Center for Gender & Refugee Studies

We Must Reaffirm not "Reform" the Refugee Convention

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Reform means change designed to improve something. Yet we are in a moment when the notion of "reform" threatens to destroy the Refugee Convention. The dangers are evident in President Trump's demagogic speech to the United Nations General Assembly and the State Department announcing its five principles to "save" asylum. Both follow an Executive Order to review all treaties to which the United States is a party to determine which are contrary to U.S. interests and whether they can be reformed, and to recommend whether the United States should withdraw from any treaties.

The new U.S. principles on asylum, which notably fail to include asylum's fundamental principle of *non-refoulement*, have been denounced by civil society organizations in the United States and elsewhere. The High Commissioner for Refugees has warned that, "In an environment where everything is highly politicized, putting the Refugee Convention and the principle of asylum on the table would be a catastrophic error."

In such an environment, proponents of even the most well-intentioned recommendations must be clear about the implications of their proposals. The Migration Policy Institute (MPI)'s new proposal to reform refugee law may appear at first glance to be a reasonable attempt to address state concerns over migration, but is in fact deeply troubling and ill-advised. MPI calls for a new Protocol to the Refugee Convention to address gaps in the current treaty regime, specifically: 1) rules for onward movement of refugees from safe first countries of asylum; 2) a mechanism to share responsibility in situations of mass displacement; and 3) improved financial burden-sharing.

Before addressing each of these in turn, it is important to note that negotiations on a new Protocol would open up any and all aspects of existing refugee law, not just the gaps. The 1967 Protocol, after all, fundamentally changed the parent Convention and dramatically extended its scope by addressing the gaps of its temporal and geographic limitation. Fear of compromising fundamental principles by re-opening settled law is the reason it has long been taboo to suggest reforming the Convention. Yet, despite acknowledging this, the authors stress that a new Protocol should (somehow) be limited to a targeted set of changes and focus on a narrow set of issues. They assert that negotiators could (somehow) sidestep the need for debate on the core text of the Convention.

Yet there is no indication at all as to how only carefully circumscribed reforms could be accomplished, particularly when, as the authors note, the United States and other governments are contemplating revising or withdrawing from the treaty. The authors merely suggest that any new Protocol would require a great deal of "grown-up diplomacy," surely not a skill that the current U.S. administration is in a position to practice or to reciprocate. Now that the United States has announced its principles for reforming refugee law, the notion of drafting a new Protocol should be a complete nonstarter.

It is also necessary to be clear about what a U.S.-led reform effort could mean for the UN Refugee Agency (UNHCR). While UNHCR should of course be in the lead of any discussions with states about how best they can meet their international protection obligations, it is shocking to suggest in the current political moment that the new High Commissioner, not even chosen yet, could have a "huge win" by steering the process for a new Protocol. It would instead be forcing this unlucky individual to preside over their own institutional demise, along the lines of some current U.S. cabinet members appointed with the clear understanding that they will eviscerate or even shut down their own departments.

But even if the new High Commissioner (somehow) successfully limited a new Protocol to the three issues identified in the proposal, such an undertaking is still not, as the authors assert, the right thing to do.

Instead, such a process would undermine protection, fail to solve the problems identified, and create an enormous drain on resources for an agency already battered by budget cuts. As the authors acknowledge, many of the changes they recommend do not require revisions to international law, namely, more safe pathways, increased pre-entry processing, expanded rights for refugees in host states, more funding from donors, additional regional or bilateral safe third country agreements, more efficient domestic asylum procedures, and more robust return systems.

A brief look at each of MPI's three recommendations illustrates the drawbacks of re-opening the Convention.

Limiting asylum to situations of immediate harm. Here, the proposal seeks to establish a set of rules around onward movement from first safe countries of asylum. Initially, the practice of returns to a safe "third" country meant either the country of first asylum or another country of transit, so that people seeking asylum were sent back to a country where they had been physically present and which the destination state deemed to be safe.

Increasingly, however, countries such the United States and the United Kingdom wish to send asylum seekers to a country where they have never been before and have no ties, such as Rwanda. In current U.S. practice, there is not even a pretense that the third country is safe. These countries may be in the midst of armed conflict, like South Sudan, or struggle with widespread violations of human rights, like Guatemala, and may even imprison asylum seekers without recourse under intolerable conditions, as in El Salvador.

It is curious, then, that the proposal fails to address the recent alarming expansion of the third country concept, which has completely undermined whatever logic it might once have had, and apparently addresses only irregular onward movement from a first or transit country. But even in this limited sense, MPI frames the recommendation as limiting asylum to situations of immediate harm, without recognizing that countries of first asylum or transit may not in fact be safe. This elision eviscerates the principle of *non-refoulement* and undermines the argument that a new Protocol would address only gaps, not core Convention text.

An additional flaw is that a Protocol codifying rules for safe third country agreements will contribute to, not alleviate, the disproportionate share of responsibility for hosting refugees that low- and middle-income countries already bear, by ensuring that wealthy destination countries have a mechanism to transfer even more refugees to them. While suggesting various benefits for which "third" countries could negotiate, the proposal does not acknowledge the real-world economic inequality between countries like the United States and the states that host most refugees, much less its current preferred partners like Eswatini.

The proposal argues that codifying safe third country rules would shrink the space in which organized crime operates. It does not explain how giving states greater leeway to return people seeking asylum would starve criminal networks, but presumably the argument is that they would stay put rather than travel onward. However, it bears repeating that this ignores the glaring reality that many transit countries cannot provide safety. Like all restrictive border measures, it would simply make smuggling services more highly sought-after and trafficking networks more dangerous.

The authors also claim that writing such rules into a new Protocol would help shield states against legal challenges. This is a striking argument, suggesting that legal norms should be diluted to prevent litigation and that the correct response to states violating international law is to change the law, not the behavior of the states. It is also not realistic. Any such rules would have to include protection for refugees, notably an assessment of whether the country is actually safe and is able and willing to process the asylum seeker's claim in a fair and efficient procedure. Reasonable minds may differ on these factual determinations, particularly when the sending government is making the decision and is thus incentivized to overlook potential problems, and disputes will be taken to court.

A blueprint for responding to mass displacement. While rightly pointing out the limitations of the Convention's refugee definition, the proposal is curiously silent on the existing examples of legal frameworks that encompass those displaced for reasons not reflected in the Convention, such as generalized violence. Notably, the Organization of African Unity, the European Union, Latin American countries adhering to the Cartagena Declaration, as well as states accepting their responsibilities to provide protection under the International Covenant on Civil and Political Rights or other international agreements, all provide for a wider scope of protection. Nor is there any explanation of how attempting to universalize these agreements into a new Protocol in this political environment could be done without diluting existing protections.

Increased financial support from donor states to major hosting states. As noted in the proposal, the nonbinding Global Compact on Refugees has not fully lived up to its ambitions. Nevertheless, the proposal suggests that a new binding Protocol could more effectively create targets or incentives for "non-affected" states to provide more financial support to "frontline" states, specifically in the form of safe third country agreements. However, this suggestion fails to account for current realities.

On the one hand, nearly all donor states would likely consider themselves "affected," as evidenced by the desire of their governments to transfer asylum seekers elsewhere. Indeed, the United States has already imposed drastic cuts to UNHCR's budget and to humanitarian assistance more generally, shut down asylum processing at its border, and slashed its resettlement program.

On the other hand, major refugee hosting states are not likely to enter into safe third country agreements which would only increase the number of refugees they host. Notably, none of the states targeted by recent U.S. practice, such as Eswatini, is a major hosting state. It is counterproductive at best to funnel money into smaller states who agree to act as "third" countries to the detriment of the countries actually hosting most of the world's refugees.

It damages the ability of the major hosting countries to create conditions that allow refugees to stay and not feel compelled to move on. It harms efforts to promote voluntary repatriation when people are forcibly transferred to countries far from home. Finally, it undermines the logic of resettlement as a durable solution if asylum is to be limited to situations of immediate harm; the proposal notes that it would be in donor countries' self-interest to engage in more safe third country agreements because it is cheaper for them to support refugees closer to where they are displaced.

There is no doubt that states must both protect refugees and manage migration more effectively. But they must do so on the basis of international law. The proposal argues that "publics" are skeptical of the added value of international law. Yet the problem is not refugee law, it is the cynical, timeworn deployment of xenophobic and racist rhetoric to create fear and undermine democratic institutions. This is the moment to follow the lead of hundreds of civil society organizations around the world in reaffirming the value of international law and refugee protection. A useful place to start would be speaking out against the demonization of desperate people and working toward a more inclusive and rights-based approach to migration governance.

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