few of the almost 200,000 original TPS Salvadorans have had to leave.¹³¹ Some have achieved permanent legal status, but more have found anonymity in the general population, essentially lost to any accounting by the U.S. legal system.¹³²

As demonstrated in Europe, the Americas, and Asia, large portions of any mass influx population will integrate on their own in lieu of legal alternatives. States affording economic advantage and security, not just front-line states or “hot spots,” will bear the brunt of the flow. The estimated 12,000,000 “illegals” in the United States, and the multitude of “disappeared” migrants who have become the new normal of urban poor populations throughout Europe, are evidence enough. Enhanced border controls, without much more, simply abandon management of the flow to greater risk-taking by the more desperate migrants, and grow the criminal networks of human trafficking.

Going forward considering the historical experience, the instruction, therefore, is that any potential “durable solution,” or any other strategy that may help in the management of mass migration, requires assessment of the state interests implicated, and collating these interests with migrant choice. For the member states of the EU, the costs of resettlement are naturally to be weighed against the costs of securing borders for strategy of return, or integration in place, or temporary protection, today manifested most prominently in Turkey and Lebanon. But the relative costs—economic, social, and humanitarian—will be assessed, in some form, by each government involved, and by the migrants themselves, as the condition for engagement in, and cooperation with, any collective strategy.

Though management depends on sovereign consent and migrant choice, it must be secured within a typically complex reality of diverse and changing motivations. The challenge is heightened by the constantly evolving nature

129. See Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> (reporting that Pew Research Center estimated that 12.2 million illegal immigrants were living in the U.S. in 2007, although the estimate for the illegal immigrant population in the U.S. in 2015 dropped to 11 million).

130. See Aaron Terrazas, *Salvadoran Immigrants in the United States*, MIGRATION POLICY INSTITUTE (Jan. 5, 2010), <https://www.migrationpolicy.org/article/salvadoran-immigrants-united-states>.

131. See *id.*

132. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY, 889-96 (3d. ed. 1995).

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of migrant flow—changing numbers of migrants, their ethnic and cultural make-up, and today, the perceived risks of international terrorism. The necessary accounting includes costs and job availability that varies over time—which indicates the inadequacy of any system that would depend on fixing allocations on anything other than a temporary basis. Success in managing mass migration has always depended on ongoing negotiation of numbers and conditions and adjustment as states' interest and migrant choice evolve, as exemplified best by the Indochinese and Central American migrations.

To the extent any management strategy is at odds with the interests of the separate states involved, it is marked for failure. This is illustrated by recent EU experience, especially by the recent EU proposal of negative sanction to be leveled against EU member states that fail to follow EU migration Directives on burden sharing, imposing a penalty of €250,000 for each refugee resettlement refused.¹³³ On any realistic evaluation, the proposal is a non-starter. Governments already disinclined to bear the perceived social and economic costs of migrant management will simply refuse on grounds of sovereign interest to bear such costs.

The historical experience in reference to state interest demonstrates that the governments of transit and potential resettlement, as well as states of origin and potential return, respond to positive incentives, namely some form of payment or other support for migrant protection and refugee asylum. Payment was made available to facilitate both the Central American resolution and the CPA for Indochina. To the extent such financial support can be obtained through a general funding rather than direct imposition of individual state debit or penalty, it affords the greatest promise of success. The same governments that will reject any sanction system, will contribute to general purpose regional funding. Agreed payments from a central fund need not founder on problems of exactitude and fairness, but can be determined by negotiation, as they were for the Indochinese CPA and Central America. Such general funding is also an attractive means for any state to avoid long term commitments. It thereby helps to mollify domestic fiscal concern. We already see this in the evolving strategies of the EU, which has allocated general funding not only to secure borders, but also for refugee relief, resettlement, and repatriation.¹³⁴ Moreover, states disinclined to make long term commitments on a national basis can be most easily drawn into regional arrangements, where preexisting patterns of cooperation and trade-of can be engaged.

The EU/Turkey/Greece deal, despite all its flaws, legal and practical, was targeted to capitalize on the interests of the EU member states and Turkey. Turkey gained immediate substantial geopolitical advantage and financial support in its relations with Europe—in the promise of payment of about €6,000,000,000 and the promise of relief from visa restrictions in its relations

133. Dublin IV Proposal, *supra* note 21, at art. 37.

134. See Asylum Fund Regulation, *supra* note 12.

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with Europe.¹³⁵ Indeed, the promise of EU visas for Turkish citizens was made a condition of the deal, though yet unfulfilled, having become a major sore point in the troubled saga of Turkey/EU relations.

The EU/Turkey/Greece deal's arrangement for containing migrant flow is the principal collective effort to date for the management of the flow towards Europe and the apparent model for broader European response to the migrations from the Middle East and Africa.¹³⁶ But, where that deal has critically failed is in its negation of migrant choice. Its flaws and failings as it has played out on the ground have been well documented in an abundance of non-contradicted NGO reports and press accounts. Everyone confirms the situation on the ground is seriously out of compliance with the requirements of international refugee law, humanitarian law, and human rights law.¹³⁷ This should be expected in that the deal affords little if any deference to migrant choice. Thus far in its evolution, it represents, almost exclusively, a negotiation of state interest without significant correlation to migrant choice. And, because it ignores migrant choice, it is barely more than collateral to the closing of the Balkan route, resulting in irregular migrant surge elsewhere, such as through the more dangerous route from Africa across the Mediterranean to Italy. The tragic reality is a small number of migrants are being relocated through the EU/Turkey/Greece deal, while irregular arrivals are increasing through ever more dangerous routes.¹³⁸

1. *Quota Schemes*

The history of international involvement in migration management compels the conclusion that there is no single scheme that suits all migration management, given the variety of evolving state interests and migrant motivations that characterizes mass migration. But what is certain, is that

135. See European Commission Memoranda MEMO/16/963, *supra* note 20.

136. North African transit countries have seen it as a basis for similar demands of a *quid pro quo* for curbing immigration, such that in September of 2016 German chancellor Angela Merkel, in recognition of these demands, recommended that a number of African and North African countries be given agreements similar to the deal with Turkey. Michelle Martin et al., *Merkel: We Need Migrant Deals with African States like EU-Turkey Pact*, REUTERS, Sept. 26, 2016, <http://www.reuters.com/article/us-europe-migrants-germany-idUSKCN11W1FR> (last visited May 19, 2017). See also Makini Brice, *Niger Tells Europe it Needs 1 Billion Euros to Fight Illegal Migration*, REUTERS, May 3, 2016, <http://af.reuters.com/article/worldNews/idAFKCN0XU1JV> (last visited May 19, 2017). Similar arrangements have also been advanced for the Libya-Italy route, with Libya seeking investment commitment in return for migrant control. See Isla Binne, *Italy, Libya Discuss Investment in Return for Migration Control*, REUTERS, May 17, 2016, <http://www.reuters.com/article/us-europe-migrants-italy-libya-idUSKCN0Y82IS> (last visited May 19, 2017).

137. See e.g., Mark Povera, *The EU-Turkey Deal: Analysis and Considerations*, JESUIT REFUGEE SERVICE EUROPE Apr. 27, 2016.

138. See Drew Hinshaw et al., *Migrant Toll Rises as Quarrels Hinder Rescues*, WALL ST. J., Apr. 19, 2017, at A11 (noting that irregular arrivals of migrants crossing the Mediterranean are up almost 24 percent from the same period in 2016, with the record of migrant deaths crossing the Mediterranean similarly on track to be broken). See also Spijkerboer, *supra* note 32.

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maximizing reconciliation of the state interests and migrant motivations in each evolving context of mass migration is the prescription for greatest success. Furthermore, because mass migration typically overwhelms the resources of any state, solution and resolution is best achieved through collective response, variable though it may be.

There are many proposals for more “equitable burden sharing” as the basis for collective international response. Typically, these are proposals for quota commitments by each potential state for resettlement, to be declared in reference to a formula designed to achieve fairness in distributing the migrants for resettlement and for repatriation, if that should become possible. Typically, the commitments are secured at a “pledging conference.” Typically, the results fall short of the pledges.¹³⁹ But the concept, nevertheless, is to provide a viable formula for correlating the durable solutions of resettlement and repatriation with the respective resources of the governments involved. A formula is developed to accomplish this, based on objective measures, such as GNP, a country’s population size and employment rate. The “reference key” of the Dublin IV proposal is the most prominent current example of this approach.¹⁴⁰ But in seeking as a priority, “fairness between states,” quota systems are notable for their diminishment of consideration of migrant preferences and particularized state interests, and therein lies their greatest flaw.

Provision for quotas are one response to the principle of non-refoulement declared as fundamental in Article 33 of the Refugee Convention.¹⁴¹ Mass migration typically results in undue pressure on frontline states, as it has in Europe. The rule of non-refoulement precludes return, at least for the time required for the processing of claims, which even under so-called “expedited determination” procedures may be a considerable time. This requires, to relieve the volatile pressures of mass migration, settlement somewhere, at least on a temporary basis, of those migrants with bona fide claims for protection. Quota systems are accordingly promoted as providing a safety valve, which, whether operating within a scheme of temporary protection or long term, can reinforce the principle of non-refoulement.

139. In September 2016, fresh off the heels of a summit held by the UNHCR, former President Obama of the United States held a Leader’s Summit on Refugees aimed at establishing concrete commitments to refugee relocation and integration from the leaders of fifty-two countries and international organizations. The ultimate outcome was that the states and organizations involved pledged to roughly double the number of refugees they admit over their 2016 levels. Fact Sheet on the Leader’s Summit on Refugees, Sept. 20, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/fact-sheet-leaders-summit-refugees> (last visited May 19, 2017). However, in 2016, there were about 162,500 refugees submitted for resettlement through the UNHCR. UNHCR–Resettlement, 2017, <http://www.unhcr.org/en-us/resettlement.html> (last visited May 19, 2017). Doubling that number still will not be adequate for satisfying the projected need of 1.19 million resettlements in 2017. Press Release, UNHCR, UNHCR report puts projected resettlement needs in 2017 at 1.19 million (June 13, 2016).

140. See Dublin IV Proposal, *supra* note 21.

141. Convention Relating to the Status of Refugees art. 33, Jul. 28, 1951, 189 U.N.T.S. 137.

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As promoted in the major episodes of mass migration since the 1951 Convention, a quota system may take a variety of forms, ranging from leaving states no option but to accept their allocated quota or inclusion of the option to renegotiate after the initial allocation, as did occur in the evolving Indochinese CPA and Central American mass migration managements.¹⁴² Schemes developed in the academic literature also prominently include the market analogy of tradeable quotas, analogous to the “cap and trade” schemes of environmental law, whereby governments would be able to buy and sell quotas with each other after the initial allocation, but within a collective status determination process.¹⁴³

As quota systems are proposed as means to secure “burden sharing” among states—migrants are being envisioned as the “burden,” and not in any sense a resource for constructive development. In the EU context, quotas are proposed to relieve the “burden” on the front-line states where the flow of migrants may be staunched, particularly Greece, to diminish the flow particularly to the states targeted by migrants as the most desirable destinations, such as Germany and France.

In seeking to achieve, above all, “equity” among states, quota systems tend to employ negative incentives, which cut precisely against particularized state interest and migrant choice. Thus, for example, in the formulation for the proposed “Dublin IV,” there is the €250,000 monetary penalty for everyone rejected from an assigned quota.¹⁴⁴

The characterization of migration as predominantly a negative social phenomenon, requiring spreading the “burden” migrants may impose, surely implies commodification of migrants incompatible with the humanitarian goals of refugee law.¹⁴⁵ This characterization ignores the proven positive social and economic aspects of immigration when constructively managed. But whether viewed from a moral or practical perspective, any systemic response based on quotas alone must fail because it is divorced from consideration of migrant preference. The employment of a distribution mechanism focused exclusively on fairness between governments relegates migrant preference to each of the affected government’s immigration policies and laws, which may or may not allow much discretion for consideration of migrant choice. Quota systems tend to operate significantly at odds with humanitarian and human rights concerns because their primary objective is to manage distribution of refugees as the means to achieve equity between states, in lieu of recognizing separate sovereign interests or provision for migrant choice that may be critical for successful management. But, what migrants choose to do cannot be successfully ignored, because what migrants choose to do is what will primarily determine where migrants are in fact “allocated.”

142. See Schuck, *supra* note 101.

143. See Schuck, *supra* note 101.

144. See Dublin IV Proposal, *supra* note 12, art. 37, at 68-69.

145. See Schuck, *supra* note 101, at 296.

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Some quota systems include compensation or other forms of support for hosting states where management resources are deemed insufficient, such as in the EU/Turkey/Greece deal. But as that deal illustrates, so far as compensation has been given as a collective means to incentivize states, it has been largely to secure detention facilities on the other side of the border.

Individuals in mass migration, at risk of basic physical security for themselves and their families, will eventually overrun any formulaic allocations such as quotas which wholly ignore their choice of destination. And, failing to attract cooperation of the migrants themselves means states will turn to coercion, which in turn compounds the pressures for secondary movement and enhancement of the pernicious smuggler networks.

This course, unfortunately, has been the general path that continues to be set for Europe facing continuing mass migration. In recent proposals for modification of the Dublin system by way of a “Dublin IV,” the EU Commission was quite explicit that the intention was to exclude refugee choice on resettlement. The Commission asserted the absolutist position that, “an applicant neither has the right to choose the member state of application nor the member state responsible for examining the application.”¹⁴⁶ Under Dublin IV, failure to comply would result in harsh sanctions, such as that the member state not in compliance would be required to examine the asylum application in an accelerated procedure, and that the applicant would not be entitled to common reception conditions other than emergency health care.¹⁴⁷

It is, therefore, not surprising that attempts to secure formulaic sharing mechanisms by way of quotas to be imposed based on objective criteria such as GNP and population, as in the more recent EU formulation, have so far have been unsuccessful. Moreover, in the historical experience of mass migration, where quota assignments have in fact achieved significant success, it has been only where the quotas were negotiated on an ad hoc basis between states, taking some significant account of where migrants chose to move, as in the Indochinese and Central American migrations.¹⁴⁸

In sum, quota systems share the fatal flaw of divorce from particularized state interest and migrant choice. In turning management on “burden sharing” between states, quota systems simply ignore particularized state interest and migrant motivation. But, as well demonstrated in the European crisis, governments simply will not comply with mandated quotas they have not themselves negotiated state *qua* state, and the migrants will do their best to avoid mandated “legal” pathways that will not get them where they choose to go. It follows, to the great misfortune of the migrants and governments alike, that smuggler networks become a dominant course for immigration to Europe.

146. Dublin IV Proposal, *supra* note 12, at art. 4.

147. *Id.* at art. 5.

148. See Schuck, *supra* note 101.

Institutionalization and collective determination of refugee management can follow a different course. A collectively designed and administered system could provide more predictable outcomes for governments and migrants—shared benefits and lower costs and risks, as the most well considered studies have demonstrated.¹⁴⁹

Management of refugee flow must be distinguished from other cross border phenomenon, such as the flow of capital, goods, and services. Because mass migration is about the cross-border flow of human beings, it simply cannot be managed effectively and in compliance with international refugee law and humanitarian and human rights law by ignoring the interests and motivation of the human beings and different governments whose vital concerns are affected.

2. *Matching*

Systemic “matching” of migrants and host states is an alternative methodology that can overcome the failings of distribution by quotas and can be utilized in conjunction with voluntarily pledging. There are collective distributional schemes proposed that do incorporate the need to account for migrant expression to be relocated to destinations, while respecting state control of immigration. These schemes for “matching” have seen limited adoption for the durable solution of resettlement but merit greater attention.¹⁵⁰

There is now considerable “matching” literature along the following lines; the individuals to be resettled rank all potentially desirable locations and are assigned their preferences through a random ordering in the nature of a lottery in relation to available destinations and the preferences of the states involved. The schemes may build in mechanisms to adjust between host states for costs and benefits of hosting migrants. The essential concept, however, is to “match” migrant preferences with prospective host countries ranked per objective measures of capacity for integration of migrants, such as wealth and population density of the prospective host countries. Unlike quota systems that allocate persons based exclusively on a generalized formula to achieve “equity” among states and thereby “burden sharing,” matching considers the particularized preferences of states and of the migrants.

A matching system allows states and migrants to submit a list of preferences reflecting both objective and subjective factors, particularized for each state and each migrant: for migrants, most importantly where they wish to be located, and for states, what migrants they would prefer based on factors such as skills, educational levels, and cultural affinity. A computer algorithm is then used to match migrants with states such that no state and

149. See Hathaway, *supra* note 5.

150. See HOUSE OF COMMONS LIBRARY RESEARCH: MELANIE GOWER & HANNAH CROMARTY, SYRIAN REFUGEES AND THE UK, (House of Commons Briefing Paper), 06805, (UK).

migrant would prefer to break their match. Conducting matches in this way gives migrants the opportunity to satisfy their self-defined interests, removing incentives to circumvent the system, while empowering the governments involved to prioritize their perception of national interest in volunteering placements and protection.¹⁵¹

A well-designed matching system can encourage parties to participate—not flee—the system.¹⁵² A primary purpose, and indeed outcome, of a well-designed matching system is the revealing of each parties' true preferences, which in turn gives each party an incentive to do their best to attract the matches they find most preferable. In other words, a well-designed matching system that respects migrant preferences can also alter a state's incentive from the deterrence of migrants, to attraction of migrants. States being able to influence who is resettled to their territory incentivizes them to be attractive to preferential groups of migrants so that those migrants will wish to match with that state.¹⁵³ To the extent that incentive is conjoined with centralized funding incentivizing states to accept migrants, success in matching becomes even more likely.

The studies of matching systems give strong support for the proposition that a matching system, though not perfectly accommodating preferences, can be designed to make the system attractive enough that migrants will want to participate, and will not resort to illegal means for resettlement. Through matching, states would gain better control over who settles in their

151. Of key concern to designers of matching systems is that parties will attempt to manipulate pre-determined matching algorithms by lying about their preferences or by lying about the information the system uses for evaluation and matching. The latter problem is solved by using non-manipulable or independently-verifiable criteria, such as language skills or simple rank-order lists.

152. ALVIN E. ROTH, WHO GETS WHAT—AND WHY: THE NEW ECONOMICS OF MATCHMAKING AND MARKET DESIGN, 165 – 67, (Eamon Dolan & Mariner Books eds., 2016). A matching system viable for migrants should include a framework of incentives that ensures, so far as practicable, that their preferences will receive due attention; *e.g.* lowering the requisite residence period for qualified beneficiaries of international protection to be eligible for long-term residence status, and therefore, rights of association and employment, as recommended by the European Parliament during consultations with the Commission. *See* European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of Third-country nationals or stateless persons eligible for subsidiary protection and for the content of protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM (2016) 467, 13 July 2016, Articles 15 and 17(1) of the Refugee Convention.

153. There are also various solutions for the race to the bottom concern whereby a state might avoid receiving refugees through various measures of discouragement such as rights abuse, to be dissuaded through penalties or payments as to unavailability. But, such proposals always break down on the challenge of enforcement, as evident in the frustration of the European Commission in imposing its will on recalcitrant governments, most apparent in the refusal of Hungary to allow any influx, and the increasing resistance of all European governments faced with the political push-back pressed by right wing nationalist politics.

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territory, and migrants would gain better choice, with lesser risk as to where they settle.

The system can be designed to allow migrants to apply for what they see as the best fit for protection, yet allow countries to compete to secure the number of migrants they are willing to accept. Matching also comports well with the efficiencies to be gained through joint processing of applications per standardized procedures. Matching thereby affords the opportunity to employ uniform standards, such as non-discrimination as to ethnicity, religion, gender, and sexual orientation, yet respond to realities of cultural difference, employment, and social affinity.

“Matching” has proven its merits in other contexts. These include, for example, matching students with schools and matching medical personnel with the specialized employment needs of health care. Though the systems are not always as efficient or fair as promised, they are generally evaluated as having achieved the objective of maximizing preferences for both sides of the “match.”¹⁵⁴

For management of mass migration, matching has been employed only on a very limited basis.¹⁵⁵ Matching, however, is of merit for management of mass migration because it can be focused so directly on the preference dynamics of migrant choice and state interest. It is also most consistent with the freedom of choice provisions of the Refugee Convention.¹⁵⁶ Matching, fitting comfortably within and being supportive of established international refugee law, can thereby provide legitimacy for migration management.¹⁵⁷

Seen through the lens of maximizing reconciliation of state interest and refugee choice, “matching” ranks high as a feature of mass migration management that should be considered for employment to achieve maximal correlation and reconciliation of state interest and migrant choice. Its

154. There is a considerable body of experience and study exposing both strengths and weaknesses, and how best to design a system. In particular, the efficiency and fairness of a matching system depends on assuring adequate information and simplification of procedures for participants to make successful matches. For related critique, see study of matching as it has operated for the New York City school system, *The Broken Promise of Choice in New York City High Schools*, THE N.Y. TIMES, May 7, 2017.

155. See HOUSE OF COMMONS LIBRARY RESEARCH, *supra* note 150.

156. See Convention Relating to the Status of Refugees art. 26, *supra* note 141, 189 U.N.T.S. at 172.

157. “[T]here is no requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection.” The prevailing view is that the universal scope of post-Protocol refugee law effectively allows most refugees to choose for themselves the country in which they will claim refugee status. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS*, 31, (Cambridge ed., 1991) (quoting Chief Justice Lufy of the Canadian Federal Court). For a contrary view rejecting right of choice, relegating the asylum seeker to seeking asylum in a “first country of asylum” or “safe third country” as reflected in the EU Directives constituting Dublin III and the proposed Dublin IV, see HELENE LAMBERT, *SEEKING ASYLUM; COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES*, 91, 98 (Dordrecht, Martinus, Nijhoff, eds., 1995).

promise is a unique potential for accommodating state control over immigration and resettlement, while maximizing migrant choice to move within legal limits.

**B. STATE INTEREST AND MIGRANT CHOICE IN THE
EXTERNALIZATION OF MIGRANT MANAGEMENT**

Management of mass migration can involve either domestic policies for protection, resettlement, and integration, or policies employing a variety of forms of externalized response—that is, procedures and programs for reversing or stymying migrant flow. These tools for mass migration management may be adopted exclusively, or in any combination. In this regard, the EU/Greece/Turkey model is a hybrid, composed of temporary protection and some measure of resettlement. But, EU policy may evolve, the different forms of externalization have become increasingly the politically preferred path for the EU, as exemplified by the EU's recent announcement of major aid programs to engage states of origin to prevent movement to Europe.

As the impacts of mass migration are felt in states of transit and destination, as in the current context of the EU, externalization means enhancing border controls and other forms of push-back and prevention, notwithstanding the fundamental principle of non-refoulement. This includes, on the one hand erection of border barriers and interceptions at sea, endangering migrant lives,¹⁵⁸ and on the other, development assistance ostensibly to discourage migration.

Any form of externalization of the mass migration challenge is naturally suspect, which is commonly revealed by the NGO community as constituting either internment or forced repatriation. “Aid” as an externalized response may all too easily degenerate to mean bribery to officials of states of origin to stem the flow, but camouflaged as economic and social development funding. But, there are also truly ambitious and promising schemes of migrant empowerment within the context of temporary protection. The lens of migrant choice and state interest reveals the difference between externalization that serves constructive mass migration management and that which does not.

1. Push-back and Border Controls

Externalization in its most primitive form—by push-back and border blockage—does not accomplish effective management. Indeed, it brings with it the dark and destructive consequence that is undeniable—generation and enhancement of smuggler networks that exploit and abuse migrant populations. The value of the human smuggling business is now estimated,

158. See generally Jenna Belhumeur, *Libyan Coastguard Opened Fire at Refugee Boats: NGOs*, ALJAZEERA, (May 25, 2017), available at <http://www.aljazeera.com/news/2017/05/libyan-coast-guard-opens-fire-migrant-boats-ngos-170525100451559.html>.

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in the European context alone, to amount to billions of dollars per annum. In its more organized form, it has even developed features akin to insurance and bonding. Such irregular migration, through payment, occurs in many forms when people have few if any alternatives for achieving personal security. If controls such as visa regimes and carrier sanctions remove choice other than to enter illegally, that is what the desperate will do, and that is what feeds the smugglers.

As mass migration reaches “crisis” proportions, it is perhaps only to be expected that the governments impacted will try to deter and diminish the flow. This was the course of events in the four mass migration episodes discussed above. In the current European crisis, we see a similar political response that was reflected in the Brexit vote in England, resurgence of right wing parties throughout Europe, and other expressions of xenophobia, generating new efforts at policing migrants, visa restrictions, and carrier sanctions to staunch the flow. Such programs have been developed both as joint international endeavors, as through the institutionalization of maritime interdiction by Frontex, and by individual states through national border controls. But because a large proportion of the migrant population chooses to move despite the risks imposed, blockage, as a longer-term policy emphasis, invariably proves counterproductive—not only enhancing irregular movement and smuggling, but also undermining the values of human rights and humanitarian concern embodied in the Refugee Convention and the applicable regional law of the EU.

2. “Hotspots”

The Turkey/EU/Greece deal was promoted as a scheme that would transcend the risks involved in the mass migration to Europe, while affirming refugee rights and migrant protection. The EU Commission proposals of 2016 presented the deal as a methodology for registration and identification of asylum seekers arriving at EU’s external borders—both for relieving the pressure on the front-line states and providing a “legal” pathway for resettlement and integration.¹⁵⁹ It was to be a model for management of mass migration with the objectives of swiftly identifying, registering, and fingerprinting migrants, primarily to support relocations and returns.¹⁶⁰

The failure of the EU/Greece/Turkey deal to satisfy the mandates of international refugee law and European law, is echoed in the failure of this model. It has been distinguished not by relocation and repatriation, but by profound denial of migrant choice and trivialization of state interest. Media reports and the protests of NGOs have presented the international community with what is the real picture: tens of thousands of migrants

159. For a detailed report, see Aspasia Papadopoulou et al., *The Implementation of the Hotspots in Italy and Greece*, Eur. Council for Refugees and Exiles, <http://www.ecre.org/study-of-eu-hot-spot-approach-reveals-serious-challenges-in-greece-anditaly/>.

160. See *id.*

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trapped in prolonged detention without any meaningful access to asylum, struggling with minimal physical and informational resources and abbreviated appeal procedures, resulting for the most part in expedited returns and relatively few resettlements.¹⁶¹

State interest has been particularly ill-served for the front-line state of Greece, which bears the brunt of the model. Migrant choice is made a mockery by inadequate infrastructure at all levels where the relevant legal norms of refugee law, human rights, and humanitarian law are supposed to apply.¹⁶² All the evidence is that the “hotspot” model, promoted as a hybrid of policing and protection, has morphed into a minor variation on what is essentially a push-back strategy. EU officials claim success as the flow to Greece has diminished, yet generally ignore the unintended dire consequences of inadequate protection of migrants confined in Greece and Turkey and the generation of alternative irregular movement on which the smuggler networks capitalize.¹⁶³

3. *Camps*

Migrant camps are the most significant externalization of migrant management in terms of the number of individuals subsisting within frameworks of international and national legal authority. The camps vary dramatically in the limitations imposed on migrant choice, ranging from status indistinguishable from criminal detention, to significant enablement and empowerment of migrants. But in general, the past mass migration management reality of camps has been largely one of isolation and charity, not empowerment of migrant choice. That was true even for the relatively successful managements that comprised the CPA for Indochina and the Central American flow, with the migrants essentially in “holding” status pending political negotiation of resettlements.

Today, the great majority of migrants are in “protracted situations,” which the UNHCR defines as pending for more than five years for 25,000 or more people.¹⁶⁴ More than two-dozen of these “protracted situations” have been maintained around the world, many for more than twenty years, some holding tens of thousands of migrants, limiting further freedom of movement and affording little or no education or other means of advancement.¹⁶⁵ Indeed, the norm of contemporary mass migration management is that the UNHCR mandate for protection and assimilation has evolved largely to one of isolation and charity, leaving migrants little or

161. As of May 12, 2017, 16,163 persons had been resettled to twenty-one countries, with most of the recent resettlements being from Turkey. Eur. Commission Press Release, *Relocation and Resettlement: Commission calls on all Member States to deliver and meet obligations*, (May 16, 2017).

162. See Section II, above.

163. See generally Eur. Commission, *supra* note 161.

164. See NICHOLAS CRAWFORD ET AL., *PROTRACTED DISPLACEMENT: UNCERTAIN PATHS TO SELF-RELIANCE IN EXILE* 11 (2015).

165. See *id.* at 1.

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no hope for anything better.¹⁶⁶ This is the “normal” that epitomizes the externalization of migrant management, whereby separate state responsibility is minimized and avoided, and migrant choice is limited to the choice of bare subsistence. Moreover, the mixing of substantial aid with lack of migrant empowerment breeds corruption of the worst sort, depriving migrants even of bare subsistence where crime gangs dominate.¹⁶⁷

Maximization of migrant choice and sovereign interest would dictate a far different “normal.” And there is indeed good evidence there can be a new “normal” for migrant camps that pays due respect to national immigration control, yet better serves the mixed nature of contemporary mass migration. Moreover, that new normal can include not only “refugees” as defined by the refugee Convention, but all migrants requiring “temporary protection.”

There are currently several migrant camps that have evolved in the direction of integrating camp life, whether temporary or long-term, with the proximate indigenous community. Principal examples are the camps operating in Uganda, Jordan, and Turkey, where migrant situations range from emergency relief to protracted settlements, both rural and urban. Migrants in these camps have been engaged with the local communities where they are situated, transitioning from total dependence on international aid, to become consumers, producers, buyers, sellers, employers, and employees.¹⁶⁸ Jordan’s Zaatari Refugee Camp, which is now a community of approximately 80,000¹⁶⁹ persons, is particularly notable for

166. Those granted asylum are a small portion of those who receive “temporary protection;” most migrants being caught in permanent limbo in refugee camps. See generally *Addressing Protracted Displacement*, *infra* note 125, at 6. There is reluctance to grant employment and residence rights to those with a “temporary” status or whose asylum claims are pending. Most migrants’ options are temporary or no protection because only a small fraction of migrants are granted asylum. The EU decision in September 2015 to relocate 160,000 asylum-seekers from Greece to Italy within two years, therefore, resulted in only 5,651 relocations after one year, with a highly unequal distribution. Migrants have an advantage where there is proximity allowing safe repatriation, and cultural commonalities rather than profound differences, (e.g. Syrians in Turkey of shared Islamic faith, compare Sunni vs. Shite with historic tribal rivalries, and treatment of women).

167. For example, in early 2017, Italian police arrested sixty-eight people in the southern region of Calabria, including a priest and the local head of a Roman Catholic association that ran the Sant’Anna migration center in the town of Isola Capo Rizzoto, one of the largest camps in Italy. The charges, among other offenses, were involvement in organized crime, extortion, misappropriation of public funds, and fraud. Many of those arrested were said to belong to one of the most violent crime groups in Italy. Of the 103 million pounds received by the migration center from the EU between 2006 and 2015, it was estimated 36 million pounds were stolen. Part of the alleged fraud was simply to let migrants go hungry instead of providing the subsidized meals. Jacopo Barigazzi, Politico, *EU Asylum Reform Deadlocked*, p. 3, <http://www.politico.eu/article/europe-refugees-eu-asylum-reform-deadlocked/>.

168. See ALEXANDER BETTS, LOUISE BLOOM, ET AL., *REFUGEE ECONOMIES: FORCED DISPLACEMENT AND DEVELOPMENT* (2017). For numerous examples of these achievements on a country-by-country basis, see *Addressing Protracted Displacement: A Framework for Development Humanitarian Cooperation, A Think Piece Drawing on collaboration Between OCHA, UNDP, UNHCR, UNICEF WFT, and the World Banks*, Dec. 2015.

169. Syrian Regional Refugee Response, U.N. High Commissioner for Refugees (July 3, 2017).

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what has been achieved in maximizing migrant choice and state interest. There, migrants have been integrated in work in a special economic zone enjoying tariff reductions from the EU and are given vocational training and support from the Jordanian government, which itself benefits from the greater labor force that the migrant population provides. These camps have generated World Bank support and NGO's support, as well as support from multi-national corporations such as Walmart and IKEA.¹⁷⁰ The result is migrant empowerment, conjoined with economic benefits for the host state. The camp also provides jobs for Jordanian nationals, thereby building human bonds between Jordanian citizens and migrants as a basis for the more durable solution of integration.

So, what we are seeing in the more constructive camp programs is significant movement away from the paradigm of maintenance until resettlement or repatriation, to innovative engagement of migrant choice and national interest, affording durable solutions, paradoxically, by way of "temporary protection." It has come to constitute a new paradigm that no longer ignores the reality of "protracted situations." It affords migrants choices other than the stark alternatives of the risk of irregular movement or no movement at all. It allows for migrant advancement, yet does not foreclose voluntary return when the necessary political resolution allowing repatriation may be achieved.

The relative success of these experiments in integration of migrant camps with local resources and needs bespeaks the value of strengthening, through financing and technical assistance, the human resources within the camps and national resources for engagement. This will vary considerably, of course, per political and geographic circumstance. To the extent such constructive development within the camps is made part of a regional scheme accommodating the national interests involved, this engagement paradigm can be even more effective, as was the regional migration management developed for Indochina and Central America. The focus on migrant choice is what makes it promising, creating a capacity for migrant leadership, encouraging respect for local laws and customs, discouraging illegal or anti-social behavior, and contributing to the welfare of host communities.

It should be noted that this camp/integration paradigm, while new in key respects, is wholly consistent with the Refugee Convention. The clear thrust of the Convention was not dependency, though dependency has come to characterize most mass migration management. The substantive provisions of the Convention are guarantees of social and economic rights as the means to achieve constructive integration and other forms of self-empowerment for refugees. These rights cannot be realized when migrants are caged and warehoused in camps. The Refugee Convention was not and is not a charity-based prescription for management. It is a mandate for

170. See U.N. High Commissioner for Refugees Camp Planning Standards, *available at* <https://emergency.unhcr.org/entry/45582/camp-planning-standards-planned-settlements>.

empowerment and integration, respectful of sovereign interest. This new camp model, both for refugees and for migrants more generally, can be a paradigm for successful achievement of that mandate.

4. *External Development Strategies*

Economic and social development aid focused on countries of origin of migrants has long been seen as a tool to diminish mass migration.¹⁷¹ This is the aspect of migration management through externalization most attuned to refugee choice because improvement of living conditions in the states of origin, it would seem, can significantly diminish incentives to move.

But, this thesis is not without critique. The critique is that improved standards of living in states of origin can generate more, not less, migration, by providing those who choose to migrate with the economic wherewithal to do so and to pay smugglers. This critique is often joined with the observation that it is not economic, but political push factors, that are the most significant in generating migration, and that political dysfunction, irrespective of development, is why people will migrate once they have the means.¹⁷² The best prescription, it is argued, is therefore not economic development, but rule of law projects, such as legal and judicial independence development, and public finance management.¹⁷³ But as for mass migration generally, whatever the relative significance of economic deprivation or political instability, either thesis confirms that the appropriate measure of migration management is how it will impact individual migrant choice to stay or flee.

Development as a means for externalization has been made pre-eminent in the context of the current European crisis by promulgation of “The New Migration Partnership Framework” (MPF) endorsed by the European Council in June of 2016, for coordinated structured cooperation addressing root causes. The plan is to offer support for trade and development in exchange for states of origin and transit developing disincentives to migration.¹⁷⁴ This is to include states of origin across Africa and the Middle East assisting in return, repatriation, and reintegration, and fighting against

171. See Alexander Betts, *Development Assistance and Refugees: Towards a North-South Grand Bargain?*, Forced Migration Policy Briefing 2, Refugee Studies Centre, (2009), 11-12, (building on the Hathaway and Neve concept of “common but differentiated responsibility” see James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection* (1997) 10 HARVARD HUMAN RIGHTS J. 115).

172. See Jonas Gamso & Farhod Yuldashev, *Development Aid May Not Deter Migration, But Governance Aid Will*, NEWS DEEPLY (Nov. 30, 2016), <https://www.newsdeeply.com/refugees/community/2016/11/30/development-aid-may-not-deter-migration-but-governance-aid-will>.

173. See e.g., Alexander Betts & Gil Loescher eds., *Refugees in International Relations* (2011) <https://www.newsdeeply.com/refugees/community/2016/11/30/development-aid-may-not-detr-migration-but-governance-aid-will>.

174. See *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration*, COM (2016) 385 Final (June 7, 2016).

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smuggler networks.¹⁷⁵ The scheme is a mix of positive and negative incentives, tailored to each potential country of origin.¹⁷⁶ Migration management is, thus, addressed as necessarily connecting the countries of origin, transit, and destination in coordinated policy.

Compacts with states of origin are the cornerstones of the Partnership Framework. The compacts are to be packages of financial aid and policy elements tailored to individual countries' needs to reduce the influx of irregular migrants to EU member states.¹⁷⁷ Under the Framework, between 2016 and 2020, the prospect offered is that approximately €8,000,000,000 will be invested to achieve short-term objectives, and potentially, €62,000,000,000 will be invested to achieve long-term objectives.¹⁷⁸ The plan is an aspect of the European External Investment Plan published by the European Commission in September 2016 outlining a better, harmonized, and more substantial role of the EU in economic advancement of the developing world, and including private sector investment, to boost jobs and growth in connection with the New Partnership Framework.¹⁷⁹

But, seen through the lens of migrant choice and state interest of Europe, the good governance question remains critical. There is naturally a high degree of governmental corruption in migrant generating areas, poor governance being pre-eminent as a push factor. Moreover, inherent in any implementation of the Framework is the overarching concern that development not be a euphemism for "containment," which, in its most degenerate form, is simply bribery for repression of migrant rights. The risk for Europe is that the "Framework" may become another commitment of international aid, whereby corrupt foreign officials in states of origin and transit divert to their own interests what was investment intended to achieve real improvement in quality of life for their citizens. Moreover, the "Framework" can work against Europe's long-term interests by strengthening regimes Europe does not have an interest in supporting.¹⁸⁰ So, constructive implementation will require a high priority for transparency and anti-corruption controls, such as have been developed and refined by international development institutions that commonly confront the cure-resistant global plague of corruption.¹⁸¹

175. See E. Zalan, *Commission Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration*, COM (2016) 385 Final (June 7, 2016); *EU to Make Aid Conditional on Help with Migrants*, EU OBSERVER (June 7, 2016).

176. See *id.*

177. See *id.*

178. *Id.* at 12.

179. European Commission, *Strengthening European Investment for Jobs and Growth: Towards a Second Phase of the European Fund for Strategic Investments and a New European External Investment Plan* (COM/2016/581) at 6 (Sept. 14, 2016), <http://eur-lex.europa.eu/deal-content/en/TXT/?uri=celex:52016DC0581>.

180. See Carrera, S., et al., *EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?*, CENTER FOR EUROPEAN POLICY STUDIES, No. 87, Jan. 2016.

181. See generally Eur. Commission, *supra* note 161.

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Examined through the lens of maximization of refugee choice and state interest, the preferred policy emphasis becomes clear. Aid to a state of migration origin as a containment strategy, whereby the funds will flow for enhancement of border controls and detention, is revealed as counterproductive. Without more, governments of the states of origin, who are often complicit in generating the flow, by failing to satisfy basic security concerns of their peoples, will not be reformed, but will be further corrupted by funding conditional on stemming the flow. Economic aid for border control is not a conditionality that can be controlled by donor states. Sovereignty of the states of origin will prevail to the detriment of migrant choice, and both national and regional social stability. Funding to prevent a population from fleeing, predictably, will be redirected to those in control, and for policing, that only enhances the pressure on a population seeking to flee political persecution and the other insecurities that generate mass migration. What is required, as maximization of other states' interest and migrant choice would dictate, is aid conditional on improvement in protection of human rights of the potential migrant population, affording that citizenry a voice in governance, as basis for hope for a better life, at home. That hope, of a better life at home, is surely the greatest disincentive to migrant flow.

V. Conclusion

The phenomena of mass migration will continue to test the regulatory resources of international law and administration. Certainly, successful management is beyond the aegis of national sovereignty. Achieving personal security for any migrant population is by its very nature a matter for international management, in that mass migration impacts, at the least, and collectively, the countries of origin, transit, and destination. Today, in our globalized world, mass migrant management has become a matter of greater collateral impacts and global concern. But, while it is essential to recognize mass migration as a principal international challenge of our time, it is also essential to identify the specific and individual determinants of why and how migrants move in a temporal frame that overwhelms national immigration law and process. The necessary focus, as the historical experience and diverse management strategies all demonstrate, must be the separate state interests involved and the choices made by the migrants themselves. It is only in this view that focus obtains that successful management can be achieved.

Migrant choice and state interest should, therefore, be the lens within which to evaluate each alternative migration management strategy for the future. Whether management is internalized through the “durable solutions” of resettlement, integration, and international protection pending repatriation, or whether management is externalized, through border controls, refugee camps, or international development programs, migrant choice and state interest must be the focus for the framing of policy. It is the only management project that is both pragmatic and principled—consistent

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with international refugee law, human rights law, and humanitarian law—that can protect migrants from abuse and empower their integration or repatriation.

The foundation of international refugee law, the 1951 Convention, was adopted in forthright recognition that national sovereignty would dominate migration law and policy, and that any realistic management of mass migration must acknowledge what migrants will choose to do in seeking physical and economic security. It is also the implicit insight of the Convention that the rights to be realized must be reconciled with sovereign authority in a world of nation-states. Most simply described, the Convention is an articulation of the rights critical to realizing migrant choice, correlated with state interest to ensure national and regional social stability in adjusting to mass migration. The Convention, seen in proper perspective, is therefore a constitutional document, embodying the objective of any good constitution—to provide a framework for principled and positive social evolution.

The negation of values of human rights and humanitarian concern we see in so many aspects of the international response to migrant flow is not inevitable. Guided by the lens of state interest and migrant choice, we can understand how to achieve better legal management for temporary protection, asylum determination, resettlement, and integration. That lens also instructs that punishment and deprivation of basic human rights result in the worst consequences for mass migration: irregular movement, the global business of human trafficking, and, ironically, financial support for regimes responsible for the poor governance that generates mass migration.

While it is, of course, true that effective management can be achieved only within the limits of political feasibility, what is politically feasible will vary, ever-shifting in relation to social conflict and security issues. Therefore, effective management through legal process requires examining each episode of mass influx to maximize the correlation of migrant choice and state interest in context. The current displacement and detention of hundreds of thousands of migrants who would qualify for asylum, or at least temporary protection—well within the capacities of European states and other states—simply demonstrates the gross failure to accomplish this essential task.

That is the broader tragedy of mass migration today, beyond the appalling picture of the body of a migrant child washed up on a beach. The facts are, that most migrants are condemned long term, if not for their entire remaining lives, to internationally organized detention, subsisting without hope, at the mercy of political push-back without productive engagement. The outsourcing of border controls is no solution, providing third countries of origin and transit with increased bargaining power, often to the advantage of regimes festering and feeding on human rights abuse. It is ultimately ironic and counterproductive, that policies designed to bar the flow, create and support the very insecurity that generates mass migration, amplifying irregular movement and human trafficking.

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The Refugee Convention is a design for refugee empowerment. It is not the deeply flawed but dominant charity model that management of mass migration has come to be for the great majority of migrants. The Convention envisions guarantees of social and economic rights as means to achieve self-reliance, such as access to education and the right to seek work as the essentials for meaningful migrant choice, but to be realized only insofar as possible within legal limits of assuring state interest in social stability, prosperity, and national security. The Convention is, in other words, a manifesto to maximize a beneficial relationship of migrant choice and state interest.

There is no escape from international responsibility for the management of mass migration. Even if there were not available a principled and legal prescription instructing success, states still would be significantly impacted by the migrations generated from other states where migrants' survival is at issue and would have to find some form of resolution. Whether the driver is civil conflict, global climate change, related economic deprivation, or governmental failure and corruption, sudden surges in migration that overwhelm standard state immigration process will occur. Finding guidance for successful international management through the lens of migrant choice and state interest can serve to secure the shared values of international community. After all, mass migration management, at its best, is about human beings managing their communal existence on this planet to their mutual advantage. Seen in the light of migrant choice and state interest, the better course for action can become clear.

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