



ARTICLES

A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?

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ABSTRACT

Reflecting upon the 50th anniversary of the conclusion of the 1967 Protocol relating to the Status of Refugees, this article argues that it is time for the first two links in the chain of the international refugee protection regime – the 1951 Convention and the 1967 Protocol – to be joined by a third. This third link, it is argued, should take the form of a mechanism designed to distribute more equitably between States the responsibility to provide protection and durable solutions for refugees and suggests that a tool developed by international environmental lawyers – the framework convention – could form the basis for coordinated, incremental improvement. After exploring the notion of responsibility sharing in international refugee law and examining the manner in which international environmental lawyers have tackled similar collective action problems, the article sets out the key elements of a proposed Framework Convention for Refugee Responsibility Sharing. It argues that such a convention would be: capable of being widely ratified, and thus able to serve as a forum for global efforts; principled; comprehensive; accountable; capable of linking issues so as to better serve the interests of States and refugees; and able to serve as a forum for the discussion and generation of new and innovative ideas. The article argues that there is, therefore, every reason to believe that a framework convention would lead to a more equitable sharing of responsibility for the world's refugees, as well as an increase in the overall level of protection and the number and quality of durable solutions available.

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1. INTRODUCTION

On 31 January 2017, it was exactly 50 years since the Protocol relating to the Status of Refugees was concluded.¹ On 4 October, it will be 50 years since it entered into force, following the deposit of the sixth instrument of accession by Sweden.² The adoption of the Protocol was an enormous achievement that, by removing its temporal and geographical limitations, significantly extended the reach of the 1951 Convention relating to the Status of Refugees.

Indeed, the Protocol can be thought of as a ‘link’ in the chain that is the international refugee protection regime. The Refugee Convention was the first link: it established the refugee definition, the principle of *non-refoulement*, and the rights of refugees, but was limited in its scope because it looked backwards and applied only to persons whose well-founded fear of persecution was ‘[a]s a result of events occurring before 1 January 1951.’³ That is, it applied only to those whose well-founded fear resulted from events that had already occurred. Furthermore, for States making a declaration under article 1B(1)(a), the Convention only applied in relation to events occurring *in Europe* before that date. Thus, its scope of application was strictly limited and certain – to a degree – because it was possible for States to have a general idea of the number of people to whom the Convention would apply when they signed it. Furthermore, there was little possibility that this number would greatly increase; indeed, the Convention was relatively certain to apply to fewer and fewer people with the passage of time as those people lost their well-founded fear of persecution, received protection, or passed away.⁴ A proposal to adopt a definition without these restrictions was rejected on the basis that ‘it would be difficult for a Government to sign a blank cheque and undertake obligations toward future refugees, the origin and number of which would be unknown.’⁵

The 1967 Protocol was the second link in this chain: by removing the Convention’s strict temporal and geographical limitations, it greatly expanded the reach of

¹ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

² *ibid* art VIII. The first five instruments of accession were deposited by (in chronological order): The Holy See, Central African Republic, Cameroon, Gambia, and Senegal: United Nations Treaty Collection, ‘Protocol relating to the Status of Refugees’ (United Nations 2016) <https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTS&tabid=2&mt_dsg_no=V-5&chapter=5&lang=en> accessed 1 February 2017.

³ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).

⁴ Although, see Phil Orchard, *A Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge University Press 2014) 192 (‘The most important innovation in response to the Hungarian refugees [who fled Hungary in 1956 and 1957] was that the UNHCR devised a legal justification for its presence within the January 1, 1951, dateline set by the Refugee Convention. Paul Weis, the legal adviser to the high commissioner, argued that the departure of the refugees related to the establishment of the People’s Republic of Hungary, which had occurred in 1947, and therefore that this new refugee exodus was “an after effect of this earlier political change”).

⁵ *Report of the Ad Hoc Committee on Statelessness and Related Persons*, UN doc E/1618 (17 February 1950) 38.

international refugee law. Henceforth, protection would be available to any person with a well-founded fear of persecution for any of the reasons set out in the Convention, regardless of when or where the events that gave rise to that fear occurred. By becoming parties to the Protocol, States signed the blank cheque and agreed to extend the rights of protection to an unknowable number of refugees – whose magnitude had the potential to decrease or increase with time – emanating from an unknowable number of States and fearing persecution for an unknowable number of reasons.

Whilst the removal of temporal and geographical limitations and the resulting expansion of the scope of the protection to be afforded under the Convention should rightly be celebrated, it is appropriate – as we commemorate the Protocol's 50th birthday – to reflect on what it did *not* do. In particular, it did not include measures to distribute equitably the responsibility for providing protection to the greatly expanded and uncertain number of people entitled to it.

Despite frequent discussion of an international norm that requires States to share the responsibility for providing protection and durable solutions to refugees, this responsibility has fallen disproportionately on States ill-equipped to provide it. The humanitarian crisis caused by the flight of refugees from the conflict in Syria is only the most visible of a number of ongoing situations that illustrate this shortcoming of the international refugee protection regime. As at February 2017, there were more than 4.9 million Syrian refugees registered with the United Nations High Commissioner for Refugees (UNHCR),⁶ and more than 90 per cent of them were hosted by just three countries: 2.85 million were in Turkey, more than a million were in Lebanon, and more than 650,000 were in Jordan.⁷ Hosting such a large number of refugees is having drastic effects on these countries; it is 'dramatically depressing wages and inflating rental prices, while depleting what public services are available for health and education.'⁸ The 1967 Protocol has enabled States to recognize that these people are refugees in need of international protection, but it has not supplied a mechanism to support the States shouldering the vast majority of the responsibility for providing it.

This is not to say that these States and the refugees they host have received no support at all. Extensive efforts have been made to provide assistance to those displaced by the conflict and the communities hosting them, particularly through the Syria Humanitarian Response Plan and the Regional Refugee and Resilience Plan.⁹ A pledging conference

⁶ UNHCR, 'Syrian Regional Refugee Response: Inter-Agency Information Sharing Portal' (2016) <<http://data.unhcr.org/syrianrefugees/regional.php>> accessed 1 February 2017.

⁷ *ibid.*

⁸ Tendayi Achiume, 'Syria, Cost-Sharing and the Responsibility to Protect Refugees' (2015) 100 *Minnesota Law Review* 687, 689.

⁹ The Syria Humanitarian Response Plan 'puts forward the collective vision and strategic priorities of the international humanitarian community and its national partners for responding to the assessed humanitarian needs of people in Syria', while the Regional Refugee and Resilience Plan is 'a country-driven, regionally coherent response to the Syria refugee crisis, drawing together the national crisis response plans for humanitarian, resilience and stabilisation [needs] in the five most affected countries neighbouring Syria, namely, Turkey, Lebanon, Jordan, Iraq and Egypt, in a coordinated regional framework': United Nations, *Overview: 2016 Syria Humanitarian Response Plan & 2016–2017 Regional Refugee and Resilience Plan* (United Nations 2016) 8, 11.

in London in February 2016 raised US\$6 billion to support these efforts and, at another conference in Geneva the following month, States pledged ‘modest increases in the number of resettlement and humanitarian admission places’ that they would make available to Syrian refugees, bringing the total of such places to 185,000.¹⁰

These efforts, however, fall drastically short of what is required, causing UNHCR to conclude that ‘international solidarity with [the] victims is failing to match and reflect the scale and seriousness of the humanitarian tragedy.’¹¹

The refugee situation arising from the conflict in Syria is not a unique one, either, but one of many ongoing, protracted refugee situations. In 2015, the number of forcibly displaced people in the world passed the threshold of 65 million for the first time:

The total of 65.3 million [forcibly displaced persons] comprises 3.2 million people in industrialized countries who as of end 2015 were awaiting decisions on asylum (the largest total UNHCR has recorded), 21.3 million refugees worldwide (1.8 million more than in 2014 and the highest refugee total since the early 1990s), and 40.8 million people who had been forced to flee their homes but were within the confines of their own countries (an increase of 2.6 million from 2014 and the highest number on record).¹²

At the end of 2015 – and despite the unprecedented number of asylum seekers entering Europe that year – more than 90 per cent of the world’s refugees remained in low- and middle-income countries close to situations of conflict.¹³

An unavoidable consequence of this situation is that host countries and UNHCR are unable to provide sufficient protection – or any hope of a durable solution – forcing many refugees to make dangerous and, often, deadly ‘secondary movements’. The Norwegian Refugee Council, for example, reports that ‘[r]efugees mention to us cuts in food assistance as one of the main reasons for leaving Jordan’ and making their way towards Europe.¹⁴ (Primary movements are also often dangerous, of course.) In 2015, more than one million people fled across the Mediterranean to Europe; half a million

¹⁰ UNHCR, ‘Donors Pledge More than US\$6 Billion for Syrians’ (2016) <<http://www.unhcr.org/news/latest/2016/2/56b3902c6/donors-pledge-us6-billion-syrians.html>> accessed 1 February 2017; UNHCR, ‘Geneva Conference on Syrian Refugees Ends with New Pledges of Places, Recognition of Challenges Ahead’ (2016) <<http://www.unhcr.org/en-us/news/press/2016/3/56fc0cf06/geneva-conference-syrian-refugees-ends-new-pledges-places-recognition-challenges.html>> accessed 1 February 2017; see also Elizabeth Ferris, *In Search of Commitments: The 2016 Refugee Summits* (Andrew & Renata Kaldor Centre for International Refugee Law Policy Brief No 3, November 2016) 7–8.

¹¹ UNHCR, ‘Syria Conflict at Five Years’ (2016) <<http://www.unhcr.org/news/latest/2016/3/56e6e1b991/syria-conflict-at-five-years.html>> accessed 1 February 2017.

¹² UNHCR, ‘With 1 Human in Every 113 Affected, Forced Displacement Hits Record High’ (20 June 2016) <<http://www.unhcr.org/en-us/news/press/2016/6/5763ace54/1-human-113-affected-forced-displacement-hits-record-high.html>> accessed 1 February 2017.

¹³ *ibid.*

¹⁴ Nick Miller, ‘Wars, Climate Change, Funding Cuts: World Food Program Battles to Give Hope’ *Sydney Morning Herald* (15 November 2015) <<http://www.smh.com.au/world/wars-climate-change-funding-cuts-world-food-programme-battles-to-give-hope-20151113-gky4vu.html>> accessed 1 February 2017.

of them were Syrian, and 84 per cent of them came from the world's top 10 refugee-producing countries. More than 80 per cent commenced their sea voyage in Turkey and almost 4,000 are believed to have drowned.¹⁵

This article will argue that, in order to improve the standard of protection that refugees receive in their host countries and thus minimize the need for such dangerous journeys, a third link is required to again extend the reach of the chain of the international refugee protection regime. This link should take the form of a mechanism designed to distribute more equitably between States the responsibility to provide protection and durable solutions for refugees. Many such mechanisms have been proposed before, but none has been adopted because – I argue – they have been insufficiently concrete or have been based on unrealistic assumptions about the level of commitment that States are willing to make. This article will suggest that a device developed by international environmental lawyers – the framework convention – could form the basis for a coordinated, incremental improvement in the manner in which the international community shares the responsibility to provide protection and durable solutions to the world's refugees.

After examining the norm of responsibility sharing for refugees, this article will explore the manner in which international environmental lawyers have sought to combat collective action problems not dissimilar to that which currently besets the international refugee regime. It will then give a general outline of what a Framework Convention for Refugee Responsibility Sharing¹⁶ might look like and explain why there is reason to believe that such a convention would lead to a more equitable sharing of responsibility for the world's refugees, as well as an increase in the overall level of protection and the number and quality of durable solutions available.

2. RESPONSIBILITY SHARING AND THE INTERNATIONAL REFUGEE REGIME¹⁷

States, scholars, and civil society organizations have regularly asserted that there is a strong norm of responsibility sharing inherent in the international refugee protection

¹⁵ UNHCR, 'Over One Million Sea Arrivals Reach Europe in 2015' (30 December 2015) <<http://www.unhcr.org/en-us/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>> accessed 1 February 2017.

¹⁶ Throughout this article, lower case instances of 'framework convention' should be understood as references to that category of treaty. Capitalized references to the 'Framework Convention' should be understood as references to the Framework Convention for Refugee Responsibility Sharing that I propose.

¹⁷ Although the 1951 Refugee Convention and many subsequent documents refer to 'burden sharing', particularly in the context where a State is overwhelmed by a large influx of asylum seekers, this has more recently become somewhat of a controversial term. Some have sought to replace it with 'responsibility sharing', whilst others consider the whole debate a waste of time: see eg UNHCR, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities: Summary Conclusions* (2011) 2 ('It was felt that a lengthy discussion on terminology (especially on the merits of "burden" versus "responsibility" sharing) at the expense of making concrete progress on enhancing cooperation in practice, needs to be avoided'). Because of the unfortunate and incorrect assumption inherent in the former that refugees are always a burden on host States (and nothing else), this article will refer to 'responsibility sharing'.

regime that 'requires states to cooperate in dealing with the global refugee problem' and in ensuring that refugees receive adequate protection and access to a durable solution.¹⁸ The best known reference to this norm is in the preamble to the Refugee Convention itself, where States parties recognize that:

the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation[...]¹⁹

The responsibility-sharing norm is also expressed in the Final Act of the conference that drafted the Convention,²⁰ more than 70 resolutions of the United Nations (UN) General Assembly,²¹ regional agreements,²² and more than one-third of the Conclusions on International Protection issued by UNHCR's governing body, the Executive Committee, of which 98 States are members.²³ On the occasion of the 50th

¹⁸ BS Chimni, *International Refugee Law: A Reader* (Sage Publications 2000) 146. See also Benjamin Cook, 'Method in Its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and a Proposed Refugee Market' (2004) 19 *Georgetown Immigration Law Journal* 333, 337–38; Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) 139–46.

¹⁹ Refugee Convention, preamble.

²⁰ 'The Conference ... RECOMMENDS that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement': Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (25 July 1951) IV(D).

²¹ UNHCR, *Thematic Compilation of General Assembly & Economic and Social Council Resolutions* (2015) 50–51; UNGA res 69/189 (18 December 2014) para 25; UNGA res 70/234 (23 December 2015) paras 22 and 36; UNGA res 70/135 (17 December 2015) paras 5, 9, 46, 48; UNGA res 70/134 (17 December 2015) paras 15, 24, 27, 28; New York Declaration for Refugees and Migrants, UNGA res 71/1 (19 September 2016). The most notable of these (before the New York Declaration at least) is the Declaration on Territorial Asylum, UNGA res 2312 (XXII) (14 December 1967) (adopted without a vote) art 2(2): ('Where a state finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State').

²² See eg Convention governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art 2(4) ('Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum'). See also Emmanuel Opoku Awuku, 'Refugee Movements in Africa and the OAU Convention on Refugees' (1995) 39 *Journal of African Law* 79, 82–83.

²³ Forty-two of 111 Conclusions: see UNHCR, *A Thematic Compilation of Executive Committee Conclusions* (2014) 42–69. The Executive Committee adopts Conclusions as a record of the consensus reached during discussions concerning international protection at its sessions: see generally UNHCR, 'Executive Committee' (2015) <<http://www.unhcr.org/pages/49c3646c83.html>> accessed 1 February 2017.

anniversary of the Convention, States parties unanimously declared that ‘the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and effective responsibility and burden-sharing among all States.’²⁴ They further committed themselves ‘to providing, within the framework of international solidarity and burden-sharing, better refugee protection through comprehensive strategies.’²⁵

The exact nature of the responsibility-sharing norm, however, is unclear;²⁶ it has been described as a moral obligation, a legal principle, a ‘functional necessity’, and – by some – a rule of customary international law (though the record of State practice hardly warrants such a conclusion).²⁷ It is not a rule of treaty law, however, although it might have been. Secretary-General Trygve Lie of Norway proposed a Preliminary Draft Convention relating to the Status of Refugees (and Stateless Persons) in 1950 which provided that ‘[t]he High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to [refugees] ... by agreeing to receive a certain number of refugees in their territory’. The accompanying commentary explained that:

[o]wing to their geographical position and liberal traditions, some States are destined to become the initial reception countries for refugees. It is but just that other countries should not allow these to bear the whole burden and by agreeing to admit a certain number of refugees to their territory should assume their equitable share.²⁸

²⁴ UNHCR, *Agenda for Protection* (3rd edn, UNCHR 2003) 25.

²⁵ *ibid* 28.

²⁶ Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2009) 3 (‘Whereas the norm of asylum is well established and is based on a strong legal and normative framework, the norm of burden-sharing is subject to a very weak legal and normative framework’).

²⁷ Chimni (n 18) 146 and, in relation to the question of State practice and *opinio juris*, 150–51. See also J-PL Fonteyne, ‘Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees’ (1978) 8 *Australian Year Book of International Law* 162, 175, 177, 178–84 (‘The moral and legal foundations of burden sharing’); James C Hathaway and R Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* 115, 117–18 (‘The critical right of at-risk people to seek asylum will survive only if the mechanisms of international refugee protection can be reconceived ... dependably and equitably to share responsibilities and burdens’); 169–71; Guy S Goodwin-Gill, ‘Towards a Comprehensive Regional Policy Approach: The Case for Closer Inter-Agency Co-Operation’ (1993) 5 *International Journal of Refugee Law* 347, 348 (‘[U]nilateral measures to deal with population movements and displacements tend merely to shift problems, while irregular and unmanaged migration not only threatens the integrity of national procedures, but also fails to exploit fully the benefits available to both sending and receiving States’); Hurwitz (n 18) 161 (‘Unfortunately, practice in the last two decades has not been conclusive’).

²⁸ *Status of Refugees and Stateless Persons: Memorandum by the Secretary-General*, UN doc E/AC.32/2 (3 January 1950) 22.

This proposal was not adopted, however. A French proposal to refer to ‘international cooperation to help to distribute refugees throughout the world’ in the preamble to the Refugee Convention suffered the same fate.²⁹

Furthermore, there is no strategy – comprehensive or otherwise – to ensure that the responsibility for providing protection to the world’s refugees is shared. The principle has not been ‘operationalized’, making responsibility sharing ‘by far the weakest aspect of the refugee regime’.³⁰ The ‘hard’ obligations – *non-refoulement* in particular – in the Refugee Convention are only triggered when a person enters the territory of a State party and makes a claim for protection, and – legally speaking – the responsibility for complying with those obligations ‘fall[s] squarely on that country’.³¹ The Convention

²⁹ Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (Research Centre for International Law, University of Cambridge 1995) 14 (‘considering that the exercise of the rights to asylum places an undue burden on certain countries because of their geographical situation, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international cooperation to help to distribute refugees throughout the world’) (emphasis added). See also 15 (‘The French delegation thought that immigration countries would recognize the exceptional nature of the burdens assumed by the receiving countries, and would understand that in certain States the pressure of population was such that it was impossible to ensure a satisfactory future for refugees’); 17 (the Belgian representative suggesting that the proposed paragraph become a substantive article of the Draft Convention); 18 (the Canadian representative arguing that the proposed paragraph ‘seemed irrelevant, since the draft Convention laid down a series of obligations towards refugees in any country, but contained no article regarding the distribution of refugees’); 19 (‘The French representative said that he sensed in the minds of certain delegations a fear not merely of the slightest involvement, but of the slightest suggestion of involvement, in some Machiavellian scheme. He assured the Committee that the French amendment contained no dark design and, in particular, that it was not a request to governments, but only a statement of certain obvious truths, with an indication of certain situations which might arise and, in that event, of the conclusions to be drawn from them. Recalling once more the undue burden which France had had to bear in the matter of receiving refugees, he thought that all European countries which ran the same risks should be conscious of the need for including such a safety clause in the Convention’); 22 (the Committee rejecting the inclusion of the proposed paragraph ‘by 5 votes to 5, with 5 abstentions’); 25 (the French representative introducing an amended version of the same paragraph, without the reference to the distribution of refugees throughout the world). I am indebted to Claire Inder of UNHCR for making me aware of this proposal.

³⁰ Betts (n 26) 12.

³¹ Adrienne Millbank, ‘The Problem with the 1951 Refugee Convention’ (2000) Parliament of Australia Research Paper 5 2000-01; Hathaway and Neve (n 27) 117, 119, 141 (‘Under the present protection system, the government of the asylum State is solely responsible for delivering and funding the protection of all refugees who arrive at its jurisdiction ... the duty to protect refugees is primarily allocated on the basis of accidents of geography and the relative ability of governments to control their borders’); Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 *Harvard Human Rights Journal* 229, 250 (‘The obligations articulated in the Convention all run from the State to refugees who arrive in its territory. There are no duties to relieve other States of the burdens of asylum by providing either financial resources or offers of admission. Moreover, though its tasks have multiplied enormously, financing of the UNHCR remains voluntary’).

does not impose any substantive obligation upon States to share the responsibility beyond a vaguely worded undertaking to 'co-operate with [UNHCR] in the exercise of its functions'.³² Any responsibility sharing that does occur is *ad hoc*, voluntary, and, because it occurs in the absence of a framework for facilitating cooperation, unreliable.³³ This gives rise to a 'large-scale free-rider problem' – often compounded by toxic domestic political debates on refugee issues – whereby there is an incentive for States to erect ever-higher physical, legal, and other barriers to deter those seeking protection in the hope that they will seek it elsewhere.³⁴ Wealthy States spend large amounts of money on such measures,³⁵ so that the responsibility to provide protection to those seeking it falls disproportionately on developing and least-developed States,³⁶ with lacklustre voluntary funding meaning that UNHCR's ability to assist is limited.³⁷ This leads to inadequate protection in countries of first asylum – and no hope of a durable solution – which in turn drives refugees to make dangerous onward journeys, often facilitated by people smugglers.³⁸

In short, 'the importance of cooperating to achieve equitable [responsibility] sharing is almost universally acknowledged, [but] the ways and means of effectively accomplishing this task have been largely elusive'.³⁹ Nobody intended States to respond to refugee flows in an 'atomized and uncoordinated way', but this is what has happened the vast majority of the time.⁴⁰

³² Refugee Convention, art 35; Refugee Protocol, art 2 (both articles being identical).

³³ Alexander Betts, 'International Cooperation in the Global Refugee Regime' (2008) Global Economic Governance Programme Working Paper 2008/44, 2; Achiume (n 8) 691; Hurwitz (18) 147–67.

³⁴ Cook (n 18) 342. See also Peter H Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 *Yale Journal of International Law* 243, 253; Betts (n 33); Achiume (n 8) 703.

³⁵ Khalid Koser, *Australia and the 1951 Refugee Convention* (Lowy Institute Analyses 2015) 7 (noting that 'industrialised states now spend far more money on their asylum systems ... than UNHCR spends to support the vastly more numerous and needy refugees in camps and cities in poorer countries around the world').

³⁶ Betts (n 26) 3 ('Given that the overwhelming majority of world refugees come from and remain in the global South, the disjuncture between these norms [of asylum and responsibility sharing] has significant consequences. It means that Southern States that neighbour on conflict-ridden or human rights-abusing countries have an obligation to provide asylum to people who arrive on their territory but that Northern States that remain outside of the refugees' region of origin have no obligation to contribute to the protection of refugees that remain in the South'); Michèle Morel, 'The Lack of Refugee Burden-Sharing in Tanzania: Tragic Effects' (2009) 22 *Africa Focus* 107 ('[I]t is not Tanzania but the international community that is to be held responsible [for the plight of the thousands of refugees who have been living in camps in Tanzania for many years and who have no prospect of a durable solution]. There is a lack of international refugee burden-sharing, as evidenced by the lack of an international legal framework for durable solutions for refugees'); Hathaway and Neve (n 27) 141; Fonteyne (n 27) 166–67; Achiume (n 8) 690–91.

³⁷ Cook (n 18) 344–45; Jack I Garvey, 'Toward a Reformulation of International Refugee Law' (1985) 26 *Harvard International Law Journal* 483, 489.

³⁸ Koser (n 35) 8.

³⁹ Cook (n 18) 334; Schuck (n 34) 253.

⁴⁰ James C Hathaway, 'Moving Beyond the Asylum Muddle' (*EJIL: Talk!*, 14 September 2015) <<http://www.ejiltalk.org/moving-beyond-the-asylum-muddle/>> accessed 1 February 2017.

3. PROPOSALS FOR CHANGE

3.1 Proposals at the international level

A number of proposals have been made concerning the ways in which the responsibility for providing protection and durable solutions to refugees could be shared more equitably. Until recently, the most notable at the international level was the so-called 'Convention Plus' initiative endorsed by UNHCR's Executive Committee as part of the 'Agenda for Protection' in 2002.⁴¹ As High Commissioner Lubbers explained, '[t]he "plus" concerns the development of special agreements or multilateral arrangements to ensure improved [responsibility] sharing, with countries in the North and South working together to find durable solutions for refugees.'⁴² Convention Plus called for closer dialogue between States on refugee issues and multilateral 'ownership' of the search for comprehensive responses to them.⁴³

In 2005, however, it was decided that Convention Plus should be 'mainstreamed into the overall work of UNHCR'.⁴⁴ The initiative's final report described the progress achieved to that time as 'mixed'.⁴⁵ Ultimately, '[n]o agreement of any substance was reached and the abstract negotiations were never applied to address specific regional situations in the way that had been envisaged'.⁴⁶ It is 'widely recognized' as a failure.⁴⁷

The most recent international effort at improving responsibility sharing in the international refugee protection regime emerged during the follow-up processes to the Millennium Summit in the UN General Assembly. In December 2015, the General Assembly '[d]ecided to convene on 19 September 2016 a high-level plenary meeting of the General Assembly ... on addressing large movements of refugees and migrants'.⁴⁸ In advance of the meeting, the UN General Assembly requested that the Secretary-General 'prepare a comprehensive report ... setting out recommendations on ways to address large movements of refugees and migrants'.⁴⁹

⁴¹ UNHCR (n 24) 21. See generally Betts (n 26) 143–74.

⁴² UNHCR (n 24) 6, 13. See also Goal 3 of the Agenda: 'Sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees', 56–61; Ninette Kelley and Jean-François Durieux, 'UNHCR and Current Challenges in International Refugee Protection' (2004) 22 *Refuge: Canada's Journal on Refugees* 6, 14 (describing Convention Plus as 'a process that brings States and intergovernmental and non-governmental partners together to reach special agreements to enhance protection of refugees in areas that are not fully addressed by the 1961 Convention and 1967 Protocol').

⁴³ UNHCR (n 24) 56, 74; see also 15–17 (calling on 'countries of origin, host States, UNHCR, humanitarian partners (including NGOs) and refugees to integrate voluntary repatriation, local integration and resettlement into a comprehensive approach to finding durable solutions, particularly for protracted refugee situations').

⁴⁴ UNHCR, *Progress Report: Convention Plus* (2005).

⁴⁵ *ibid* 2.

⁴⁶ Betts (n 33).

⁴⁷ Betts (n 26) 19.

⁴⁸ UNGA, *Resolutions and Decisions Adopted by the General Assembly during Its Seventieth Session, Volume II: Decisions*, UN doc A/70/49 (2016) 14.

⁴⁹ *ibid* 14.

In his report of April 2016, the Secretary-General advocated for '[a] more predictable and equitable way of responding to large movements of refugees'.⁵⁰ Noting that 'individual countries cannot solve these issues [of mass displacement] on their own', the Secretary-General argued – correctly – that '[i]nternational cooperation and action to address large movements of refugees and migrants must be strengthened'.⁵¹ To this end, he proposed the negotiation of two 'global compacts', one on responsibility sharing for refugees and the other for safe, regular, and orderly migration.⁵²

The first proposed compact was to 'commit Member States to support a comprehensive refugee response whenever a large-scale and potentially prolonged refugee movement occurs'.⁵³ The proposal was short on detail – this being left to negotiation between States – but called on States to 'commit to sharing responsibility for hosting refugees more fairly', to take 'immediate steps' in this regard, and to support UNHCR's efforts to develop a 'comprehensive refugee response plan for refugees in situations involving large movements of refugees'.⁵⁴

The second proposed compact was to be a 'comprehensive international cooperation framework on migrants and human mobility' that was to be 'based on the recognition that all migrants, regardless of their status, must receive the protection, respect and fulfilment of their human rights'.⁵⁵ It was to express 'the intention to develop more opportunities for safe, orderly and regular migration', ensuring that such opportunities 'entail the ethical recruitment of migrants, reductions in the cost of migration, facilitation of the flow of remittances and increasing their productive use, enhancement of the transfer of skills and knowledge and mutual recognition of skills and portability of acquired benefits'.⁵⁶

Although it was hoped that the proposed Global Compact on Refugees would be adopted at the meeting on 19 September 2016 (with the proposed Global Compact for Safe, Orderly and Regular Migration to be negotiated thereafter), deadlock in New York could not be overcome and the adoption of both compacts was deferred until 2018.⁵⁷ The outcomes document that was agreed upon – the New York Declaration for Refugees and Migrants – does, however, contain a strong political commitment to refugee responsibility sharing:

We underline the centrality of international cooperation to the refugee protection regime. We recognize the burdens that large movements of refugees place on national resources, especially in the case of developing countries. To address the needs of refugees and receiving States, we commit to a more equitable sharing of

⁵⁰ UN Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, UN doc A/70/59 (21 April 2016) 1.

⁵¹ *ibid* 2.

⁵² *ibid* 24–27.

⁵³ *ibid* 17.

⁵⁴ *ibid* 25.

⁵⁵ *ibid* 26–27.

⁵⁶ *ibid*.

⁵⁷ Somini Sengupta, 'UN Deadlocked Over Draft Agreement on Refugees and Migrants' *New York Times* (1 August 2016) <<http://www.nytimes.com/2016/08/02/world/americas/un-united-nations-refugees-migrants.html>> accessed 1 February 2017. See also Ferris (n 10) 10–12.

the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States.⁵⁸

The reaction to the New York Declaration has been mixed. Amnesty International described it as an 'abject failure' and the *Lancet* called the deferral of the refugee compact 'scandalous'.⁵⁹ Jane McAdam, whilst recognizing the significance of the reaffirmation of States' existing commitments under international law, nonetheless concluded that the outcome represents 'a missed opportunity for a concerted action plan for the future'.⁶⁰ Alexander Betts lamented that the New York Declaration and its annexures 'focus mainly on the agreement of abstract principles', with some States reported to be 'privately celebrating having managed to strip them of almost all substantive content'.⁶¹ Ultimately, he argued, the General Assembly adopted an '[a]pproach [that] simply defers the need for institutional transformation'.⁶²

UNHCR's response, on the other hand, was much more up-beat. The High Commissioner, Filippo Grandi, described the New York Declaration as 'a political commitment of unprecedented force and resonance' that 'fills what has been a perennial gap in the international refugee protection system, namely the fair distribution of responsibility'.⁶³ Volker Türk, the UNHCR Assistant High Commissioner for Protection, described the outcome of the 19 September meeting as 'nothing short of a miracle', given 'the real and imperfect world in which we struggle to advance the rights of refugees'.⁶⁴ He argued that the New York Declaration 'can serve as a basis for mobilizing a more effective – and more predictable – response when large movements of refugees occur'.⁶⁵ A number of their former colleagues disagree, however. Former Director

⁵⁸ New York Declaration for Refugees and Migrants (n 21) para 68.

⁵⁹ Amnesty International, 'UN Refugee Summit Talks End in Abject Failure' (3 August 2016) <<https://www.amnesty.org/en/latest/news/2016/08/un-refugee-summit-talks-end-in-abject-failure/>> accessed 1 February 2017; The Lancet Editorial Board, 'Refugee and Migrant Crisis: The Deficient Global Response' (2016) 388 *The Lancet* 633.

⁶⁰ Jane McAdam, 'Filling Up or Emptying the Glass? Musings on the 19 September Refugee Summit' (Andrew & Renata Kaldor Centre for International Refugee Law, 5 September 2016) <<http://www.kaldorcentre.unsw.edu.au/publication/filling-or-emptying-glass-musings-19-september-refugee-summit>> accessed 1 February 2017.

⁶¹ Alexander Betts, 'UN Refugee Summit: Abstract Discussions in the Face of a Deadly Crisis' (*Refugees Deeply*, 12 September 2016) <<https://www.newsdeeply.com/refugees/community/2016/09/12/u-n-refugee-summit-abstract-discussions-in-the-face-of-a-deadly-crisis>> accessed 1 February 2017.

⁶² *ibid.*

⁶³ UNHCR, 'UNHCR Welcomes "Unprecedented Force and Resonance" of New York Declaration' (19 September 2016) <<http://www.unhcr.org/news/press/2016/9/57dff34f4/unhcr-welcomes-unprecedented-force-resonance-new-york-declaration.html>> accessed 1 February 2017.

⁶⁴ Volker Türk, 'The New York Declaration: Once in a Lifetime Opportunity to Enhance Refugee Protection' (Andrew & Renata Kaldor Centre for International Refugee Law, 11 October 2016) <<http://www.kaldorcentre.unsw.edu.au/news/new-york-declaration-once-lifetime-opportunity-enhance-refugee-protection>> accessed 1 February 2017.

⁶⁵ *ibid.*

of Programme Support and Management, Jean-François Durieux, worried that the New York Declaration was ‘hollow and ritualistic’,⁶⁶ whilst erstwhile Deputy High Commissioner, Alexander Aleinikoff, concluded that the Declaration ‘is not a document that prepares us for the future’.⁶⁷

Whilst one may hope that the proposed Global Compact on Refugees clears the high bar of expectation that UNHCR has set for it, there are – unfortunately – reasons for pessimism. The primary reason stems from the fact that the preparations for the proposed refugee compact are now to be run in parallel with those for the proposed migration compact. Although, as noted above, the original plan was to adopt the refugee compact at the 19 September meeting and to negotiate the migration compact thereafter, it is now envisaged that the two will be adopted simultaneously in 2018. This was reportedly done in response to concerns that prioritizing the proposed refugee compact ‘would send a message that refugees were “more important” than migrants’.⁶⁸ Regardless of the reasons for the move, however – and despite the fact that the resolution on the Modalities for the Intergovernmental Negotiations of the Global Compact for Safe, Orderly and Regular Migration describes the processes leading to the two compacts as ‘separate, distinct and independent’⁶⁹ – the view appears to have taken hold that the two are now inextricably linked and a failure to reach consensus on one will automatically sink the other.

Unfortunately, there is a real risk that States will not reach consensus on the proposed migration compact by 2018. International refugee law is a rich, largely coherent, existing regime, comprised of treaties and custom, whose gaps the proposed refugee compact is designed to fill. The same cannot be said for international migration law, to the extent that such a thing can be divined from the small twigs on other branches of international law – including international human rights law, international labour law, international trade law, and transnational criminal law – that impact in some way upon migration.⁷⁰ It is ‘substance without architecture’,⁷¹ ‘a giant unassembled juridical jigsaw puzzle’ that the proposed migration compact seeks to solve.⁷²

⁶⁶ Jean-François Durieux, ‘Time in the Refugee Regime’ (Opening Keynote Address, Andrew & Renata Kaldor Centre for International Refugee Law Annual Conference, Sydney, 18 November 2016).

⁶⁷ Sengupta (n 57).

⁶⁸ Ferris (n 10) 11. See also the comment of Karen AbuZayd, Special Adviser to the 19 September meeting, that ‘the people [on] the migration side said that “if you do that refugee compact [first] ... we know what will happen to the migration compact: everyone will forget ... so we will do them at the same time”’: Karen AbuZayd, ‘The Global Response to Refugees and Vulnerable Migrants’ (Humanitarian Policy Group Annual Lecture, Overseas Development Institute, 1 December 2016).

⁶⁹ ‘Modalities for the Intergovernmental Negotiations of the Global Compact for Safe, Orderly and Regular Migration’, UN doc A/RES/71/280 (6 April 2017) preamble.

⁷⁰ See generally Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) and (forthcoming) Vincent Chetail, *International Migration Law* (Oxford University Press 2017).

⁷¹ T Alexander Aleinikoff, ‘International Legal Norms on Migration: Substance Without Architecture’ in T Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 229.

⁷² Vincent Chetail, ‘The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law’ in Chetail and Bauloz (eds) (n 70) 1.

The proposed migration compact, therefore, is full of ‘unknowns’; its ‘stated aims ... are ambitious and wide-ranging, but they are also vague and lacking in references to implementation.’⁷³ Furthermore, ‘[b]ehind the consensus agreements to launch a compact negotiation process lurks substantial *disagreement* among States over the issues it should address and how best to do so.’⁷⁴ Developing States, for example, can be expected to ask for an increase in regular migration into developed States, where concern amongst the general public about the perceived negative impacts of migration – particularly on security and the economy – make such a request very difficult to grant. The fact that the organization charged with coordinating the preparations – the International Organization for Migration – has recently acquired the ill-defined ‘related organization’ status vis-à-vis the UN and has never had the sort of strong normative role that lies at the heart of UNHCR’s mandate only adds to the risk that consensus on the proposed migration compact will not be reached and that, as a consequence, the proposed refugee compact will not be concluded either. (This would please those States who – it is rumoured – ‘don’t want [the refugee compact] to see the light of day at all.’⁷⁵)

Even if these primary concerns are misplaced, the negotiations for the proposed refugee compact will face numerous hurdles. Around the world, political momentum appears to be with those who oppose expanding migration and refugee protection, and this will add significantly to the degree of difficulty.⁷⁶ The need (or very strong desire, at least) for consensus has the potential to weaken the commitments made in the proposed refugee compact; as we have seen, the inability to reach consensus is the reason that the New York Declaration – a ‘watered-down’ alternative to a fully fledged refugee compact⁷⁷ – was adopted at the 19 September meeting. If the commitments to refugee responsibility sharing are weakened too far, the compact will lose meaning; countries hosting large number of refugees will not have the guarantees of support needed to ensure that they can adequately protect the refugees on their territory and manage the strains placed on their socio-economic systems, thereby failing to reduce the risk of *refoulement* and the need for dangerous onward movements. Furthermore, the fact that the compact is proposed only to encompass large movements of refugees begs the question of the relationship that it will have to refugee situations that do not meet this threshold, however defined, but nonetheless pose a considerable risk to the safety of those involved.

3.2 Academic proposals

Scholars have also sought to propose ways to distribute more equitably and to coordinate more effectively responsibility sharing for refugees. Whilst some have made

⁷³ Evalyn Tennant, ‘The UN Summit’s Hidden Cost for Migrant Rights’ (*IRIN News*, 28 September 2016) <<https://www.irinnews.org/fr/node/259081>> accessed 1 February 2017.

⁷⁴ *ibid* (original emphasis).

⁷⁵ McAdam (n 60).

⁷⁶ See eg Elizabeth Ferris, ‘After Trump’s Election, We Need to Get Creative on the Refugee Crisis’ (*Andrew & Renata Kaldor Centre for International Refugee Law*, 22 November 2016) <<http://www.kaldorcentre.unsw.edu.au/publication/after-trump%E2%80%99s-election-we-need-get-creative-refugee-crisis>> accessed 1 February 2017.

⁷⁷ Ferris (n 10) 11.

general calls for greater coordination in the provision of protection without any concrete mechanism or plan of action to achieve it,⁷⁸ or have suggested that there should be an international legal framework to govern responsibility sharing without examining what it might look like,⁷⁹ others have made more specific proposals.

These more specific proposals lie on a spectrum of formalization. At one end, lie proposals like that of James Hathaway and Alexander Neve, which argue for the creation of ‘interest-convergence groups’, composed of a fluid membership without a ‘rigid structural form’, and which will ‘agree in advance to contribute to protect refugees who arrive at the territory of any state member of the group’.⁸⁰ Further along the spectrum, lie proposals for the international community to pay for a kind of lease over land already occupied by refugees in return for unobstructed access to that area by human rights monitors.⁸¹ Without any formal structure, however, these proposals would represent a continuation of the thus far unsuccessful *ad hoc* approach to responsibility sharing in which States tend to participate on a case-by-case basis depending on their own interests.

At the more formalized end of the spectrum, lie suggestions which – in one way or another – seek to quantify the responsibility-sharing obligations of individual States by ‘pre-allocating possible future refugee populations to a number of suitable resettlement countries’,⁸² including through the establishment of a system of tradable quotas.⁸³

⁷⁸ Goodwin-Gill (n 27); Fonteyne (n 27); Garvey (n 37); Koser (n 35) (calling for ‘a review of the international protection system’).

⁷⁹ See eg Morel (n 36).

⁸⁰ Hathaway and Neve (n 27) 143–51, 187–201.

⁸¹ Eve B Burton, ‘Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries’ (1987) 19 Columbia Human Rights Law Review 307, 309 (‘Under the proposal, the international community buys an easement, or right of access, to land that refugees already occupy. In consideration for a payment, the host country allows an international human rights monitoring team unobstructed access to the refugee populations within the country’); Terje Einarsen, ‘Mass Flight: The Case for International Asylum’ (1995) 7 International Journal of Refugee Law 551. For an alternative safe haven proposal, see Ahilan T Arulanantham, ‘Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System’ (2000) 22 Human Rights Quarterly 1.

⁸² Fonteyne (n 27) 185–86; Hathaway and Neve (n 27) 204 (citing unpublished work by BS Chimni); Atle Grahl-Madsen, ‘Ways and Prospects of International Co-operation in Refugee Matters’ (1983) 23 AWR (Association for the Study of the World Refugee Problem) Bulletin 278; Schuck (n 34); Cook (n 18); James C Hathaway, ‘Toward the Reformulation of International Refugee Law’ (1996) 15 Refuge: Canada’s Journal on Refugees 1, 3.

⁸³ Schuck (n 34) (‘First, a group of states would agree to observe a strong norm of proportional burden-sharing for refugees, would seek to induce other states to join the group, and would arrange for an existing or newly-established international agency to assign to each participating state a refugee protection quota. A state’s quota would commit it to assure temporary protection or permanent resettlement for a certain number of refugees over a certain time period. Second, the participating states would then be permitted to trade their quotas by paying others to fulfil their obligations’); Eiko R Thielemann, ‘Burden-Sharing: The International Politics of Refugee Protection’ (2006) Center for Comparative Immigration Studies (CCIS) Working Paper 134, 23–24; Hathaway (n 40); Hillel Rapoport and Jesús Fernández-Huertas Moraga, ‘Tradable

The proponents of such systems argue that they would make countries of first asylum less likely to expel refugees because those countries would know that the responsibility for providing protection would be shared,⁸⁴ that such systems would speed up the process of resettlement,⁸⁵ and that they would make that process cheaper.⁸⁶

The chance of such proposals being accepted by States – particularly wealthy ones – must be considered to be virtually nil, however. They would require those States to agree, in advance, to accept unknowable numbers of refugees from unforeseen future crises. This would represent an even greater leap of faith than States took when ratifying the 1967 Protocol. It is one thing to accept that an unknowable number of people from an unknowable number of countries would be deserving of refugee protection *from someone*, but quite another to agree in advance to accept a fixed share of the responsibility for providing that protection. Furthermore, these proposals would require States to relinquish entirely the freedom that they currently enjoy to determine the extent to which they will share the responsibility for providing protection and durable solutions, as well as the flexibility that they currently have to adjust their policies in case of unforeseen events.⁸⁷

This makes such policies politically unviable; ‘the answer is to affirm the need for international law to bring both order and principle to bear on the way States address refugee flows, while recognizing that international law will be respected by governments only if it is seen to be attentive to their basic concerns.’⁸⁸ What is required is a response that accommodates the continuing role of sovereignty and self-interest in the international order, rather than ‘fantasizing it away.’⁸⁹

Furthermore, a ‘fundamental restructuring’ of the regime, which some of these proposals entail,⁹⁰ is likely to produce only chaos because unless and until all States accede to the new system (which must be considered unlikely), it would result in two parallel but fundamentally different regimes. What we need are ‘stepping stones in a

Refugee-Admission Quotas: A Policy Proposal to Reform the EU Asylum Policy’ (2014) European University Institute (EUI) Working Papers 2014/101.

⁸⁴ Fonteyne (n 27) 186.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.* 187; Bill Frelick, ‘Toward the Reformulation of International Refugee Law: Symposium Report’ (1996) 15 *Refuge: Canada’s Journal on Refugees* 16, 21; Astri Suhrke, ‘Burden-Sharing during Refugee Emergencies: The Logic of Collective Versus National Action’ (1998) 11 *Journal of Refugee Studies* 396, 402 (‘states have shown themselves to be weary [sic] of long-term, institutionalized commitments where the rights of other states to draw on the institution – akin to the right to draw on a bank account – are uncertain or beyond their control ... the cost implications of such schemes are highly uncertain’).

⁸⁸ Hathaway and Neve (n 27) 137. See also Arulanantham (n 81) 8 (‘Reforms must give states a self-interested reason to participate in the system’).

⁸⁹ Garvey (n 37) 492.

⁹⁰ James C Hathaway, ‘The Next Stage of the Reformulation Project’ (1996) 15 *Refuge: Canada’s Journal on Refugees* 23, 24.

process towards more responsibility sharing'⁹¹ that can form a 'solid basis for interstate cooperation.'⁹²

4. ADDRESSING COLLECTIVE ACTION PROBLEMS IN INTERNATIONAL ENVIRONMENTAL LAW: THE FRAMEWORK CONVENTION APPROACH

Refugee protection is not the only international issue to face problems of collective action; those faced by environmental protection are similar to those that challenge the international refugee regime in a number of ways. Given the success in Paris in late 2015 of the 21st meeting of the Conference of the Parties to the United Nations Framework Convention on Climate Change (Climate Change Convention),⁹³ the issue of climate change is a timely example of the manner in which international environmental lawyers have sought to address collective action problems.

The problems posed by refugees and climate change bear a number of striking resemblances. They are both transnational issues that are of international concern,⁹⁴ but that are also the subject of considerable uncertainty. For climate change, the uncertainty lies in the nature and extent of the impact of anthropogenic emissions on the climate and the best ways to counteract their adverse consequences,⁹⁵ whilst the refugee protection regime must deal with uncertainty concerning the number of persons who will be deserving of protection into the future, as well as their protection needs, their location, and the most appropriate durable solution for them. Despite being international in nature, the significant domestic impact of refugee and climate change policies means that they are largely seen through a 'domestic prism' and, within that prism, advocating for greater international cooperation can be politically risky.⁹⁶ All States have an interest in the resolution of climate change and refugee issues, but no State can resolve them by acting alone. This gives rise to significant 'free-rider' problems, whereby there is an incentive for States to do

⁹¹ Julian Lehmann, 'Up the Creek without the Law: What Is at Stake in Refugee Responsibility Sharing?' (*EJIL: Talk!*, 2 November 2015) <<http://www.ejiltalk.org/up-in-the-creek-without-the-law-what-is-at-stake-in-refugee-responsibility-sharing/>> accessed 1 February 2017.

⁹² Hathaway and Neve (n 27) 187.

⁹³ UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

⁹⁴ Sandrine Maljean-Dubois, 'The Making of International Law Challenging Environmental Protection' in Sandrine Maljean-Dubois and Yann Kerbrat (eds), *The Transformation of International Environmental Law* (Pedone & Hart 2011) 26 ('Serious, complex, and to a certain extent irreversible, threats to the environment are also, for the most part, global').

⁹⁵ Although the scientific uncertainty that existed in 1992 (when the Climate Change Convention was concluded) on the question of whether climate change is man-made has almost entirely subsided, there is still uncertainty about what amount of warming will have what effect on the planet, and concerning the most effective ways to mitigate and adapt to climate change.

⁹⁶ Daniel Bodansky, 'A Tale of Two Architectures: The Once and Future UN Climate Change Regime' (2011) 43 *Arizona State Law Journal* 697, 710.

nothing unless there is coordinated international action that gives them confidence that the effort will be shared equitably.⁹⁷ Particularly challenging is the fact that, when it comes to both climate change and refugee protection, an absence of coordinated international action will result in the most adverse consequences being visited upon those States least able to bear them.

The 'innovative approaches to global governance' that international environmental lawyers have devised in response to transnational problems that can only be addressed by coordinated international action have earned international environmental regulation a reputation as 'the laboratory of tomorrow's international law'.⁹⁸ One key tool employed to combat problems of collective action, particularly in circumstances of uncertainty,⁹⁹ has been the framework convention. This is a type of treaty that establishes few – if any – firm commitments; rather, framework conventions record the nature of the problem at hand, set out the agreed principles that are to be used to guide action to combat it, and establish an appropriate institutional structure within which further action (often including further legal obligations) can be taken to find a solution.¹⁰⁰ By way of example, the Climate Change Convention:

⁹⁷ *ibid* 709 ('[C]limate change is a classic example of a collective action problem, which can be solved only through cooperative action by all the world's major emitters. Individual States have little incentive to act unless they are confident that their actions will be reciprocated by others'); Betts (n 26) 8 ('Because the benefits of refugee protection are collectively available to all states, whereas the costs fall on whichever states contribute, there are strong incentives for states not to contribute significantly to refugee protection but, rather, to shirk international responsibility and free-ride on the contributions of other states'); Betts (n 33) 6.

⁹⁸ Lawrence O Gostin, 'A Proposal for a Framework Convention on Global Health' (2007) 10 *Journal of International Economic Law* 989, 1003; Maljean-Dubois (n 94) 54.

⁹⁹ Jorge E Viñuales, 'Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law' (2010) 43 *Vanderbilt Journal of Transnational Law* 437, 452–54.

¹⁰⁰ Laurence Boisson de Chazournes, 'Environmental Treaties in Time' (2009) 39 *Environmental Policy and Law* 293; Maljean-Dubois (n 94) 36 ('The best technique in this case is the framework convention, which represents a minimum agreement, the first stage in a statutory *process* towards a more constraining and elaborate regime which will take the form of additional *protocols*') (emphasis added) 37–39; Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press 2015) 125–26; Viñuales (n 99) 452–53 ('Framework conventions provide for broad principles and norms and for an institutional architecture for the subsequent development of the regime, while protocols ... embody the more specific rules and decision making procedures necessary for the implementation of the regime'); Ian H Rowlands, 'Atmosphere and Outer Space' in Daniel Bodansky, Jutta Brunée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 319; Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1992) 81 *Georgetown Law Journal* 675, 687; Kenji Shibuya and others, 'WHO Framework Convention on Tobacco Control: Development of an Evidence Based Global Public Health Treaty' (2003) 327 *British Medical Journal* 154, 154; Gostin (n 98) 1003; Allyn L Taylor and Douglas W Bettcher, 'WHO Framework Convention on Tobacco Control: A Global "Good" for Public Health' (2000) 78 *Bulletin of the World Health Organization* 920, 922.

- acknowledges that 'change in the Earth's climate and its adverse effects are a common concern of humankind' and that human activity may 'result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind';¹⁰¹
- acknowledges that 'the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response';¹⁰²
- establishes the ambitious 'ultimate objective' of the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system';¹⁰³
- requires the parties to be guided by the principles of intergenerational equity, common but differentiated responsibilities,¹⁰⁴ sustainable development, and the need to 'take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects';¹⁰⁵
- imposes non-specific 'commitments' on parties to, *inter alia*, measure their emissions, take measures to reduce emissions and adapt to the impacts of climate change, and share technologies and other information that assist these efforts, with developed countries 'taking the lead';¹⁰⁶
- establishes a Conference of the Parties, which is to meet annually to 'keep under regular review the implementation of the Convention';¹⁰⁷
- establishes – to exist alongside the pre-existing Intergovernmental Panel on Climate Change – a 'subsidiary body for scientific and technological advice', which is to provide 'timely information and advice on scientific and technological matters relating to the Convention', as well as a 'subsidiary body for implementation ... to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention';¹⁰⁸ and
- establishes '[a] mechanism for the provision of financial resources on a grant or concessional basis'.¹⁰⁹

The Convention imposes no emission reduction targets and, in fact, does not require parties to reduce their emissions at all; the closest it gets is to impose a requirement on developed States to 'adopt national policies and take corresponding measures on the

¹⁰¹ Climate Change Convention, preamble. It should be noted, of course, that the scientific uncertainty that existed in 1992 concerning climate change and the contribution that human activities make to it has all but disappeared.

¹⁰² *ibid* preamble.

¹⁰³ *ibid* art 2.

¹⁰⁴ This concept will be expanded upon below.

¹⁰⁵ Climate Change Convention, art 3.

¹⁰⁶ *ibid* art 4.

¹⁰⁷ *ibid* art 7.

¹⁰⁸ *ibid* arts 9 and 10.

¹⁰⁹ *ibid* art 11.

mitigation of climate change, by limiting ... anthropogenic emissions of greenhouse gases and protecting and enhancing their greenhouse gas sinks and reservoirs'.¹¹⁰

On its own, a true framework convention cannot solve the problem that it seeks to address. It can, however, set in motion a *process* for the solution of the problem: '[b]y providing a normative and institutional frame, the framework convention allows progress and offers the possibility of real acceleration in a negotiation process which would otherwise be dysfunctional'.¹¹¹ Framework conventions are a tool of 'incremental regime development'.¹¹² The iterative processes created by them – often assisted by an institutional mechanism for the collation and dissemination of up-to-date research and analysis – allow the international community to react to new circumstances or information without having constantly to renegotiate the original text.¹¹³ In addition to climate change, framework conventions have been used to reduce the use of substances that deplete the ozone layer,¹¹⁴ to address long-range transboundary air pollution,¹¹⁵ and to protect biodiversity.¹¹⁶ Their use has also spread beyond environmental regulation to other areas of international law. There is a framework convention on tobacco control,¹¹⁷ and framework conventions have been proposed for global health more generally, as well as the human right to water.¹¹⁸

One of the great advantages of regimes based on framework conventions is that they can be institutionally stable and – at the same time – sufficiently flexible to adapt to changes in circumstances.¹¹⁹ This is because the framework convention 'provides an almost permanent forum for discussion that allows questions to be added to the agenda

¹¹⁰ *ibid* art 4(2)(a). Art 1 defines 'sink' to mean 'any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere', whilst a 'reservoir' is 'a component or components of the climate system where a greenhouse gas or a precursor of a greenhouse gas is stored'.

¹¹¹ Maljean-Dubois (n 94) 36; Dupuy and Viñuales (n 100) 133 ('Although [the Vienna Convention on the Protection of the Ozone Layer] does not impose any specific substantive obligations, and despite significant scientific uncertainties, the Convention has provided a framework for the adoption of one of the most ambitious instruments of international environmental law, the Montreal Protocol').

¹¹² Gostin (n 98) 1003; Shibuya and others (n 97) 154. This is particularly so in respect of issues that are characterized by uncertainty: see Viñuales (n 99) 488–89.

¹¹³ Viñuales (n 99) 490.

¹¹⁴ Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.

¹¹⁵ Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217.

¹¹⁶ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

¹¹⁷ WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166; Shibuya and others (n 97); Taylor and Bettcher (n 97).

¹¹⁸ Vol 9, No 1 of *Global Health Governance* (2015) was dedicated to the proposed Framework Convention on Global Health. See also Gostin (n 98); Eibe Riedel, 'The Human Right to Water' in K Dicke and others (eds), *Essays in Honour of J Delbrück* (Duncker & Humblot 2005).

¹¹⁹ Boisson de Chazournes (n 97) 293.

more easily and facilitates negotiation.’¹²⁰ An excellent, recent example of this phenomenon in action is the manner in which the Montreal Protocol on Substances that Deplete the Ozone Layer – a protocol to the framework Vienna Convention for the Protection of the Ozone Layer – has been amended and adjusted to deal with evolving challenges. When ozone-depleting chlorofluorocarbons (CFCs), one of the Protocol’s main targets, were gradually phased out, they were replaced in appliances such as air-conditioners and refrigerators by non-depleting hydrofluorocarbons (HFCs). In response to the more recent revelation that HFCs contribute considerably to climate change, States agreed at the 28th Meeting of the Parties to the Montreal Protocol in Kigali, Rwanda, in October 2016 to amend the Protocol so as to phase out the use of HFCs as well.¹²¹

Furthermore, States can be persuaded to join a framework convention because, by doing so, they assume very few – if any – obligations. Experience shows, however, that, ‘if countries agree to participate in [a] framework convention, they may become sufficiently engaged that they can subsequently agree’ to undertake further obligations.¹²²

Action taken under a framework convention can adopt a ‘top-down’ or a ‘bottom-up’ approach.¹²³ The top-down approach defines the policies and measures that parties must adopt, whilst the bottom-up approach ‘allow[s] each participating state to define its own commitments.’¹²⁴ The approach taken in the fight against climate change was initially top-down: the Kyoto Protocol to the Climate Change Convention – which was adopted at the third Conference of the Parties – imposed national emissions targets that were ‘defined through a process of international negotiations rather than determined by each country unilaterally.’¹²⁵ Whilst, in an ideal world, it might be far preferable to adopt a top-down approach that ensures a truly coordinated and equitable effort across the international community, we do not live in such a world. The use of the top-down approach in the Kyoto Protocol meant that many States refused to sign up: it initially covered only 30 per cent of global greenhouse gas emissions,¹²⁶ and this figure fell to 15 per cent during its second commitment period.¹²⁷

Beginning with the 15th Conference of the Parties in 2009 and the much-maligned Copenhagen Accord, however, States began to take a bottom-up approach.¹²⁸ With such an approach, ‘the role of the international regime is not to define what each

¹²⁰ Maljean-Dubois (n 94) 30.

¹²¹ UN Environment Programme, ‘The Kigali Amendment to the Montreal Protocol: Another Global Commitment to Stop Climate Change’ (2016) <<http://web.unep.org/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate-change>> accessed 1 February 2017; Coral Davenport, ‘Nations, Fighting Powerful Refrigerant that Warms Planet, Reach Landmark Deal’ *New York Times* (15 October 2016) <<http://www.nytimes.com/2016/10/15/world/africa/kigali-deal-hfc-air-conditioners.html>> accessed 1 February 2017.

¹²² Weiss (n 97) 688.

¹²³ Bodansky (n 96) 698–701.

¹²⁴ *ibid* 698.

¹²⁵ *ibid* 702–03.

¹²⁶ *ibid* 703.

¹²⁷ Laurence Boisson de Chazournes, ‘The Climate Change Regime – Between a Rock and a Hard Place?’ (2014) 25 *Fordham Environmental Law Review* 625, 632–33.

¹²⁸ Bodansky (n 96) 703–08 (‘Copenhagen and Cancun: The Bottom-Up Approach Strikes Back’).

state must do, but rather to help generate greater political will by raising the profile of the climate change issue and providing greater transparency.¹²⁹ The development of the bottom-up approach culminated at the 21st Conference of the Parties in December 2015 with the Paris Agreement, the centrepiece of which is a requirement for States to set 'nationally determined contributions' to the international fight against climate change, which are to be compiled in a publicly accessible register.¹³⁰ This classically bottom-up measure 'preserve[s] the sovereign space' by allowing States to determine for themselves their level of ambition and, for this reason, has been described as being 'purpose-built to make it easy for states to come on board'.¹³¹ The fact that it secured ratifications with such speed that it came into force a little more than six months after opening for signature suggests that States did, indeed, find it easy to 'come on board'. It would be a mistake to think that this approach allows States to do as they please, however. When adopted within the context of a framework convention, the bottom-up approach 'gives a sense of direction and of collective purpose',¹³² as well as providing both a public forum within which States must justify the sufficiency of their actions and regular meetings to review commitments. In the climate change context, for example, nationally determined contributions must be updated at least every five years 'with a view to setting more ambitious targets each time'.¹³³ Together, these factors provide a mechanism that puts pressure on States to 'ratchet up' their commitments over time as other States do the same.¹³⁴ As Christina Voigt observed, '[o]nce a critical mass of countries had come forward, there seemed to be a gravitational pull on others'.¹³⁵

5. A FRAMEWORK CONVENTION FOR REFUGEE RESPONSIBILITY SHARING?

Given the success that framework conventions have had in addressing international collective action problems, I propose a framework convention as a third link in the chain of the international refugee protection regime. Such a convention would seek to address

¹²⁹ *ibid* 710.

¹³⁰ Jorge E Viñuales, 'The Paris Climate Agreement: An Initial Examination' (2015) C-EENRG (Cambridge Centre for Environment, Energy and Natural Resource Governance) Working Paper No 6, 5–6.

¹³¹ Christina Voigt, 'On the Paris Agreement's Imminent Entry into Force (Part I of II)' (*EJIL: Talk!*, 11 October 2016) <<http://www.ejiltalk.org/on-the-paris-agreements-imminent-entry-into-force/>> accessed 1 February 2017.

¹³² *ibid*.

¹³³ Laurence Boisson de Chazournes, 'One Swallow Does Not a Summer Make, But Might the Paris Agreement on Climate Change a Better Future Create?' (2016) 27 *European Journal of International Law* 253, 254 (describing the technique of asking States 'to continually do more than they have committed to do up to that point in time' as a new 'principle of non-regression'); Viñuales (n 130) 5–6.

¹³⁴ Fergus Green, 'The Finishing Straight in Paris: Why the Ratchet Mechanism Is (Almost) Everything' (*Lowy Interpreter*, 8 December 2015) <<https://www.lowyinstitute.org/the-interpreter/finishing-straight-paris-why-ratchet-mechanism-almost-everything>> accessed 1 February 2017.

¹³⁵ Voigt (n 131).

the major gap left in that regime by the fact that the 1967 Protocol greatly expanded the scope of people entitled to refugee protection, without establishing a mechanism to distribute the responsibility for providing it. This section will set out what I see as the six 'building blocks' of a Framework Convention for Refugee Responsibility Sharing, whilst the next section will explain why the convention I propose would represent a significant improvement on existing efforts aimed at sharing the responsibility for refugees.

5.1 Independence from the 1951 Convention and 1967 Protocol

The first building block that I propose for the Framework Convention for Refugee Responsibility Sharing is independence from the 1951 Convention and its 1967 Protocol; that is, the Framework Convention should reaffirm their importance but have a life independent of them. This is for two reasons.

First, the Refugee Convention and Protocol need not – and should not – be renegotiated. The refugee definition, the principle of *non-refoulement*, and the rights contained in the Convention have stood the test of time.¹³⁶ They have proven to be applicable to the much wider set of circumstances and the far larger class of people that the Protocol has applied them to and these central principles of the international refugee regime cannot be subjected to the risks that would be posed by their renegotiation.¹³⁷

Secondly, States parties to neither the Convention nor the Protocol should nevertheless be allowed and encouraged to accede to the Framework Convention. Many States that are not a party to either of the existing instruments – including Lebanon and Jordan – host large numbers of refugees, and the Framework Convention should not be blind to the contribution made by these States to refugee protection simply because they are not parties to the existing refugee treaties (although of course they should be encouraged to become parties).

¹³⁶ Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' (2016) 4 Journal on Migration and Human Security 45, 47 ('The 1951 Convention was crafted 65 years ago as both a moral and legal response to people who were fleeing their countries for many of the same reasons people are fleeing today – and in even larger numbers. It has been applied successfully over the years in situations of mass influx to ensure admission to territory and protection on a group basis or through accelerated procedures, and it is equally well positioned to do so today ... The application of the Convention has evolved to address modern forms of persecution, such as those related to gender, sexual orientation, children, and gang-related violence. It can also accommodate new approaches to large-scale movements such as the strategic use of refugee status determination or temporary protection in the immediate term, complemented by community-based protection approaches to identify individuals with specific needs, such as unaccompanied or separated children, survivors of sexual and gender-based violence, or victims of trafficking').

¹³⁷ *ibid* 47 ('There are certain risks in such an exercise, as reopening the discussion could inadvertently result in many of the hard-won advances made in negotiating international refugee protection being undermined'); Fitzpatrick (n 31) 235–38; Hathaway and Neve (n 27) 147, 155–56, 207; Arulanantham (n 81) 5; Hathaway (n 40); Andrew I Schoenholtz, 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century' (2015) 16 Chicago Journal of International Law 81.

5.2 Clearly stated objective and principles

As noted above, a key element of environmental framework conventions is that they clearly state an overall objective and the principles that are to guide action taken in pursuit of it. Because the objective is not legally binding, it can be ambitious: we have already seen that the ‘ultimate objective’ of the Climate Change Convention is the ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.’¹³⁸

Although – as with many of the building blocks I propose – this would be a question for negotiation between States, the Framework Convention for Refugee Responsibility Sharing should include as its ‘ultimate objective’ the provision of protection and durable solutions to *all* the world’s refugees. This may seem hopelessly ambitious – and may well be impossible – but it would be a worthwhile objective for the international community to aim for.

In addition to stating an ambitious objective, the practice of enunciating principles to be used to guide action towards that objective presents an important opportunity for States to clarify the nature and the status of the norm of responsibility sharing in the international refugee protection regime. As noted above, the exact nature of the responsibility-sharing norm is unclear. Is it merely a moral obligation, or does it have legal content? If so, can we go as far as to say that it is a binding rule of customary international law, or is it a non-binding legal principle? I would suggest that the responsibility-sharing norm is a legal, as opposed to a purely moral, principle.¹³⁹ Rather than being strictly binding, however, it serves to guide the actions of States, much like the principles of prevention and precaution in international environmental law.¹⁴⁰

When setting out the responsibility-sharing norm as a key principle of the proposed Framework Convention, it should be explicitly grounded in another device developed by international environmental lawyers in the context of collective action problems: the principle of ‘common but differentiated responsibilities.’¹⁴¹ This was first enunciated as Principle Seven of the Rio Declaration at the Rio Earth Summit in 1992:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.¹⁴²

¹³⁸ Climate Change Convention, art 2.

¹³⁹ See the works referred to at (n 27), especially Chimni (n 18) 146–51 (‘The principle of burden-sharing which requires states to cooperate in dealing with the global refugee problem is not merely a moral but a legal principle’).

¹⁴⁰ See Dupuy and Viñuales (n 100) 58–64.

¹⁴¹ *ibid* 73–75; Jutta Brunnée, ‘The Stockholm Declaration and the Structure and Processes of International Environmental Law’ in Aldo Chircop and Ted McDorman (eds), *The Future of Ocean Regime Building: Essays in Tribute to Douglas M Johnston* (Brill 2009) 46–47, 55–56.

¹⁴² UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN doc A/CONF151/26 (12 August 1992).

The principle of common but differentiated responsibilities thus links concerns about environmental protection with issues of equity between the developed and developing world by allowing for differentiated commitments between the two groups, often in the form of lesser obligations, longer timelines, or the provision of technical or financial assistance to developing countries to aid compliance:

Situated at the intersection between development and the protection of the environment, this principle is intended to reconcile potentially conflicting requirements. On the one hand, developing countries see it as a way to gain recognition for their development need, their reduced ability to contribute to the management of environmental problems and also their lower contribution to their creation. On the other hand, developed countries consider it as a tool to ensure [the] participation of developing countries in the management of environmental problems and to ensure that the development process takes place in a manner that is respectful of the environment.¹⁴³

In the Climate Change Convention, the principle of common but differentiated responsibilities forms part of the very first of the ‘principles’ mentioned in article 3:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

A further recognition of this principle comes with the acknowledgment that ‘[t]he specific needs and special circumstances’ of States that ‘have to bear a disproportionate or abnormal burden ... should be given full consideration’,¹⁴⁴ as well as the different commitments made by developed and developing States in article 4, which explicitly recognizes that ‘[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology’.¹⁴⁵

In the refugee responsibility-sharing context, the principle of common but differentiated responsibilities could be employed to ‘harness the ability and willingness of different States to contribute in different ways’¹⁴⁶ by recognizing that, whilst all States should share the responsibility for providing refugee protection, developed countries’

¹⁴³ Dupuy and Viñuales (n 100) 73–74.

¹⁴⁴ Climate Change Convention, art 3(2) (‘The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration’).

¹⁴⁵ *ibid* art 4(7).

¹⁴⁶ Hathaway (n 40); Burton (n 81) 326–27.

greater capacities give them special responsibilities.¹⁴⁷ Adopting a drafting style that mirrors that used in the Climate Change Convention, the responsibility-sharing norm could be expressed as follows in the Framework Convention I propose: ‘States should share the responsibility for providing adequate protection to and durable solutions for the world’s refugees, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities’.

5.3 A lean institutional structure

The creation of a massive new international bureaucracy – or the expansion of an existing one – is most certainly not an aim of the proposed Framework Convention. However, the experience of international environmental lawyers with framework conventions is that some institutional structure is necessary to drive forward the process established by the convention. Again drawing inspiration from the Climate Change Convention, the Framework Convention I propose would have a governing body and two subsidiary bodies.

The governing body would be a conference of the parties, mandated to ‘keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and [to] make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.’¹⁴⁸ The conference of the parties would meet at intervals that would be sufficiently short to allow States to respond to the ever-changing global refugee situation, but not short enough to allow ‘conference fatigue’ to set in. This, I tentatively venture, would mean a meeting every two or three years. In addition, special emergency meetings would be able to be held if a particular refugee situation arose that required immediate action. These meetings could be triggered on the say-so of a sufficient number of States parties (a quarter, perhaps) and/or the UN High Commissioner for Refugees (or the UN Secretary-General).¹⁴⁹ The conference of the parties would be supported by a small secretariat, possibly within UNHCR.

The conference of the parties would have two subsidiary bodies, one for advice and the other to monitor implementation.¹⁵⁰ The first – the subsidiary body for protection

¹⁴⁷ This is not the first time that the principle of common but differentiated responsibilities has been suggested for the international refugee regime: see Morel (n 36); Hathaway and Neve (n 27) 118, 144–45, 172–73, 201–02; Hathaway (n 90) 24. Although its manifestation in international environmental law also reflects the fact that developed countries have generally contributed more to the creation of environmental problems, the apportionment of blame for refugee flows is neither necessary, nor appropriate, in the refugee context.

¹⁴⁸ Climate Change Convention, art 7(2).

¹⁴⁹ This is broadly consistent with the approach adopted in the Climate Change Convention, which provides for ‘ordinary sessions of the Conference of the Parties’ to be held annually, while ‘[e]xtraordinary sessions of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to the Parties by the secretariat, it is supported by at least one third of the Parties’: see *ibid* arts 7(4)–(5). As to the acceptable and not-so-acceptable uses of the phrase ‘and/or’, see Liam Boyle, ‘“And/Or” in the Law: Condemnations, Uses and Misuses’ (2013) 87 Australian Law Journal 349.

¹⁵⁰ See Climate Change Convention, arts 9 and 10.

and durable solutions – would be a multidisciplinary body whose main function would be to provide information and advice to the conference of the parties on the existing global refugee situation and responsibility-sharing efforts, as well as new and innovative approaches to providing protection and durable solutions, whether they come from the government, non-government, academic, or private sectors. The second – the subsidiary body for implementation – would ‘assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention’, as well as the adequacy of the ‘aggregated effect of the steps taken’ under it.¹⁵¹

5.4 Indication of contribution to the international responsibility-sharing effort

At meetings of the conference of the parties, States parties would indicate – on a ‘bottom-up’ basis, as with ‘nationally determined contributions’ made under the Paris Agreement – the contribution that they would be willing to make to the international responsibility-sharing effort over an agreed time period. (This period should stretch beyond the next scheduled conference so as to allow for longer-term planning.) As with the Climate Change Convention, the proposed Framework Convention would allow regional economic integration organizations, such as the European Union (EU), to become parties and for them and their Member States to ‘decide on their respective responsibilities for the performance of their obligations under the Convention’.¹⁵²

In advance of the conferences, UNHCR would report publicly on the existing global refugee situation, including the number of refugees and their protection needs. It would also forecast – to the best of its ability – how these numbers and needs were likely to change over the forthcoming contribution period. Much of this information is already produced by UNHCR in its reporting, particularly the annual *Global Trends* and *Projected Global Resettlement Needs* publications, so this is not anticipated to require significant additional resources. The experience from the climate change regime, however, suggests that – in the context of a framework convention – such reporting can have a significant impact: Pierre-Marie Dupuy and Jorge Viñuales have shown, for example, how each major development in the international climate change regime can be linked to an assessment report of the Intergovernmental Panel on Climate Change.¹⁵³

The contributions indicated by States would be in the form of the number of refugees to whom each State was providing or would be willing to provide permanent and temporary protection, as well as the funding they would be willing to contribute to assist global efforts to improve protection and find durable solutions. Financial contributions could be in the form of humanitarian assistance to address the immediate needs of refugees and/or longer-term development assistance targeted at refugees

¹⁵¹ *ibid* art 10.

¹⁵² See *ibid* art 22.

¹⁵³ Dupuy and Viñuales (n 100) 142–45 (linking the first assessment report to the adoption of the Climate Change Convention, the second to the ‘Berlin Mandate’ that ‘laid the groundwork for the adoption of the Kyoto Protocol’; the third to the Marrakesh Accords, and the fourth to the ‘Bali Mandate’. The fifth was released shortly before the adoption of the Paris Agreement in 2015).

and the communities that host them.¹⁵⁴ If it were thought appropriate, the Framework Convention could also – in recognition of the fact that ‘more than “just” money is needed’ to address refugee problems¹⁵⁵ – allow States to indicate in-kind contributions (such as the provision of medical professionals to refugee camp health clinics), commit to take steps to open labour markets to refugees, or enter into agreements whereby one State finances resettlement in another, thus expanding the total number of resettlement States. Although there would be no binding quotas (for the reasons given above), there would be nothing preventing civil society organizations from developing and applying their own quota-like systems to commend States that are doing their fair share, and to encourage others to do more.¹⁵⁶

As with the Climate Change Convention,¹⁵⁷ States would be required to communicate information regarding the fulfilment of their contributions to the subsidiary body for implementation, which would, in turn, report such information to the conference of the parties.

5.5 A way for non-parties to contribute

The Climate Change Convention acknowledges, in its first preambular paragraph, that ‘change in the Earth’s climate and its adverse effects are a common concern of human-kind’. In furtherance of this sentiment, the Conference of the Parties is open not just to States parties, but – on an observational basis – to all States that are *not* parties, to the UN and its specialized agencies, and the International Atomic Energy Agency, and to:

[a]ny body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer ... unless at least one third of the Parties present object.¹⁵⁸

¹⁵⁴ Achiume (n 8) 732–33; ‘How to Do Better: Spontaneous Migrant Flows Cannot Be Prevented, But They Can Be Handled More Competently’ (*The Economist*, 28 May 2016) <<http://www.economist.com/news/special-report/21699311-spontaneous-migrant-flows-cannot-be-prevented-they-can-be-handled-more>> accessed 1 February 2017 (‘the West should introduce long-term development thinking into refugee policy, the better to align the interests of refugees with those of the communities that host them. Some refugee aid should be shifted from humanitarian agencies to development budgets, politically difficult though that might be. The World Bank has already changed its rules to help middle-income countries facing large refugee burdens. Individual rich countries, or clubs of them, could offer trade preferences to countries with large refugee populations, as they do for the world’s poorest’); World Bank, *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts* (advance edn 2016); Ferris (n 10) 19–21.

¹⁵⁵ Ferris (n 10) 16.

¹⁵⁶ See eg Mathias Czaika, ‘A Refugee Burden Index: Methodology and Its Application’ (2005) 2 Migration Letters 101; Achiume (n 8) 730 (suggesting the creation of a quota based on the UN assessed contributions formula).

¹⁵⁷ Climate Change Convention, art 12.

¹⁵⁸ *ibid* art 7(6).

Given that adequate refugee protection is also rightly considered a matter of international concern, and that a truly comprehensive approach to durable solutions must embrace all parts of society that are capable of contributing, the Framework Convention that I propose would enable States that are not parties to the Framework Convention, international organizations, non-governmental organizations (NGOs), sub-State entities (such as regional or city governments), and private sector actors to participate in conferences of the parties and – crucially – to indicate any contributions that they were willing to make to the international refugee protection effort. Of course, some contributions – such as accepting refugees for resettlement – will lie within the exclusive domain of national governments in most cases. This does not mean, however, that national governments cannot be encouraged to increase resettlement numbers by city or regional governments willing to commit to provide housing and other social support; international organizations – such as the World Bank – willing to provide development assistance; NGOs and individuals willing to provide private sponsorship; universities willing to provide enrolment places, scholarships, or other support; or companies willing to provide jobs. This, again, is an area in which refugee protection can take the lead from environmental action. Just as the failure of the United States to become a party to the Kyoto Protocol did not prevent California from enacting its own emissions trading scheme,¹⁵⁹ there are many opportunities for non-State and sub-State actors to make their own contributions to the provision of protection and durable solutions for refugees.¹⁶⁰

Furthermore, allowing States that are not parties to the proposed Framework Convention to participate in the meetings of the conference of the parties and to make protection commitments would ensure the broadest possible participation, including amongst States that are unlikely to be able to ratify the Framework Convention because of domestic constitutional restraints.¹⁶¹

5.6 Forum for discussion and further negotiation

The final element of the proposed convention is that, like other framework conventions, it would provide a forum for the discussion of ways in which international cooperation on matters of refugee responsibility sharing could be extended. Where necessary or

¹⁵⁹ See International Carbon Action Partnership, *Emissions Trading Worldwide: International Carbon Action Partnership Status Report 2015* (International Carbon Action Partnership 2015) 39–40.

¹⁶⁰ In the Syrian context, see Laura Smith-Spark, 'Making Refugees Welcome: Citizens of Germany, Iceland Show the Way' (CNN, 2 September 2015) <<http://edition.cnn.com/2015/09/02/europe/europe-migrants-welcome/>> accessed 1 February 2017; Ryan Scott, 'Do Companies Have an Obligation to Help Syrian Refugees?' (*Forbes*, 2 October 2015) <<http://www.forbes.com/sites/causeintegration/2015/10/02/do-companies-have-an-obligation-to-help-syrian-refugees/#3973562d4648>> accessed 1 February 2017 ('UNHCR said it has received \$17 million in donations from companies and individuals in just six days'); Daniel Howden, 'How the Private Sector Can Help Tackle the Refugee Crisis' (*Refugees Deeply*, 3 October 2016) <<https://www.newsdeeply.com/refugees/articles/2016/10/03/analysis-how-the-private-sector-can-help-tackle-the-refugee-crisis>> accessed 1 February 2017.

¹⁶¹ The obvious example, of course, is the United States, where the consent of two-thirds of the Senate is required for treaty ratification.

desirable, these discussions could evolve into the negotiation of legally binding protocols to the Framework Convention.

6. HOW WOULD A PROPOSED FRAMEWORK CONVENTION ON REFUGEE RESPONSIBILITY SHARING REPRESENT AN IMPROVEMENT ON CURRENT EFFORTS?

It might be thought that the Framework Convention I propose would be little more than the institutionalization of a tactic that is already in use – the holding of pledging conferences – and that, even if the Framework Convention were to be negotiated, adopted, and ratified by a sufficient number of States to enter into force, it would achieve no more than pledging conferences currently do. Whereas such conferences are *events*, the Framework Convention I propose would set in motion a *process* which, I believe, would lead to a more equitable sharing of the responsibility for the world's refugees, as well as an increase in the overall level of protection and the number and quality of durable solutions available. This is for six interrelated reasons.

The first is that, if negotiated, the Framework Convention has a good chance of being broadly ratified. Whereas other proposals for mechanisms for more equitable responsibility sharing either lack a sufficiently concrete structure, or require the international community to take too great a leap forward (making them unviable in the current political climate), the proposed convention charts a middle course. It establishes a structure but, as with other framework conventions, it has very low barriers to entry.¹⁶² Indeed, the only real obligation imposed on States would be to participate in good faith in the meetings of the conference of the parties, including by indicating the contribution that they would be willing to make and reporting on the action they had taken to fulfil that commitment. As noted above, low barriers to entry have been credited with the fact that the Paris Agreement entered into force a little more than six months after opening for signature.

Because of the opportunity this represents for more equitable responsibility sharing, those States currently bearing more than their fair share of the responsibility are particularly likely to sign up, and to put pressure on those that are not to do the same. This is so for responsibility-bearing States regardless of whether they are parties to the 1951 Convention or 1967 Protocol or not, since the Framework Convention would exist independently of those instruments.

If refugee-hosting States were supported in their efforts to secure wide ratification by refugee-focused NGOs – possibly organized in a campaign styled on the International Campaign to Ban Landmines¹⁶³ – the chances of other States taking the small step to

¹⁶² Others have suggested that low barriers to entry are also essential to any successful refugee responsibility-sharing mechanism: see eg Schuck (n 34) 276–77.

¹⁶³ See Nicola Short, 'The Role of NGOs in the Ottawa Process to Ban Landmines' (1999) 4 International Negotiation 483; Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society' (2000) 11 European Journal of International Law 91; Stefan Brem and Ken Rutherford, 'Walking Together or Divided Agenda? Comparing Landmines and Small-Arms Campaigns' (2001) 32 Security Dialogue 169; Diana O'Dwyer, 'First Landmines, Now Small Arms? The International Campaign to Ban Landmines as a Model for Small Arms Advocacy' (2006) Irish Studies in International Affairs 77.

become parties to the Framework Convention must be considered good. Even if some States decided not to become parties, however, the Framework Convention would still be able to operate. Unlike the proposed Global Compact on Refugees, there would be no need for consensus in order for it to be adopted, which would also mean that the objectives and principles would not need to be watered down in order to cater to the desires of recalcitrant States.

Secondly, the Framework Convention would reaffirm and clarify the responsibility-sharing norm and the pre-meeting reporting by UNHCR would publicly recognize the disproportionate responsibility being borne by some States.

There is reason to believe that these two factors alone would be sufficient to improve the behaviour of States vis-à-vis refugee responsibility sharing. There is a rich literature that suggests that behavioural theories of ‘acculturation’ – defined as ‘the general process of adopting the beliefs and behavioral patterns of the surrounding culture’¹⁶⁴ – apply not only to individuals and organizations, but also to the behaviour of States.¹⁶⁵ Such a process can – at the international level – ‘induce[] behavioral changes not only by changing the target actor’s incentive structure or mind but also by changing the actor’s social environment’.¹⁶⁶ The two requirements for bringing about a process of acculturation are: ‘(1) embedding target actors in an institutionalized social setting and (2) institutionalizing at the group level preferred forms of identity’.¹⁶⁷ The proposed Framework Convention would satisfy these two conditions: it would establish an ‘institutionalized social setting’ with very low barriers to entry, and would encourage the institutionalization of a particular form of State identity, namely that of a State that bears a fair share of the international responsibility for refugees. It would thus use the fact that ‘states are significantly shaped and legitimated through their broader organisational environment’ to improve the overall level of international refugee protection and the number and quality of durable solutions available to refugees.¹⁶⁸

The third reason why the Framework Convention would represent an advance on current efforts is that it would create a framework for the development of a comprehensive approach to the sharing of the responsibility to provide protection and durable solutions for the world’s refugees. Existing efforts on responsibility sharing are largely undertaken in an *ad hoc*, uncoordinated manner and, when they are regular, planned, and coordinated, they tend to be restricted in their focus. Take, for example, UNHCR’s Annual Tripartite Consultations on Resettlement. This is an important forum for governments, civil society organizations, and UNHCR to come together for ‘open and frank dialogue’ on resettlement issues.¹⁶⁹ It addresses ‘policy and procedural matters,

¹⁶⁴ Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54 *Duke Law Journal* 621, 638.

¹⁶⁵ *ibid* 646–55; Ryan Goodman and Derek Jinks, ‘Toward an Institutional Theory of Sovereignty’ (2003) 55 *Stanford Law Review* 1749, 1757–65.

¹⁶⁶ Goodman and Jinks (n 164) 638.

¹⁶⁷ *ibid* 647.

¹⁶⁸ *ibid*.

¹⁶⁹ UNHCR, ‘Frequently Asked Questions about Resettlement’ (2013) 15–16 <<http://www.unhcr.org/events/conferences/56fa35b16/frequently-asked-questions-resettlement.html>> accessed 1 February 2017.

including advocacy, capacity building and operational support', and also 'promotes transparency and stimulates the development of new and innovative ways to solve problems and to combine resources to improve resettlement outcomes for refugees'.¹⁷⁰ These consultations provide a thoroughly worthwhile forum whose effectiveness would be enhanced if they formed part of a wider, comprehensive approach that strengthened the normative basis for resettlement, coordinated action on all durable solutions, and engaged all relevant actors capable of playing a constructive role in providing protection and durable solutions, including States, international organizations, sub-State entities, corporations, and civil society groups. Such a comprehensive approach, the need for which is recognized in the New York Declaration,¹⁷¹ would better marshal efforts and focus them on the search for more equitable responsibility sharing.

The fourth reason is that the Framework Convention would create an accountability mechanism, the subsidiary body for implementation, the reporting of which would help to address the fact that the international community needs to do a better job at 'keeping track of the commitments made [at the various pledging conferences that seek to boost the financial and other resources required to provide protection to refugees] and the extent to which they are fulfilled'.¹⁷²

The fifth reason is that, since it would form the basis of a comprehensive approach to refugee responsibility sharing, the proposed Framework Convention would allow for the kind of issue-linkage that would incentivize developed States to contribute more to protection and durable solutions for refugees. As Betts rightly points out, '[t]he contributions of Northern States to [responsibility] sharing have not been based on altruism or a concern with refugee protection per se; rather, they have been based on a perception that refugee protection is related to their wider interests in other issue areas, notably immigration, security and trade'.¹⁷³ Using the logic of suasion games to analyse four attempts to share responsibility more equitably in specific circumstances,¹⁷⁴ he argues that the two that succeeded – the Indo–Chinese Comprehensive Plan of Action and the International Conference on Refugees in Central America (ICARA) – did so because 'protection in the South [was] structurally related to migration, security or trade in the North', and because UNHCR's advocacy and intervention 'enable[d] states to recognize this structural interdependence'.¹⁷⁵ Likewise, Tendayi Achiume argues that comprehensive approaches to refugee solutions will be supported by States if they achieve issue convergence, in that they simultaneously promote regional stability, managed migration, and international security.¹⁷⁶ The ICARA conferences in the early 1980s failed, according

¹⁷⁰ *ibid.*

¹⁷¹ New York Declaration for Refugees and Migrants (n 21) Annex I, para 1 ('The scale and nature of refugee displacement today requires us to act in a comprehensive and predictable manner in large-scale refugee movements. Through a comprehensive refugee response based on the principles of international cooperation and on burden- and responsibility-sharing, we are better able to protect and assist refugees and to support the host States and communities involved').

¹⁷² Ferris (n 10) 16.

¹⁷³ Betts (n 26) 3–4.

¹⁷⁴ *ibid* 32–36.

¹⁷⁵ Betts (n 33) 4, 10, 13–18. See also Betts (n 26) 176 ('In the two successful case studies presented, refugee protection was credibly linked to Northern interests in other issue areas') 179–80.

¹⁷⁶ Achiume (n 8) 752–59.

to Betts, because they were held at a time when ‘there was very little South–North movement between Africa and Europe through asylum or migration channels’ and thus ‘there was very little structural interdependence between refugee protection in Africa and Northern interests.’¹⁷⁷ The Convention Plus initiative was unsuccessful because, despite the existence of issue linkages, UNHCR ‘did very little to highlight the complex interdependence that connected Northern States’ interests [in reducing the then-high number of asylum seekers] to refugee protection in the South and, if anything, played a counter-productive role’ by isolating discussions on resettlement, illegal secondary movements, and development from one another, thus preventing issue linkages.¹⁷⁸ UNHCR failed, in short, to recognize that ‘the very basis of cooperation would have been the linkages that existed across the three areas of debate.’¹⁷⁹

There can be little doubt that, given the processes of globalization and the improvements in transportation technology that have occurred since the ICARA conferences in the early 1980s, the widespread movement of people and commerce around the globe is an irreversible fact, meaning that issues of refugee protection, migration, security, and trade are interlinked for the long term. This is all the more so in relation to the conflict in Syria:

What is at stake is not only [the] lives of the refugees, but the stability and perhaps even the survival of the states that host them. And the consequences extend further. They include: a rise in threats to regional and international security as the sectarian conflict in Syria reproduces itself in neighbouring countries; creation of fertile conditions for radicalization that fuels transnational terrorist organizations, as overall conditions in the Middle East worsen; and increased unauthorized desperation-driven migration to the West (especially Europe) as refugees risk their lives to escape starvation and conflict’.¹⁸⁰

By establishing a forum that allows for the linking of issues of migration, security, and trade to refugee protection, the Framework Convention would allow for the two conditions identified by Betts to be met simultaneously, thus maximizing the chances of a more equitable distribution of the responsibility for providing refugee protection. In turn, this would give greater assurance to States dealing with mass influxes of refugees that they would be supported, thus reducing the incentive to engage in *refoulement*.

Finally, the proposed Framework Convention would provide a forum for States, international organizations, sub-State entities, and non-State actors to discuss new and innovative ways of improving the protection of and durable solutions for the world’s refugees. As Erika Feller, former UNHCR Assistant High Commissioner for Protection, noted in November 2015:

If there is one positive thing coming out of this crisis [in Europe], it is that it has launched an avalanche of ideas about how better to respond. Advice is streaming into EU countries from many sources. Some ideas being acted on or canvassed,

¹⁷⁷ Betts (n 33) 11–12. See also Betts (n 26) 53–77.

¹⁷⁸ Betts (n 33) 18–20. See also Betts (n 26) 143–74.

¹⁷⁹ Betts (n 33) 19.

¹⁸⁰ Achiume (n 8) 689.

which should be considered by countries outside Europe as well, involve: enforceable national intake quotas based on GDP, number of asylum seekers or unemployment levels; joint reception and processing arrangements, including specialized centres for those coming from countries deemed safe; differentiated stay arrangements pegged to the likely duration of protection needs; and legal migration pathways. *Most of these ideas are not new. What will be new, if it happens, is how they are pieced together and then acted upon in a coherent and coordinated manner, to determine who, how and where to protect.*¹⁸¹

Aided by the information and advice from the subsidiary body for protection and durable solutions, the Framework Convention could provide the forum for the piecing together and coordination of these ideas, as well as the development of new ones.

In addition to the ideas mentioned by Feller, the parties could negotiate the establishment of an emergency fund which could be drawn on in case of large movements of refugees,¹⁸² or a financial mechanism to fund innovative projects that aim to enhance refugee protection.¹⁸³ Such projects could include experimental and pilot programmes for, say, preference matching in resettlement or special economic zones for refugees.¹⁸⁴ Italy could pursue its proposal for the issuance of bonds to finance refugee protection, or Germany its idea for a refugee tax on petrol.¹⁸⁵ NGOs could prosecute the case for the revival of the Nansen passport.¹⁸⁶

¹⁸¹ Erika Feller, 'Protection Elsewhere – But Where? National, Regional and Global Perspectives on Refugee Law' (Kaldor Centre for International Refugee Law Annual Conference, Sydney, 20 November 2015) (emphasis added) <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Conference2015_Keynote.pdf> accessed 1 February 2017. On joint reception and processing arrangements, see eg Guy S Goodwin-Gill, 'Refugees: Challenges to Protection' (2001) 35 International Migration Review 130, 136–37; Hathaway (n 82) 3; Guy S Goodwin-Gill, 'Asylum 2001 – A Convention and a Purpose' (2001) 13 International Journal of Refugee Law 1, 2.

¹⁸² *The Economist* (n 154) ('An expanded global fund for displacement, overseen by an independent authority that can spring into action when required, would make such planning and response easier. Governments might prefer the predictability of regularly paying into a fund to ad hoc donor events').

¹⁸³ The Climate Change Convention, for example, establishes '[a] mechanism for the provision of financial resources on a grant or concessional basis' to projects to address climate change: art 11.

¹⁸⁴ Will Jones and Alexander Teytelboym, 'Choices, Preferences and Priorities in a Matching System for Refugees' (2016) 51 Forced Migration Review 80, 80 ('Concretely, in our proposal, states and refugees submit their preferences – about which refugees they most wish to host or which state they most wish to be protected in – to a centralised clearing house which matches them according to those preferences'); Alexander Betts and Paul Collier, 'Help Refugees Help Themselves: Let Displaced Syrians Join the Labor Market' (2015) 94 Foreign Affairs 84.

¹⁸⁵ 'Italy Wants EU Bonds to Fund Refugee Response' (*Reuters*, 22 February 2016) <<http://www.reuters.com/article/us-italy-eu-idUSKCN0VV203>> accessed 1 February 2017; Justin Huggler, 'German Finance Minister Proposes EU-Wide Petrol Tax to Pay for Refugee Crisis' *The Telegraph* (London, 16 January 2016) <<http://www.telegraph.co.uk/news/worldnews/europe/germany/12103359/German-finance-minister-proposes-EU-wide-petrol-tax-to-pay-for-refugee-costs.html>> accessed 1 February 2017.

¹⁸⁶ Stefan Wallaschek, 'The Nansen Passport: Time to Revive a Realistic Utopia' (*Refugees Deeply*, 19 August 2016) <<https://www.newsdeeply.com/refugees/op-eds/2016/08/19/the-nansen-passport-time-to-revive-a-realistic-utopia>> accessed 1 February 2017.

As noted above, a hallmark of framework conventions is that they can engage States in a way that accelerates otherwise dysfunctional negotiation processes and can lead to further negotiated outcomes that would not otherwise have been possible. With time, these negotiations might even extend to the expansion of the scope of the Framework Convention to allow for the sharing of the responsibility to provide protection to some of those in need of it who do not meet the definition of 'refugee' in the Convention,¹⁸⁷ such as internally displaced persons,¹⁸⁸ or those fleeing the effects of climate change and disasters.¹⁸⁹ This would not involve a renegotiation of the refugee definition in the 1951 Convention, but merely an expansion of the scope of the responsibility-sharing efforts undertaken in the context of the Framework Convention.

As a result of all of the above, there is every chance that the Framework Convention on Refugee Responsibility Sharing would be widely ratified, and thus able to serve as a forum for global efforts; principled; comprehensive; accountable; capable of linking issues so as to better serve the interests of States and refugees; and able to serve as a

¹⁸⁷ Despite the fact that UNHCR adopts a flexible interpretation of the Refugee Convention definition in art 1A(2), it is widely recognized that this definition does not cover a wide range of people who have been forced to flee their homes and who are deserving of protection: see Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 *International Journal of Refugee Law* 238, 250, 258; Garvey (n 37) 489; Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence* (UNHCR Legal and Protection Policy Research Series 2012); Chimni (n 18) 1 (describing a 'refugee', within the everyday meaning of the word, as 'a person who is forced to flee his or her home for any reason for which the individual is not responsible, be it persecution, public disorder, civil war, famine, earthquake or environmental degradation'); Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 15–134 (devoting 120 pages to the minutiae of the Convention definition of 'refugee'); Paul Freedman, 'International Intervention to Combat the Explosion of Refugees and Internally Displaced Persons' (1995) 9 *Georgetown Immigration Law Journal* 565, 569; Fitzpatrick (n 31) 229–30, 238–42; Cook (n 18) 335–37; Garvey (n 37) 483–84; Schuck (n 34) 251. In particular, the definition is criticized as being too technical, as unduly focusing on the question of 'persecution', and as failing to accommodate internally displaced persons and new categories of refugees, such as those fleeing the effects of climate change. It is impossible, however, to believe that the definition in the Refugee Convention could be widened to include all forcibly displaced persons (assuming this to be desirable) largely because States would not accept the obligation of *non-refoulement* in relation to such a vastly expanded class of people. And, in fact, advocates fear that any renegotiation of the Convention would result in a weakening of the level of protection: Koser (n 35) 4.

¹⁸⁸ Freedman (n 188) 572–73; Cook (n 18) 336; Arulanantham (n 81) 16; Luke T Lee, 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis?' (1996) 9 *Journal of Refugee Studies* 27; Barnett (n 188) 252–53.

¹⁸⁹ For whom some have proposed a new convention: see Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349; Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 *Law & Policy* 502. But see Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty Is *Not* the Answer' (2011) 23 *International Journal of Refugee Law* 1.

forum for the discussion and generation of new and innovative ideas. For these reasons, it is likely to lead to a more equitable sharing of the responsibility for the world's refugees, as well as an increase in the overall level of protection and the number and quality of durable solutions available.

I do not suggest that my proposal would lead to a complete resolution of all refugee problems. Clearly it would not. But, as the experience of international environmental lawyers shows, the framework convention has a strong track record as an effective tool to address collective action problems. Furthermore, the perfect cannot be allowed to be the enemy of the good, and any opportunity to improve international cooperation and coordination when it comes to sharing the responsibility for providing refugee protection is worth pursuing.

7. CONCLUSION

As the 1967 Protocol relating to the Status of Refugees turns 50, it is right to celebrate its achievements. This article has conceived of the Protocol as the vital second link in the international refugee regime which removed the temporal and geographical limitations from the 1951 Refugee Convention and thus recognized that all people meeting the refugee definition are entitled to protection, regardless of when or where their persecution occurred.

As this article has argued, however, the international refugee protection regime is in need of a new, third link. The disproportionate responsibility for the protection of Syrian refugees being shouldered by Turkey, Lebanon, and Jordan is but one illustration of the fact that the regime will not be complete until it includes a mechanism for equitably sharing that responsibility.

In this article, I have suggested that a tool developed by international environmental lawyers to deal with collective action problems – the framework convention – could be that third link. This approach would avoid the pitfalls of previous proposals for change that either ask too little or too much of States. As with other framework conventions, it would have low barriers to entry so as to encourage participation, but would nonetheless set in motion a process for the incremental development of a regime for the equitable sharing of the responsibility for providing protection and durable solutions to refugees.

As outlined above, the proposed Framework Convention would have six key elements: (i) an existence independent of the 1951 Convention and 1967 Protocol so as to keep those treaties intact and to allow non-parties to join the Framework Convention; (ii) clearly stated and ambitious objectives and principles; (iii) a lean institutional structure; (iv) regular meetings of the conference of the parties, in which States would indicate the contribution to refugee protection they were willing to make; (v) a way for non-parties – including sub-State entities and non-State actors – to participate and contribute; and (vi) a forum for discussions to deepen, with time, international cooperation on refugee responsibility sharing. This approach would reorient States towards a process for solutions by establishing an inclusive, principled, and comprehensive framework for an integrated approach to refugee responsibility sharing.

Images of drowning refugees – especially that of three-year-old Aylan Kurdi – and the crossing of the Mediterranean by more than one million people in a single year¹⁹⁰ have drawn the attention of the developed world, possibly briefly, to the failure of the current refugee protection regime to share equitably the responsibility of providing protection and durable solutions. The time is ripe, therefore, for a campaign for lasting change. We cannot afford to return to ‘business as usual’ when the current situation eventually subsides.¹⁹¹

In its 52nd Conclusion on International Protection, UNHCR’s Executive Committee reaffirmed that ‘refugee problems are the concern of the international community and their resolution is dependent on the will and capacity of States to respond in concert and wholeheartedly, in a spirit of true humanitarianism and international solidarity.’¹⁹² A framework convention of the type suggested in this article might just be the best chance that we have of turning this noble sentiment into concerted, coordinated action.

¹⁹⁰ UNHCR (n 15).

¹⁹¹ Hathaway (n 40). See also Guy S Goodwin-Gill, ‘The Politics of Refugee Protection’ (2008) 27 *Refugee Survey Quarterly* 8, 9 (‘The question is, whether the politics of protection at any particular moment best serve the refugee – are humanitarian; or whether they serve primarily other purposes, in which the refugee is merely instrumental; and the way in which the question is framed recognizes that there may be different answers at different times’).

¹⁹² UNHCR (n 21) 52.