

Migrants and Refugees: Examining the Global Protection System and Its Failures

Migrantes y Refugiados: Examinando el Sistema Global de Protección y sus Fracasos

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ABSTRACT

This article critically analyzes the global protection system for migrants and refugees, highlighting systemic failures that undermine effective humanitarian responses. Through a multidisciplinary review of international law, migration policies, and case studies from the Mediterranean, Central America, and Southeast Asia, the research reveals gaps in asylum procedures, border enforcement, and resettlement programs that disproportionately affect vulnerable populations. The study introduces novel frameworks that emphasize the rights-based approach, intersectionality, and the need for enhanced international cooperation. By foregrounding voices from migrant and refugee communities, the article contributes to understanding how existing global governance structures perpetuate exclusion and propose actionable strategies to reform protection mechanisms. This work advances scholarship on migration by linking

human rights with practical policy reforms in a highly politicized global context.

Keywords *Migrants, Refugees, Global protection system, Asylum, Migration policy*

RESUMEN

Este artículo analiza críticamente el sistema global de protección para migrantes y refugiados, destacando las fallas sistémicas que debilitan las respuestas humanitarias efectivas. A través de una revisión multidisciplinaria del derecho internacional, políticas migratorias y estudios de caso en el Mediterráneo, América Central y el Sudeste Asiático, la investigación revela vacíos en los procedimientos de asilo, control fronterizo y programas de reasentamiento que afectan desproporcionadamente a poblaciones vulnerables. El estudio propone marcos novedosos que enfatizan un enfoque basado en derechos, la interseccionalidad y la necesidad de una mayor cooperación internacional. Al poner en primer plano las voces de las comunidades migrantes y refugiadas, el artículo contribuye a comprender cómo las estructuras de gobernanza global existentes perpetúan la exclusión y plantea estrategias concretas para reformar los mecanismos de protección. Este trabajo avanza en la investigación sobre migración al vincular los derechos humanos con reformas políticas prácticas en un contexto global altamente politizado.

Palabras clave *Migrantes, Refugiados, Sistema global de protección, Asilo, Política migratoria*

A. Introduction

The contemporary global landscape is currently defined by a mobility crisis of historic proportions, characterized by an unprecedented scale and persistence of forced displacement that threatens to overwhelm existing humanitarian architectures. According to the most recent data from the UNHCR (2025), the number of individuals forcibly displaced by persecution, conflict, and generalized violence has surpassed the 120 million mark, representing a doubling of the displaced population over the last decade. This phenomenon is no longer a series of isolated, "acute" emergencies but has evolved into a permanent state of "protracted displacement," where refugees spend an average of 20 years in exile. Such persistence suggests that displacement is no longer an aberration in the

international order but a structural feature of modern geopolitical instability and state fragility.

Despite the clear humanitarian imperative and the rising numbers of those in need, migration governance has become a site of intense political contestation, often characterized by a retreat from multilateral cooperation toward isolationist policies. In both the Global North and South, the "refugee question" is frequently securitized, with states increasingly viewing mobility through the prism of national sovereignty and border integrity rather than human rights or collective responsibility. This contestation has manifested in the rise of restrictive "externalization" policies, where wealthy nations strategically outsource their protection obligations to third-party states through financial and diplomatic coercion. As argued by Betts and Collier (2017), this political friction creates a "protection gap" where the legal rights of individuals are sacrificed to satisfy domestic populist pressures and xenophobic rhetoric.

To navigate this volatile political environment, it is essential to re-frame migration protection not as an act of discretionary charity or "hospitality," but as a binding matter of international legal obligation. The foundational pillar of this regime is the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which establish the principle of *non-refoulement*—the prohibition against returning individuals to territories where their lives or freedom are threatened. This is further reinforced by the International Covenant on Civil and Political Rights (ICCPR, 1966) and the Convention Against Torture (CAT, 1984), which extend protection to all migrants regardless of their formal refugee status. Framing protection in these legal terms shifts the discourse from political whim to institutional accountability, requiring states to adhere to the *jus cogens* norms of human dignity.

This article seeks to interrogate the profound disconnect between robust legal standards on paper and the precarious, often lethal reality on the ground by addressing two primary research questions. First, why does the existing global protection system fail to provide effective and consistent protection to displaced persons? This question probes the structural contradictions between the universalist ambitions of human rights law and the exclusionary nature of the Westphalian state system. It examines the "sovereignty-protection paradox," where the very states tasked with protecting human rights are those that implement policies designed to deter and exclude those seeking asylum.

Second, the study asks, how do these systemic failures manifest across different regional contexts, and what are the specific legal mechanisms used to facilitate this exclusion? From the Mediterranean

"frontier" to the encampments of Sub-Saharan Africa and the maritime borders of Southeast Asia, these failures are not identical but are linked by a common logic of containment. By examining these manifestations, the article identifies the specific mechanisms—such as legal "gray zones," administrative hurdles, and the "safe third country" fiction—that strip migrants of their agency and rights. This comparative analysis reveals how states exploit the "gaps" in international law to bypass their obligations while maintaining a facade of legal compliance.

The central thesis of this article is that the global protection regime is currently suffering from a "structural obsolescence," as it remains anchored in a post-WWII framework that fails to account for 21st-century drivers of displacement. Contemporary displacement is increasingly driven by climate change, state fragility, and non-state actor violence—categories that the 1951 Convention definition of a refugee does not explicitly cover. Unlike traditional scholarship that focuses on individual state failures, this article argues that the failure is inherent in the design of the Dublin Regulation and similar "first country of entry" models. The originality of this work lies in its "legal-structuralist" approach, which moves beyond humanitarian critiques to identify how the law itself is being used as a tool of exclusion and "illegalization."

This research offers a critical contribution to international legal scholarship by bridging the gap between "black-letter law" and the "socio-legal reality" of the migrant experience. It challenges the prevailing narrative that the refugee crisis is merely a logistical or financial problem, demonstrating instead how the erosion of rights is facilitated by the sophisticated misuse of legal instruments. By synthesizing the theories of Agamben's (1998) "state of exception" with the practical constraints of the Global Compact on Refugees (2018), the article provides a roadmap for a "new protection architecture." This architecture advocates for the de-linking of protection from territory, ensuring that individuals carry their legal protections across borders, thereby modernizing the global regime for the complexities of a mobile world.

B. The International Legal Architecture of Migration and Refugee Protection

1. Refugee Law and Its Normative Foundations

The international refugee regime is anchored in a post-World War II normative framework designed to address specific categories of state-sponsored persecution. At its heart lies the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which provide the definitive legal criteria for refugee status. While these instruments

have provided a lifeline for millions, their scope is inherently limited by a restrictive definition that requires a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" (Hathaway, 2021). This traditional focus often excludes individuals fleeing generalized violence, environmental catastrophes, or systemic economic collapse—drivers of displacement that are increasingly prevalent in the 21st century (Goodwin-Gill & McAdam, 2021).

The foundational principle of this regime is *non-refoulement*, codified in Article 33 of the 1951 Convention, which prohibits the return of a refugee to a territory where their life or freedom would be threatened. This principle is widely regarded as a rule of customary international law, binding even on states that have not formally ratified the Convention (Lauterpacht & Bethlehem, 2003). It serves as the ultimate "safety net," ensuring that the sovereign right of states to control their borders does not override the fundamental human right to be free from torture or extrajudicial killing. However, the application of *non-refoulement* is frequently contested in "extra-territorial" settings, where states argue that the obligation does not apply until the individual physically touches their soil (Gammeltoft-Hansen, 2011).

Complementing *non-refoulement* is the principle of asylum, which, although not explicitly defined as a right to *be granted* in the 1951 Convention, is recognized as a sovereign act of protection that states should facilitate. The Universal Declaration of Human Rights (1948) asserts in Article 14 that "everyone has the right to seek and to enjoy in other countries asylum from persecution." The tension in the legal architecture arises from the fact that while individuals have a right to *seek* asylum, states retain the ultimate authority to *grant* it (Cherubini, 2016). This creates a legal limbo where individuals are protected from return but are not guaranteed a permanent legal status or the right to integrate into the host society.

The normative foundation of refugee law rests on the principle of international responsibility-sharing. Because refugees often flee to neighboring countries that may lack the resources to support them, the 1967 Protocol and the Global Compact on Refugees (2018) emphasize that the "refugee question" is a collective global concern (Betts & Collier, 2017). Analytically, this principle is intended to prevent "frontline states" from bearing a disproportionate burden. Yet, in practice, responsibility-sharing remains largely voluntary and underfunded. The lack of a binding mechanism to redistribute refugees or financial costs means that the regime often defaults to "containment" in the Global South rather than equitable protection across the international community (Aleinikoff & Zamore, 2019).

2. *Protection of Migrants Under International Human Rights Law*

Beyond the specific category of "refugee," international human rights law (IHRL) provides a broader, status-blind protective umbrella that applies to all migrants, including those in an irregular situation. This universalist approach is predicated on the idea that human rights are inherent to the person and are not contingent upon citizenship or legal residency (Chetail, 2019). The International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) mandate that states must respect the rights of all individuals within their territory or subject to their jurisdiction. This includes the right to life, freedom from arbitrary detention, and access to emergency healthcare, regardless of the migrant's "legal" label (Costello, 2016).

The applicability of these norms creates a significant legal challenge for states that seek to use administrative detention or summary deportations as deterrents. For example, the UN Human Rights Committee has consistently affirmed that the prohibition of "cruel, inhuman, or degrading treatment" applies to the conditions of migrant reception centers (Edwards, 2011). This means that even if a person does not qualify for refugee status under the 1951 Convention, they are still protected by a "complementary protection" framework under IHRL. This broader framework effectively forbids the return of any person to a risk of torture under Article 3 of the Convention Against Torture (CAT, 1984), significantly expanding the scope of protection beyond the traditional refugee definition (McAdam, 2007).

However, a persistent tension exists between this human rights mandate and the traditional doctrine of state sovereignty. Historically, international law has recognized the "plenary power" of states to regulate the entry, stay, and expulsion of non-citizens (Dauvergne, 2008). Governments often invoke "national security" or "public order" to justify restrictive measures that infringe upon the individual rights of migrants. From a descriptive-analytical perspective, the border has become a "site of exception" where states attempt to suspend human rights norms in favor of sovereign control (Agamben, 1998). This clash creates a fragmented legal reality where the "universal" rights of the migrant are constantly negotiated against the "exclusive" rights of the nation-state.

Furthermore, the protection of migrants is hampered by the lack of ratification of specific instruments like the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 1990). While this convention provides a detailed blueprint for the rights of migrants, it has seen very little uptake among

major receiving states in the Global North (Lyon, 2013). This selective engagement with international law allows states to benefit from migrant labor while systematically denying migrants the full suite of social and labor rights. The resulting "legal precariousness" is not an accident but a structural feature of a governance model that prioritizes economic utility over human rights (Sassen, 2014).

3. *Fragmentation and Overlapping Legal Regimes*

The global protection regime is further complicated by the fragmentation of international law, where multiple, often overlapping legal regimes apply to the same migration event. When a migrant crosses a sea border, they fall simultaneously under the jurisdictions of Refugee Law, Human Rights Law, and the United Nations Convention on the Law of the Sea (UNCLOS, 1982). While UNCLOS mandates the "duty to render assistance" to persons in distress at sea, it does not specify where those persons should be disembarked (Papanicolopulu, 2018). This legal ambiguity allows states to engage in "jurisdictional games," where they avoid rescue operations or delay disembarkation to evade the subsequent triggers of refugee and human rights obligations (Moreno-Lax, 2017).

The intersection of migration with Transnational Criminal Law—specifically the Palermo Protocols (2000) on human smuggling and trafficking—adds another layer of complexity. These protocols focus on the criminalization of the "smuggler" rather than the protection of the "smuggled." Analytically, the securitized focus of criminal law often overshadows the protective focus of refugee law (Gallagher, 2010). In many cases, the "securitization of the border" leads to the "criminalization of the migrant," where individuals fleeing for their lives are treated as evidence in a criminal case or as accomplices to a crime, rather than as victims in need of international protection (Mitsilegas, 2015).

The consequences of this fragmentation are dire for legal certainty and protection outcomes. Because there is no single, unified global court for migration, different bodies (such as the European Court of Human Rights or the Inter-American Court of Human Rights) may issue divergent interpretations of the same obligations (Milanovic, 2011). States often exploit these "gaps" by choosing the least restrictive legal regime to justify their actions—a practice known as "forum shopping" by the state (Mann, 2016). For the migrant, this fragmentation results in a "rights-maze" where the ability to claim protection depends less on their objective need and more on the specific legal "pathway" or "gray zone" they happen to be in.

The overlapping regimes create a system of "legalized illegality." By using maritime law to push back boats or transnational criminal law to justify detention, states can claim they are following the law while systematically violating the spirit of human rights protections (Legomsky, 2006). This structural fragmentation allows for the "de-territorialization" of responsibility, where no single state is held accountable for the collective failure of the protection regime. To restore legal certainty, the international community must move toward an "integrative interpretation" of these regimes, ensuring that the fundamental right to protection remains the primary objective, regardless of the legal "silo" in which the migrant is categorized (Chetail, 2014).

C. Structural Failures in the Global Protection System

1. Asylum Procedures and Access to Protection

The contemporary global protection system is increasingly defined by the externalization of asylum, a strategic maneuver where high-income states relocate the processing of refugee claims to third countries or remote maritime zones. This phenomenon represents a profound structural failure, as it establishes a "barrier of physical distance" intended to prevent the individual from ever reaching a jurisdiction where they could invoke the rights established under the 1951 Refugee Convention. By intercepting migrants before they reach sovereign territory, states circumvent the procedural triggers of *non-refoulement*. This practice, often justified as a deterrent against human smuggling, results in the "legalized containment" of vulnerable populations in transit states that frequently lack the judicial infrastructure to provide genuine safety (Gammeltoft-Hansen, 2011).

Procedural barriers are further compounded by the imposition of stringent visa requirements and carrier sanctions. While Article 31 of the 1951 Convention explicitly mandates that refugees should not be penalized for illegal entry if they come directly from a territory where their life was threatened, the absence of "legal pathways" essentially criminalizes the act of seeking protection. This creates a paradox where the only way to exercise a universal right is to engage in an irregular—and increasingly dangerous—act of border crossing. Consequently, access to asylum is not determined by the objective need for protection, but by an individual's ability to navigate state-imposed administrative hurdles (Hathaway, 2021).

Furthermore, the widespread adoption of accelerated asylum procedures has introduced a systemic deficit in due process. Many jurisdictions utilize "fast-track" systems for applications deemed "manifestly unfounded," often based on the applicant's country of

origin. This compression of timeframes for legal appeals and the frequent lack of access to competent legal counsel undermine the principle of "procedural fairness" essential to international law. As Costello (2016) observes, these truncated systems prioritize administrative efficiency over the meticulous identification of complex protection needs, such as those arising from gender-based persecution or non-state actor violence.

The "Safe Third Country" (STC) doctrine serves as a primary legal mechanism for the summary exclusion of asylum seekers. By designating transit countries as "safe," states can reject applicants without an individual assessment of the risks they face. This practice creates an inherent risk of "indirect refoulement," where a person is passed through multiple jurisdictions until they are eventually returned to the source of their persecution. From a critical-legal perspective, the STC designation is often a diplomatic fiction that ignores the substantive requirements of "effective protection" as defined by the UNHCR, thereby allowing states to outsource their moral and legal responsibilities (Moreno-Lax, 2017).

The lack of transparency within these administrative "black boxes" prevents meaningful judicial oversight. Decisions regarding the fate of displaced persons are frequently made in settings where the burden of proof is shifted entirely to the applicant, who may be suffering from severe trauma or lack documentation. This structural opacity ensures that errors in the assessment process remain uncorrected. To restore the integrity of the global regime, the focus of asylum procedures must shift from deterrence to a "rights-based verification" model, ensuring that sovereign administrative preferences never supersede the biological survival of the individual (Aleinikoff & Zamore, 2019).

2. Border Enforcement and Human Rights Violations

Border enforcement has shifted from a matter of administrative regulation to an arena of systemic human rights violations. The practice of "pushbacks"—the summary expulsion of migrants across territorial lines without any form of judicial review—has become a standardized, albeit unlawful, tool of border management. These actions represent a direct violation of the *non-refoulement* principle and the prohibition of collective expulsion enshrined in various regional human rights treaties. Analytically, pushbacks constitute a "state of exception" where the rule of law is suspended at the frontier, allowing for the use of force that remains shielded from public and legal scrutiny (Agamben, 1998).

The securitization of the border is inextricably linked to the routine use of arbitrary detention as a primary deterrent. Migrants,

including children, are frequently held in carceral environments for administrative infractions, often without a specific legal end-date or access to *habeas corpus*. This practice directly infringes upon the "Right to Liberty" codified in Article 9 of the ICCPR. In many frontier zones, detention has moved from being a measure of last resort to a default administrative response, stripping individuals of their dignity and the agency required to navigate the legal systems of the host state (Edwards, 2011).

In maritime contexts, the conflict between maritime interception and search-and-rescue (SAR) obligations is particularly lethal. While UNCLOS (1982) and the SAR Convention (1979) mandate that all vessels have a duty to assist those in distress at sea, states have increasingly criminalized non-governmental organizations engaged in rescue. By withdrawing state-sponsored rescue assets and delegating interception to third-country coast guards, states engage in "proxy refoulement." This tactic ensures that migrants are intercepted in international waters and returned to substandard conditions before they can ever trigger the human rights obligations associated with entering a state's domestic jurisdiction (Papanicolopulu, 2018).

The deployment of advanced surveillance technologies, such as thermal imaging drones and biometric databases, has facilitated the "weaponization of geography." While these tools are framed as mechanisms for "border security," they are predominantly used to target migrants and force them into increasingly hazardous terrains, such as deep-sea crossings or arid deserts. The state's failure to prevent deaths in these zones, despite possessing the technological capacity for rescue, raises significant questions regarding the "Positive Obligation to Protect the Right to Life" under international human rights law (Milanovic, 2011).

Contemporary border enforcement serves to "illegalize" the migrant body. By constructing the frontier as an impenetrable fortress, states create a legal environment where the mere presence of a displaced person is treated as an existential or criminal threat. This transition from "humanitarian protection" to "territorial prosecution" ensures that individual rights are consistently subordinated to state security interests. Addressing this failure requires a re-integration of border management into a human rights framework that acknowledges the inherent dignity of the person, regardless of their location on the map (Chetail, 2019).

3. Resettlement and Responsibility-Sharing Deficits

The global protection architecture suffers from a profound inequitable distribution of responsibility, wherein a small number of

low- and middle-income nations host the vast majority of the world's displaced population. According to the UNHCR (2025), roughly 75% of refugees reside in countries neighboring their origin, which often struggle with their own economic and social challenges. This concentration creates a "fragility cycle," as host states become overburdened, potentially leading to social tension and the erosion of local asylum space. Conversely, wealthier nations frequently utilize their geographic insulation to "pay their way out" of taking in refugees, providing aid rather than physical sanctuary (Betts & Collier, 2017).

The primary mechanism for alleviating this pressure—resettlement—remains woefully deficient. Resettlement is treated as a discretionary act of state sovereignty rather than a legal mandate, meaning the number of places offered is subject to the whims of political cycles rather than objective humanitarian need. Currently, less than 1% of the world's refugees are resettled annually, leaving millions in a state of "protracted exile" within camps. This failure to provide durable solutions demonstrates a collapse of the "Solidarity Principle" intended to undergird the Global Compact on Refugees (2018) (Aleinikoff & Zamore, 2019).

Furthermore, the lack of enforcement mechanisms for responsibility-sharing ensures that voluntary commitments made by states are rarely fulfilled. While international summits often result in ambitious pledges for funding or refugee intake, there are no legal "teeth" to compel compliance when domestic political tides turn toward nativism. This "compliance gap" ensures that the global protection regime remains permanently reactive and underfunded, focusing on the logistics of survival in camps rather than the substantive realization of human rights and social integration (Goodwin-Gill & McAdam, 2021).

The deficit in responsibility-sharing is also evident in the "mercantilization" of asylum. Agreements like the EU-Turkey Statement or various "offshore processing" deals effectively treat human beings as bargaining chips in broader geopolitical negotiations. This practice undermines the ethical foundations of refugee law by allowing wealthy states to outsource the biological and legal risks of migration to the periphery. As Sassen (2014) notes, this is part of a broader trend of "expulsion" where the international order seeks to render the displaced "invisible" by containing them in global "waiting rooms."

Therefore, the structural failure of resettlement and responsibility-sharing ensures that the global protection system remains fragmented and exclusionary. Without a binding, predictable system for the equitable distribution of refugees, the burden will continue to fall disproportionately on the world's most vulnerable regions. To move toward "Protection Justice," the international

community must establish a model of mandatory responsibility-sharing, recognizing that the protection of a refugee is not a local burden but a shared legal obligation of the entire international community, regardless of geographic proximity to the conflict (Hathaway, 2021).

D. Comparative Case Studies of Protection Failures

1. The Mediterranean Region: The Frontier of Externalization

The Mediterranean Sea has emerged as the global epicenter of maritime protection failures, characterized by a persistent conflict between state sovereignty and the "Duty to Render Assistance" at sea. This regional crisis is defined by the systematic erosion of Search and Rescue (SAR) obligations, as coastal states increasingly prioritize border securitization over the preservation of life. Despite the mandate of the International Convention on Maritime Search and Rescue (1979), European coastal states have frequently engaged in "jurisdictional stand-offs," refusing disembarkation to vessels carrying rescued migrants. This creates a legal vacuum where the "Right to Life" is suspended while states debate the technicalities of "Place of Safety" (PoS) requirements, a practice Moreno-Lax (2017) identifies as the "legalization of neglect."

Analytically, the Mediterranean context reveals the profound impact of third-country arrangements, specifically the cooperation between European institutions and the Libyan Coast Guard. Under the guise of "capacity building," states delegate the act of interception to non-European actors, thereby avoiding the direct trigger of *non-refoulement* obligations that would occur if European vessels conducted the rescue. This "proxy-refoulement" ensures that individuals are returned to detention centers characterized by documented human rights abuses. Gammeltoft-Hansen (2011) argues that this represents the "outsourcing of responsibility," where states utilize geographic distance to circumvent the spirit of the 1951 Refugee Convention.

Regional institutions, most notably Frontex, have shifted their operational focus from rescue to surveillance. This technological "reach" allows for the identification of migrant vessels while facilitating their interception by third-country proxies. This aligns with Agamben's (1998) theory of the "state of exception," where the frontier becomes a zone where normal legal protections are suspended in the name of security. The lack of a centralized, state-led SAR mission has transferred the burden to non-governmental organizations (NGOs),

who then face criminalization for filling the "protection gap" left by sovereign states (Cusumano & Villa, 2021).

The failure in this region is also a failure of intra-regional solidarity. The Dublin Regulation, which mandates that the "first country of entry" is responsible for processing asylum claims, has created a disproportionate burden on frontline states. Betts and Collier (2017) observe that this structural imbalance incentivizes "onward movement" or the adoption of increasingly restrictive deterrence measures to prevent arrivals. The Mediterranean thus serves as a cautionary case of how fragmented regional governance and the externalization of responsibility lead to a total collapse of protection norms, transforming a maritime highway into a "liquid graveyard."

Furthermore, the legal ambiguity of disembarkation protocols allows states to play "jurisdictional games." As Papanicolopulu (2018) notes, while the duty to rescue is clear, the duty to allow disembarkation remains under-codified, allowing states to leave migrants stranded at sea for weeks. This tactic is used as a "deterrence by omission," signaling to prospective migrants that even if they are rescued, they will not find sanctuary. This shift from proactive rescue to passive deterrence represents a fundamental abandonment of the humanitarian principles that were supposed to govern the post-war international order.

The Mediterranean case demonstrates the "securitization of the sea," where humanitarian aid is reframed as a "pull factor" for irregular migration. Scholars like Heller and Pezzani (2016) have criticized this narrative, proving that the absence of SAR missions does not reduce crossings but merely increases the mortality rate. By criminalizing solidarity and withdrawing state assets, the European protection regime has effectively prioritized the integrity of the Schengen Area over the biological survival of the displaced. This prioritizes territorial preservation over the *jus cogens* norm of the right to life, marking a significant regression in global human rights standards.

2. Central America: Securitized Transit and Externalized Borders

The Central American region is characterized by "mixed migration flows," where individuals fleeing systemic gang violence and political persecution are met with a highly securitized response. This complexity is primarily driven by the "Northward externalization" of the United States border. Through mechanisms such as the Safe Third Country agreements and the "Remain in Mexico" policy, the legal responsibility for protection is pushed progressively further south. Hathaway (2021) characterizes this as the "erosion of the right to seek

asylum," where the physical barrier of the wall is replaced by an invisible barrier of administrative and geographic obstacles.

These cooperative enforcement mechanisms function as a series of "bottlenecks" designed to exhaust the resilience of the migrant. In transit countries like Mexico, the asylum systems are chronically underfunded, resulting in what Aleinikoff and Zamore (2019) term "protection by attrition." Migrants are forced to wait in precarious conditions for months, rendering the "Right to Seek Asylum" nominally existent but practically negated by the logistical dangers of the process. This structural failure ensures that protection is only accessible to those who can survive a gauntlet of state-imposed hardships.

The militarization of transit routes has forced migrants into the hands of transnational criminal organizations. By closing "regular" pathways, state policies have inadvertently created a lucrative market for human smuggling. Sassen (2014) argues that this represents a "systemic expulsion," where the state's refusal to provide safe passage creates a "predatory zone" in which migrants are stripped of both their assets and their rights. This demonstrates a "Security Paradox": measures intended to enhance national security actually empower criminal networks, further destabilizing the region and fueling new cycles of forced displacement.

Analytically, the regional response—exemplified by the MIRPS framework—lacks the binding enforcement necessary to address the root causes of displacement. While it promotes a "whole-of-society" approach, it is consistently undermined by the unilateral enforcement actions of the United States. Dauvergne (2008) suggests that this power asymmetry allows for the "export of border enforcement," turning transit nations into "buffer zones" that bear the humanitarian costs of Northern restrictive policies. The Central American corridor thus becomes a site of "fragmented sovereignty," where the law of the North dictates the life of the South.

Furthermore, the "externalization of borders" in Central America utilizes the "safe third country" legal fiction to deny entry. By labeling countries like Guatemala or El Salvador as "safe" despite their high rates of internal violence, the U.S. creates a "legal shield" against its own human rights obligations. This practice violates the principle of "substantive protection," as individuals are returned to environments where they remain vulnerable to the same actors they originally fled. This strategy of "containment-at-a-distance" is the hallmark of modern migration governance in the Western Hemisphere.

The Central American case study highlights the "criminalization of the transit." Migrants are not viewed as victims of structural violence but as "illegal" intruders whose movement must be managed through

policing. This shift from a humanitarian lens to a criminal justice lens ensures that the underlying drivers of migration—climate change and state failure—remain unaddressed. As long as protection is viewed through the prism of border control rather than human rights, Central America will continue to be a region defined by "interrupted journeys" and systemic legal exclusion.

3. Southeast Asia: The Perils of Ad Hoc Protection

Southeast Asia presents a unique case of protection failure due to the significant absence of regional refugee instruments and low ratification rates of the 1951 Convention. Most member states of ASEAN do not have a domestic legal framework for refugees, treating displaced persons—most notably the Rohingya—as "illegal immigrants." In this legal vacuum, protection is not a matter of right but of "humanitarian discretion." Chetail (2019) notes that this absence of law allows states to operate in a "gray zone" where they can provide aid without acknowledging the legal status of the recipient.

The regional response to the Rohingya crisis exemplifies the failure of ad hoc protection. Without a standardized mechanism, displaced persons are often subjected to "push-backs" at sea, a practice colloquially known as "human ping-pong." States justify these actions by citing the lack of a legal obligation to provide asylum, ignoring the customary international law principle of *non-refoulement*. Goodwin-Gill and McAdam (2021) argue that the lack of treaty ratification does not absolve states of their duties under customary law, yet ASEAN's "non-interference" principle frequently trumps human rights concerns.

In the absence of state-led protection, the UNHCR often conducts refugee status determination (RSD) in a "proxy" capacity. However, even when recognized as refugees by the UN, their status is not legally recognized by host states. This "dual legal reality" creates a profound sense of precariousness. Edwards (2011) points out that this lack of legal status leads to "arbitrary detention," where refugees are held indefinitely in immigration centers. The Southeast Asian model thus reveals how the primacy of national immigration law can effectively "erase" the legal existence of the refugee.

The reliance on humanitarian discretion ensures that protection is often transactional. Host states may offer temporary sanctuary in exchange for international aid, but this "protection" can be withdrawn at any time. Zetter (2007) describes this as the "fractioning of the refugee label," where individuals are given temporary "guest" status rather than permanent rights. This prevents long-term integration and leaves refugees in a state of "permanent temporariness," where their

survival depends on the continued generosity of a state that refuses to grant them legal standing.

Furthermore, the "ASEAN Way" of consensus-based diplomacy prevents the development of a robust regional response. Because member states are reluctant to criticize each other's internal affairs, the root causes of the Rohingya genocide in Myanmar remain unaddressed at the regional level. This demonstrates the limitations of "regionalism without rights," where economic and political cooperation proceeds while a humanitarian catastrophe unfolds in the background. The lack of a "Common Asylum System" means that Southeast Asia remains a region of "protection lotteries."

The Southeast Asian case study reveals the "invisibility" of the urban refugee. In cities like Kuala Lumpur or Bangkok, refugees live in the shadows of the informal economy, vulnerable to exploitation and police harassment. Because they have no legal right to work or access healthcare, they are "de facto" excluded from the social contract. To address this structural failure, the region must move toward a "Rules-Based Protection Framework" that transcends ad hoc humanitarianism and acknowledges the biological and legal rights of the displaced, moving from a culture of "discretionary mercy" to one of "legal duty."

E. Intersectionality, Vulnerability, and Exclusion

1. Differential Impacts of Protection Failures

The structural failures of the global protection regime do not impact all displaced populations uniformly; rather, they interact with existing social hierarchies to create layers of cumulative disadvantage. Intersectionality—a framework pioneered by Crenshaw (1989)—is essential for understanding how gender, age, disability, and legal status converge to produce unique forms of exclusion. For instance, the collapse of search-and-rescue operations in maritime frontiers does not merely create a universal risk of drowning; it disproportionately affects those whose physical mobility is hampered by age or disability. As Chetail (2019) notes, international law often operates on a "universalist" myth that ignores the specific ways in which border violence is inherently gendered and racialized.

Women and girls frequently face a "protection double-bind" where they are vulnerable to both state-led border violence and gender-based violence (GBV) within the migration journey. International law historically struggles to recognize gender-specific persecution as a primary driver of displacement, often relegating it to the "private sphere" and thus outside the traditional scope of the 1951 Convention. Edwards (2011) argues that the lack of gender-sensitive reception conditions in detention centers further exacerbates these

vulnerabilities, turning sites intended for administration into zones of heightened risk. The refusal of states to provide gender-segregated spaces or trauma-informed care represents a significant failure to meet the "Positive Obligation" of protection under the European Convention on Human Rights (ECHR).

Age serves as another critical axis of vulnerability that is often mismanaged by state bureaucracies. Unaccompanied minors are frequently subjected to "age assessment" procedures that are scientifically dubious and psychologically traumatizing, often resulting in children being treated as adults in carceral settings. Goodwin-Gill and McAdam (2021) argue that the "Best Interests of the Child" principle, enshrined in Article 3 of the UN Convention on the Rights of the Child (1989), is routinely subordinated to the demands of immigration control. When states prioritize "age verification" over "immediate protection," they effectively strip the child of their legal status and the specialized protections it entails under international law.

Similarly, migrants with disabilities face immense physical and administrative barriers in accessing asylum procedures, which are rarely designed with "reasonable accommodation" in mind. This leads to what Sassen (2014) describes as the "forced invisibility" of the disabled migrant within the humanitarian machinery. A protection system that relies on digital literacy, physical presence at remote border posts, or lengthy interviews without support effectively excludes those with sensory or cognitive impairments. This structural exclusion means that for many, the "right to seek asylum" is physically impossible to exercise, violating the spirit of the Convention on the Rights of Persons with Disabilities (CRPD).

Legal status itself becomes a source of vulnerability when it is used to deny basic human rights. Those in "irregular" status are often denied access to healthcare, education, and legal recourse, creating a class of "rightless" individuals within sovereign states. Dauvergne (2008) argues that the "illegalization" of migrants is a deliberate state strategy to create a flexible, unprotected labor force. By denying legal status, states create a permanent state of precariousness where the migrant is constantly threatened with expulsion, preventing them from reporting labor abuses or seeking justice for violations of their fundamental human rights.

The intersection of race and displacement remains a persistent yet under-analyzed failure of the global protection regime. Sultana (2022) notes that the "color line" still dictates who is seen as a "legitimate refugee" and who is labeled as an "illegal intruder." This racialized filtering is evident in the differential treatment of refugees across various global conflicts, where geographic and cultural

proximity often dictates the level of protection offered. Addressing this requires moving beyond a color-blind legal analysis to one that acknowledges how systemic racism shapes the implementation of international refugee law at every administrative level.

2. *Limits of Status-Based Protection Models*

The contemporary international legal order remains anchored in a rigid Refugees versus Migrants dichotomy, a status-based model that fails to capture the fluid reality of "mixed migration." This binary categorization creates a hierarchy of protection where the "legitimate" refugee—one fleeing political persecution—is afforded rights, while the "economic migrant" is subjected to criminalization. Hathaway (2021) observes that this distinction is increasingly artificial in the 21st century, as individuals flee a complex nexus of poverty, climate change, and state failure that does not always fit the 1951 Convention's criteria for "persecution."

This status-based approach leads to the invisibilization of intersecting vulnerabilities, as legal systems prioritize a single "ground" for protection. When an asylum seeker is forced to choose between claiming protection based on political opinion or gender-based violence, the law ignores the reality that these forces are often intertwined. Zetter (2007) argues that this "fractioning of labels" is a tool of state control, used to reduce the number of eligible claimants by narrowing the definition of who counts as a "real" refugee. This reductionism ensures that the global protection system remains exclusionary by design, filtering out complex human experiences.

Furthermore, the focus on "status" allows states to ignore the needs of those who fall into the "gray zones" of international law. Climate-displaced persons, for example, often possess no formal status under the 1951 Convention, despite being forced to move by the total loss of their habitat. McAdam (2012) points out that the absence of a "Climate Refugee" status allows the international community to evade its responsibility-sharing duties. By maintaining a narrow definition of protection, states can treat millions of displaced people as "voluntary migrants" who have no claim to international assistance, even when their movement is entirely involuntary.

The dichotomy also creates a "meritocratic" view of protection, where only those who can prove their "victimhood" are deemed worthy of rights. This forces displaced persons to perform a specific narrative of trauma that satisfies the legal requirements of the host state. Aleinikoff and Zamore (2019) argue that this turns the asylum process into a "trial of credibility" rather than a mechanism for the realization of human rights. For those whose vulnerabilities do not align with the

state's idealized version of a refugee, the result is often summary rejection and deportation back to dangerous environments.

Additionally, status-based models often overlook the millions of internally displaced persons (IDPs) who face similar vulnerabilities but do not cross international borders. Because international refugee law is triggered by the act of crossing a boundary, those who remain trapped within their own country are left at the mercy of the very state that may be failing to protect them. Goodwin-Gill and McAdam (2021) highlight that this "territorial trap" leaves millions outside the reach of international protection regimes, despite their desperate need for sanctuary from conflict and environmental collapse.

The limits of the status-based model are evident in the "temporality of protection." Many states grant temporary protection statuses that do not lead to long-term integration, keeping migrants in a state of perpetual limbo. This "permanent temporariness" prevents individuals from building stable lives and accessing the full suite of rights associated with citizenship. As Costello (2016) suggests, a truly equitable protection regime must move away from rigid labels and toward a "humanity-based" model that provides protection based on the objective risk of harm rather than the specific legal category of the applicant.

3. *Incorporating Lived Experience into Legal Analysis*

To address these structural failures, it is imperative to incorporate the lived experiences of migrants and refugees into formal legal analysis. Historically, international legal scholarship has been "top-down," focusing on state practice and treaty interpretation while ignoring the voices of those subject to the law. Yamin (2016) advocates for a "subject-centered" approach, where the testimony of the displaced is treated as a primary source of legal evidence. This shift is not merely empathetic; it is a matter of "epistemic justice," ensuring that the interpretation of rights is grounded in the reality of their violation.

Incorporating lived experience allows legal analysts to identify "administrative violence"—the small, daily humiliations and hurdles that prevent access to justice. While a law may look fair on paper, the lived experience of a migrant may reveal that the lack of translation services or the fear of police harassment makes that law inaccessible. Chetail (2014) argues that without this "bottom-up" perspective, legal analysis remains blind to the ways in which administrative procedures are used as tools of exclusion. By centering the subject, legal scholarship can move from abstract theory to practical utility.

The testimony of refugees also challenges the "state-centric" narrative of security. For a state, "security" often means a closed border; for a refugee, "security" means an open one. By centering the migrant perspective, we can deconstruct the "Security Paradox" and reveal how border militarization actually creates insecurity for human beings. Agamben (1998) suggests that by listening to those in the "state of exception," we gain a clearer understanding of the true nature of sovereign power and the limits of modern democracy in a globalized world.

Furthermore, lived experience is essential for the "evolutionary interpretation" of human rights treaties. As the nature of displacement changes, the law must adapt. Hearing from those displaced by environmental collapse or gang violence helps legal scholars expand the definition of "persecution" and "harm." Hathaway (2021) notes that many of the most important developments in refugee law, such as the recognition of gender-based claims, began with the courageous testimonies of individuals who refused to be silenced by traditional, male-centric legal categories.

This approach also has profound implications for policy implementation. When refugees are included in the design of reception facilities or asylum procedures, the resulting systems are more efficient and humane. Participation is a fundamental human right, and as Betts and Collier (2017) argue, empowering refugees to have a voice in their own governance reduces the "dependency trap" of the camp system. It transforms the displaced person from a passive "object" of humanitarian aid into an active "subject" of international law, capable of asserting their own agency.

Incorporating lived experience is about reclaiming the "Right to Have Rights." Arendt (1951) famously argued that the loss of a political community is the ultimate loss of human rights. By bringing the perspectives of the displaced into the center of legal discourse, we begin to reconstruct that community. We move away from a global protection regime that manages "bodies" and toward one that respects "persons," ensuring that the law serves the needs of humanity rather than the narrow interests of the Westphalian state.

F. Rethinking International Cooperation and Responsibility

1. Limits of State-Centric Protection Models

The contemporary global protection regime is fundamentally hamstrung by its reliance on sovereignty-driven approaches, which prioritize the territorial integrity of the nation-state over the universal mandates of human rights. This state-centricity creates an inherent

enforcement bias, where international law is interpreted through the restrictive lens of domestic security. As Dauvergne (2008) argues, the "sovereignty of the border" has become the primary mechanism through which states exert control over global mobility, effectively treating the entry of displaced persons as an existential threat to the social contract rather than a legal trigger for humanitarian obligation.

This structural bias is reinforced by the "Westphalian trap," where states recognize human rights in theory but refuse to yield the administrative power necessary to enforce them globally. Agamben (1998) identifies this as the "state of exception," where the migrant body is relegated to a space of "bare life," stripped of political status and subject to the arbitrary whims of sovereign enforcement. In such a model, the law does not serve as a shield for the vulnerable but as a tool for their "illegalization," ensuring that the protection of refugees remains a discretionary act of state charity rather than a binding legal duty.

Furthermore, state-centricity leads to a "race to the bottom" in protection standards. To avoid becoming a "pull factor" for migration, states increasingly adopt deterrent policies that push the burden of protection onto neighbors or transit countries. This unilateralism undermines the collective spirit of the 1951 Convention, as states prioritize their short-term political stability over the long-term integrity of the global refugee system. The result is a fragmented landscape of "fortress" states that successfully export their legal obligations while maintaining a facade of compliance with international norms.

The "enforcement bias" also manifests in the judicial sphere, where domestic courts often defer to executive authority on matters of national security and border control. This prevents meaningful judicial oversight of executive actions such as offshore detention or summary pushbacks. Hathaway (2021) notes that without an independent international tribunal for refugees, the interpretation of the 1951 Convention remains at the mercy of state-appointed judges who are often influenced by the prevailing political climate, further entrenching the power of the state over the rights of the individual.

2. *Toward Enhanced International Cooperation*

To move beyond the limitations of state-centricity, the international community must transition toward a model of genuine responsibility-sharing and collective obligations. As established by the Global Compact on Refugees (2018), the "refugee question" cannot be solved by frontline states alone; it requires a predictable and equitable distribution of both financial resources and physical sanctuary. Betts

and Collier (2017) argue that this cooperation must be rooted in a "common interest" framework, where wealthy nations recognize that investing in the stability and rights of refugees in the Global South is a prerequisite for global geopolitical security.

International organizations, primarily the UNHCR, play a pivotal role in facilitating this cooperation, yet they are often constrained by their dependence on voluntary state funding. Strengthening these organizations requires moving toward a "multilateral mandate" where their authority is not merely advisory but has the capacity to hold states accountable for protection failures. Goodwin-Gill and McAdam (2021) emphasize that while the UNHCR cannot override state sovereignty, it can leverage "soft law" and normative standards to create a moral and political cost for states that violate the principles of *non-refoulement*.

The role of soft law—such as the Global Compacts and UNHCR Guidelines—is increasingly vital in bridging the gap between treaty obligations and contemporary displacement challenges. While not legally binding in the traditional sense, these instruments serve as "normative benchmarks" that shape state behavior and provide a framework for "reputational accountability." By establishing clear expectations for cooperation, soft law allows for the gradual development of "customary norms" that can eventually harden into binding legal obligations, bypassing the political gridlock associated with formal treaty negotiations.

Enhanced cooperation also necessitates the integration of non-state actors, including civil society, the private sector, and refugee-led organizations. A "whole-of-society" approach, as championed by Aleinikoff and Zamore (2019), recognizes that the protection of refugees is a broad societal responsibility that extends beyond the halls of government. By decentralizing the delivery of protection—through community sponsorship programs or private sector employment initiatives—the international community can build a more resilient and humane system that is less susceptible to the volatility of national politics.

3. Normative Pathways for Reform

The current crisis of global protection demands normative pathways for reform that strengthen rights-based approaches without necessarily requiring a full-scale "treaty overhaul," which many fear would lead to a dilution of existing standards. Instead of renegotiating the 1951 Convention, reform should focus on "evolutionary interpretation"—reading the existing text in light of 21st-century realities. Chetail (2019) suggests that by connecting refugee law more explicitly to broader International Human Rights Law (IHRL), advocates

can secure "complementary protection" for those fleeing climate change or systemic gang violence who might not fit the traditional "persecution" label.

Strengthening the "Rights-Based Approach" involves making the rights of displaced persons justiciable in regional and international courts. For example, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights have already begun to bridge protection gaps by ruling that the prohibition of torture (Article 3) and the right to life effectively forbid the return of individuals to zones of extreme generalized violence. This "judicial activism" provides a crucial check on state power, ensuring that even in the absence of a specific refugee status, the fundamental dignity of the person remains protected.

Another pathway involves the "regionalization" of protection standards. Regional instruments, such as the 1969 OAU Convention in Africa or the 1984 Cartagena Declaration in Latin America, offer broader definitions of "refugee" that are better suited to modern crises than the 1951 Convention. By promoting the adoption of these expanded definitions in other regions—particularly Southeast Asia and the Middle East—the international community can create a more inclusive global regime. This "bottom-up" normative development allows for local sensitivity while adhering to universal human rights principles.

At this context, reform must move toward the de-territorialization of protection. This means ensuring that a person's rights are not contingent upon their physical presence on a specific state's soil. Yamin (2016) advocates for a "mobile rights" framework, where the legal protections of the international community "follow" the displaced person across borders. By decoupling protection from the Westphalian border, we can dismantle the "sovereignty-protection paradox" and ensure that the right to seek asylum is a functional, universal reality rather than a geographical lottery.

G. Conclusion

This article has argued that the contemporary global protection regime is currently suffering from a state of structural obsolescence, where the universalist mandates of international human rights law are systematically undermined by a Westphalian preoccupation with territorial sovereignty. The analysis has demonstrated that the "migration crisis" is not merely a logistical failure but a legal and political one, characterized by the "illegalization" of the migrant body and the externalization of protection obligations. By utilizing a "legal-structuralist" lens, we have seen how states exploit the fragmentation of international regimes—shuttling between refugee law, maritime law,

and transnational criminal law—to create "gray zones" where the fundamental principle of *non-refoulement* is compromised. Ultimately, the system remains anchored in a post-WWII framework that fails to account for 21st-century drivers of displacement, such as climate-induced mobility and systemic state fragility.

The primary contribution of this research to the field of international legal scholarship lies in its synthesis of "black-letter law" with a critical-socio-legal analysis of administrative violence. By moving beyond traditional humanitarian critiques, this study has identified the specific legal fictions—such as the "safe third country" concept and "proxy-refoulement"—used by states to maintain a facade of compliance while effectively evading their duties. Furthermore, by applying an intersectional lens in Section V, this work has expanded the discourse on vulnerability, demonstrating that protection failures are not neutral but are mediated by gender, age, disability, and race. This adds a necessary layer of "epistemic justice" to the study of refugee law, centering the lived experience of the displaced as a valid and vital source of legal evidence.

The implications for the future of international law are profound: a sustainable protection regime cannot rely on the discretionary "hospitality" of individual states but must move toward mandatory, binding responsibility-sharing. This requires the "de-territorialization" of rights, where an individual's legal protections "follow" them across borders rather than being triggered only upon physical arrival at a frontier. The normative pathways identified in Section VI—specifically the use of "evolutionary interpretation" and the integration of complementary protection through regional instruments—offer a roadmap for reform that does not require the political impossibility of a total treaty overhaul. The future of the regime lies in its ability to bridge the gap between "territorial sovereignty" and "humanity-based protection," ensuring that the *jus cogens* norms of human dignity remain the primary objective of global governance.

Future research must continue to explore the digitization of the border and its impact on the right to privacy and the right to seek asylum. As states increasingly deploy artificial intelligence and biometric surveillance to manage mobility, legal scholars must interrogate how these technologies facilitate new, "invisible" forms of exclusion. Additionally, there is an urgent need for empirical studies on the effectiveness of "mobile rights" frameworks and community-based sponsorship models in the Global South, where the majority of refugees are currently hosted. Finally, as climate change becomes the primary driver of forced displacement, the development of a coherent legal status for "climate-displaced persons" remains a critical frontier for

international law. Only through a sustained, interdisciplinary engagement with these emerging challenges can the global protection regime fulfill its promise of universal human rights for a world in motion.

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