Survival Migration: A New Protection Framework

Alexander Betts

The modern refugee regime, created in the aftermath of World War II, provides protection mainly to people who flee individualized persecution or generalized violence. Subsequent to its creation, a range of new drivers of external displacement—particularly related to the interaction of environmental change, livelihood collapse, and state fragility—have emerged that fall outside the framework of the regime. In order to examine institutional responses to these people, this article develops the concept of survival migration, which describes people who have left their country of origin because of an existential threat for which they have no domestic remedy. It examines six case studies of national and international institutional responses to survival migrants from Zimbabwe, Somalia, and the Democratic Republic of Congo (DRC), which fall outside the 1951 Refugee Convention. Based on a conceptual model of regime stretching, the article offers an explanation for variation in the extent to which the existing global regime has adapted to address survival migration in different national contexts. Keywords: survival migration; regime stretching; refugees; Africa; human rights; complementary protection.

IN THE MODERN STATE SYSTEM, THE STATE RETAINS ULTIMATE RESPONSIBILITY for ensuring the human rights of its citizens. Sometimes, the relationship between state and citizen breaks down and states are unable or unwilling to provide the rights of their citizens. The underlying purpose of the refugee regime is to ensure that the international community provides substitute protection for people who flee their country of origin because their own state is unwilling or unable to ensure access to their most fundamental rights.

In the early 1950s, at the inception of the modern refugee regime in the European context, the main reasons for a need for substitute protection were based around individualized persecution. In Africa and Latin America, this has been supplemented by the recognition that generalized violence and public disorder may also necessitate substitute protection. Increasingly, the reasons that sanctuary is needed have changed. Today, the combination of environmental disaster, state fragility, and livelihood failure frequently interact in ways that create a need for protection.

The mass exodus of people from Zimbabwe between 2005 and 2009, with some 2 million entering South Africa alone, represents the most visible recent case of people with an obvious need for international protection, but who have
generally been seen as in a neither–nor position of not being refugees yet not being voluntary, economic migrants. However, this type of situation is not unique. In Haiti, Iraq, North Korea, and Myanmar, for example, significant numbers of people have fled to neighboring countries not because of a well-founded fear of individualized persecution, but more often because of serious deprivations of socioeconomic rights related to the underlying political situation.

In the context of climate change and discussion of “environmental displacement,” there is increasing recognition that new sources of external displacement will require the existing refugee regime to be supplemented in some way to ensure adequate international protection. Most so-called slow-onset environmental displacement, however, is not monocausal, but generally based on the complex interaction of the environment with other factors—notably, livelihoods and state fragility—and it is this broader context in which there is an institutional gap.

Despite emerging recognition of the new drivers of external displacement, states and international institutions generally continue to see the world largely in terms of the economic migrant–refugee dichotomy please keep economic migrant/refugee dichotomy. Either people who cross borders are perceived as falling within the framework of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) or, with few exceptions, they are viewed as being returnable and without protection needs. The UN High Commissioner for Refugees (UNHCR) has begun to talk of “people on the move” and to have a debate about how to protect vulnerable irregular migrants and people externally displaced for reasons that fall outside the scope of the existing refugee regime. However, states and the international community are struggling to develop a coherent response to the new drivers of external displacement.

The concept of survival migration can be defined as “persons outside their country of origin because of an existential threat to which they have no access to a domestic remedy or resolution.” It is intended to reflect the underlying purpose of the refugee regime: to highlight the circumstances under which substitute protection is required, but on a less ethically and legally arbitrary basis than the current refugee regime. In theory, survival migrants have rights under international human rights law, which may, in some cases, amount to a right not to be returned to their country of origin. In practice, however, there is no clear and universal institutional framework for ensuring these rights for those survival migrants who fall outside the scope of the 1951 Refugee Convention.

As a means to examine the broader question of how the new drivers of forced migration challenge the existing international protection regime, this article starts with an analysis of the status quo. Based on my fieldwork, I ask: What, in practice, currently exists in order to protect survival migrants who fall outside the scope of the 1951 Refugee Convention? I empirically examine national and international institutional responses to nonrefugee survival migration within the context of sub-Saharan Africa.
An exploration of this question has significant policy and advocacy implications because it contributes to identifying gaps in the existing institutional and normative framework addressing forced migration. However, it is also driven by a specific intellectual puzzle. The refugee regime was created for a specific era and for specific circumstances. However, subsequently, new drivers of forced migration—environmental disaster, livelihood failure, state fragility—have emerged. This begs the question: Under what conditions does the global regime stretch to meet national and local circumstances that were not originally envisaged by the creators of the regime? And under what conditions does it break down?

This idea of *regime stretching* is important because it highlights how international regimes—as norms, rules, principles, and decisionmaking procedures governing a particular issue area—are not fixed and static entities that exist in abstraction in Geneva or New York as international relations tends to see them. But rather they are dynamic and adaptive, and vary in their local and national manifestations. Sometimes, the norms (in this case, international refugee law) and the organization (in this case, the UNHCR) may stretch to address unforeseen circumstances but, at other times, they may not. The question is: When and why does this happen, and what does this mean in practical terms for whether (and, if so, how) the refugee regime needs to be reformed?

In order to explain variation in the extent to which the existing refugee regime has stretched to meet a set of circumstances unforeseen at the time of its creation, I employ a particular methodology in this article. Based on my primary research, including fieldwork, I examine national and international institutional responses to three populations of survival migrants in six host countries. I look at responses to Zimbabweans in South Africa, Zimbabweans in Botswana, Somalis in Kenya, Somalis in Yemen, Congolese in Tanzania, and Congolese in Angola. I chose the cases for their variation in regime stretching: two represent cases of stretching, two of breakdown, and two of an ad hoc middle through. In order to explain this variation, I draw on a qualitative approach, based mainly around interviews (with policymakers, international organizations, nongovernmental organizations (NGOs), migrants, and refugees).

The article divides into four parts. First, I outline the concept of survival migration. Second, I briefly go through the six case studies of national and international institutional response to nonrefugee survival migration. Third, I offer an explanation for this variation in institutional response. Fourth, I highlight what the analysis means for policy by setting out a range of options for a coherent institutional response to survival migration.

**The Concept of Survival Migration**

To begin with, what do I mean by survival migration? States generally tend to view people who cross international borders as either being 1951 Refugee
Convention refugees or voluntary economic migrants. The idea that people fall between the gaps of this dichotomy is not new, and a range of labels have already been adopted in academic and policy circles to capture this gap: “externally-displaced people,” “people in distress,” “distress migration,” and “vulnerable irregular migrants” have all been used to capture this. Still others have argued that the concept of a refugee simply needs to be interpreted in a more expansive and inclusive way than is currently the case.

Despite the different labels, however, there is a broad consensus that there are a range of new drivers of forced displacement, which mean that people may be outside their country of origin but fall outside of the refugee/voluntary, economic migrant dichotomy. The high-profile debates on the impact of climate change on migration and displacement have drawn attention to the potential gap in the existing institutional framework for such people. In some cases, people displaced outside of their country of origin, but who fall outside the framework of the 1951 Refugee Convention, may need immediate humanitarian support before returning home. In others, they may not be returnable and have an entitlement to temporary or more permanent forms of protection.

In practice, a range of sources of “complementary protection” have emerged to address the gray area between these extremes of voluntary economic migrant and refugee. At the regional level, three are noteworthy. The 1969 Organization of African Unity convention incorporates people fleeing “external aggression, occupation, foreign domination or events seriously disturbing public order.” The 1984 Cartagena Declaration incorporates people “fleeing generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” And the 2004 European Council Asylum Qualification Directive provides subsidiary protection to people fleeing “serious harm,” which consists of: (1) death penalty or execution; or (2) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (3) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Most notably, aspects of international human rights law have been applied to address the protection needs of a range of nonrefugees who may fall outside of the 1951 Refugee Convention, but may be nonreturnable to their country of origin. A range of jurisprudence has emerged, drawing especially on the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the Convention Against Torture (CAT). The most high-profile cases have shown that those who are not includable or are excludable under international refugee law may nevertheless be entitled to international protection if they face, for example, the prospect of torture or cruel, inhuman, and degrading treatment on their return.

However, despite its potential, complementary protection derived from international human rights law remains limited in its scope and application.
First, its jurisprudence up to now is limited to the right to life and torture, and inhuman and degrading treatment. Second, its application remains regional; most jurisprudence has emerged in the ECHR and ACHR regions, having almost no application to the African context, for example. Third, its application to economic and social rights has been limited and so it tends to exclude economic and environmental causes of flight.\textsuperscript{14}

Consequently, significant numbers of people fleeing a combination of environmental disaster, livelihood failure, and state fragility have limited recourse to international protection. The concept of survival migration can be used to capture this, and to highlight the conditions under which a person cannot get access to a fundamental set of rights in his or her country of origin and so (as a last resort) needs to seek those rights in another country.\textsuperscript{15} Survival migration can be fully defined as: “persons who are outside their country of origin because of an existential threat for which they have no access to a domestic remedy or resolution.”

This definition has three elements. First, people are “outside their country of origin.” This is important because it implies that the people have access to the international community and the international community has access to them.\textsuperscript{16} Second, they face “an existential threat.” This need not literally be reduced to the right to life, but includes the core elements of dignity. One way in which it could be grounded is in the concept of “basic rights” developed by Henry Shue and applied to the refugee context by Andrew Shacknove.\textsuperscript{17} A basic right can be defined as a right without which no other right can be enjoyed. There are three kinds of basic rights: basic liberty, basic security, and basic subsistence. At the moment, the refugee definition focuses on basic security and, to some extent, basic liberty but excludes basic subsistence.\textsuperscript{18} Defining an existential threat is obviously complex but no more so than for the same kind of bureaucratic and judicial decisionmaking required in refugee status determination. Third, “access to a domestic remedy or resolution” implies the inability to find a solution within the domestic courts or through an internal flight alternative, making cross-border migration the only viable source of protection.\textsuperscript{19}

To add conceptual clarity, Figure 1 highlights the conceptual relationship of survival migration to refugees and international migration. It is adapted from a diagram presented by the former International Federation of Red Cross and Red Crescent Societies (IFRC) special envoy on migration, Trygve Nordby. For analytical clarity, refugees are survival migrants; but not all survival migrants are refugees; survival migrants are international migrants; but not all international migrants are survival migrants.\textsuperscript{20}

Sources of survival migration are likely to proliferate in the context of climate change and the transmission of the global economic meltdown, for example. Few universally accepted sources of subsidiary protection exist to address the needs of people fleeing for reasons other than political persecution.
However, this in turn begs the question: What do current national and international institutional responses to nonrefugee survival migration look like?

**National and International Institutional Response**

I now turn to the empirical case studies of national and international institutional responses to nonrefugee survival migration in sub-Saharan Africa. My research covers three populations in six host countries: Zimbabweans in South Africa and Botswana, Somalis in Kenya and Yemen, and Congolese in Tanzania and Angola. Although the cases are all slightly different, they are comparable in the only aspect that matters for the purposes of this analysis: they all involve a national and international response to survival migrants who are outside their country of origin for reasons that fall outside the dominant interpretation of the 1951 Refugee Convention. The focus on sub-Saharan Africa means that the findings cannot be generalized, but nevertheless offer a useful and important starting point for exploring responses to survival migration. Table 1 offers a summary of the case studies. In each case, there has been variation in the national and international institutional response to nonrefugee survival migration.

Each national response is summarized under a label. Angola’s response can be characterized as *violation*, with systematic human rights abuses perpetrated against migrants. Tanzania’s response can be characterized as *paradox*—it has become a de facto protector of long-stay survival migrants, but has refused to protect new arrivals. South Africa’s response has been *ad hoc*—there has been an absence of formal status and lack of economic and social rights. Botswana’s response can be characterized as a *dichotomy*, dividing people into migrants or refugees. Kenya’s response can be characterized as *prima*...
facie, with all survival migrants recognized on the face of it, but receiving limited rights. Yemen’s response can be characterized as triage, shifting from prima facie recognition to increasingly exclusionary practices.

The international response has also varied. In Kenya and Tanzania, the UNHCR has covered the gaps. In Angola and Botswana, on the other hand, the UNHCR has been largely absent from protecting nonrefugee survival migrants, and protection has relied on “hidden protection actors” with provincial networks such as the church, Médecins Sans Frontières, or the national Red Cross. In South Africa and Yemen, the international response has been somewhere in between, based on an ad hoc muddle through, with the UNHCR offering some—but incomplete—protection to nonrefugee survival migrants (see Table 1).

**Zimbabweans in South Africa**

The response to Zimbabweans in South Africa can be characterized as ad hoc at best.21 Between 2005 and 2009, large numbers of Zimbabweans fled the country in search of sanctuary. The majority fled to South Africa. It is difficult to estimate the precise number, but the NGO network Consortium for Refugees and Migrants in South Africa (CORMSA) claims it could be anywhere between 1 million and 9 million,22 while South Africa’s Department of Home Affairs (DHA) agrees that there are likely to have been up to 2 million Zimbabweans in the country.23

The modern history of Zimbabwe is highly politicized and there is no single, objective historical account. However, it is clear that, in the words of one South African NGO employee, “most are escaping the economic consequences of the political situation” rather than political persecution per se.24 Following the Lancaster House Agreement between the UK and the Zimbabwe African

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**Table 1 The Protection of Nonrefugee Survival Migrants**

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<thead>
<tr>
<th>Case</th>
<th>National Response</th>
<th>International Response</th>
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<tbody>
<tr>
<td>DRC-Angola</td>
<td><em>Violation:</em> systematic and state-led crimes against humanity</td>
<td>MSF, church, Red Cross</td>
</tr>
<tr>
<td>DRC-Tanzania</td>
<td><em>Paradox:</em> de facto protection of long-stay survival migrants, but exclusion of new arrivals</td>
<td>UNHCR</td>
</tr>
<tr>
<td>Zimbabwe-South Africa</td>
<td><em>Ad hoc:</em> absence of formal status, lack of economic and social rights</td>
<td>MSF, church, NGOs Church</td>
</tr>
<tr>
<td>Zimbabwe-Botswana</td>
<td><em>Dichotomy:</em> refugees–voluntary economic migrants distinction</td>
<td>UNHCR</td>
</tr>
<tr>
<td>Somalia-Kenya</td>
<td><em>Prima facie:</em> recognition alongside refugees, but limited rights to all</td>
<td>UNHCR</td>
</tr>
<tr>
<td>Somalia-Yemen</td>
<td><em>Triage:</em> shift from prima facie toward growing exclusion</td>
<td>Some UNHCR</td>
</tr>
</tbody>
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*Note:* DRC, Democratic Republic of Congo; MSF, Médecins Sans Frontières; UNHCR, UN High Commissioner for Refugees; NGOs, nongovernmental organizations.
National Union (ZANU) in 1980, an agreement was reached to defer land reform provided that the UK government continued to provide development assistance. The agreement came to an end with the election of the Labour government in 1997. This triggered a wave of land invasions, leading to international sanctions, capital flight, and ultimately hyperinflation. Alongside this, declining productivity and drought contributed to famine. Consequently, by the mid-2000s, there were few viable livelihood strategies available for those without access to foreign exchange.  

In accordance with the country’s refugee policy, all Zimbabweans have been given asylum seeker permits pending refugee status determination (RSD). However, given the predominantly economic causes of flight only the approximately 10 percent of people persecuted because of political links to the opposition Movement for Democratic Change were granted refugee status.  

There has been almost no alternative channel beyond the asylum system for Zimbabweans seeking sanctuary. Although a number of reforms were proposed in April 2009, notably a temporary immigration exemption status and a three-month visa waiver for Zimbabweans, these were never implemented. The lack of alternative forms of protection has meant that, despite the situation in the country of origin, 90 percent of Zimbabweans have been liable to be detained and deported.  

In addition to a lack of status, Zimbabweans have had limited access to material assistance—either sites of reception in the border region or in the urban areas to which many have moved. For example, at the border town of Musina, only an ad hoc coalition of NGOs and international organizations has provided limited protection. Until February 2009, the so-called showgrounds in Musina were a de facto camp with squalid, insecure, and violent conditions, and with almost no national or international presence. There, they received limited protection from the government, international organizations, or NGOs. In February 2009, the DHA cleared the showgrounds and, instead, all Zimbabweans were required to move onward to urban areas to obtain asylum seeker permits from one of the country’s six Refugee Reception Offices in order to obtain a six-month asylum seeker permit. After that, Musina became a transit town in which the only available assistance was on small plots of land provided by the church. The only assistance they received came from an ad hoc coalition of NGOs and international organizations. From there, Zimbabweans were quickly moved on to urban areas to get accept the refugee status determination procedures at one of the Refugee Reception Offices.  

Meanwhile, in urban areas, many Zimbabweans were not welcome in the townships since the May 2008 xenophobic violence and were instead forced to live in crime and drug-ridden areas such as Windsor and Hillbrow or to take sanctuary in the visible Central Methodist Church, which in March 2009 housed 3,400 Zimbabweans, including 107 unaccompanied minors, in appalling and unsanitary conditions. The only significant sources of material support have
consequently come from the church, the South African Red Cross, and NGOs such as MSF and Lawyers for Human Rights (LHR). The UNHCR’s role has been nominal, overseeing the asylum system, but remaining on the fringes of debates about how to address those Zimbabweans who fall outside of the 1951 Refugee Convention framework.29

Zimbabweans in Botswana
The response to Zimbabweans in Botswana has been based on a stark dichotomy. In 2009, there were an estimated 40,000 to 100,000 Zimbabweans in Botswana, of whom only around 900 were recognized as refugees. The legal framework is in many ways more rigid than that of South Africa. Asylum seekers are required to remain in detention in Francistown during their RSD process. If they receive recognition, they are entitled to live in the refugee camp in Dukwe from where they can apply for a work permit if and when they find work. However, the majority of Zimbabweans remained outside the asylum system, facing detention and deportation. According to the NGO Ditshwanelo, roundups are generally sporadic, and immigration officials will often tolerate the presence of Zimbabweans for long periods of time knowing that deportation is only likely to lead to migrants coming back to Botswana. However, occasional roundups do take place in large trucks. No NGO or independent agency has the capacity or access to oversee this process.30 Beyond the asylum system, there is little additional legal provision that relates to the situation of people who fall outside of the refugee–voluntary, please keep as is economic migrant dichotomy.31

This dichotomous legal framework in turn changes the nature of the international response to undocumented migrants. Unlike South Africa, where the distribution of asylum seeker permits to all arrivals gives the UNHCR a mandate to at least engage with the question of undocumented Zimbabweans as asylum seekers, no such nexus exists in the context of Botswana. This has made the international response to the exodus even less developed than that in South Africa.32 As the deputy representative of the UN Children’s Fund (UNICEF) said, “When people become refugees, a number of things kick in automatically. But for these undocumented, perhaps economic migrants, it is not clear that we have any clear policies, structures or guidelines.”33 All of the UN agencies in Botswana have effectively been prevented from working with undocumented Zimbabweans who are outside of the refugee framework.

Given this, the Zimbabweans in the country have been living in both rural and urban areas, with a significant proportion based in the Little Harare area of Gaborone. They have mainly had to survive through their own networks. However, many have faced significant degrees of exploitation. According to a recent report published by the Forced Migration Studies Programme at Wits University, many face serious exploitation in domestic work, agricultural labor, and prostitution, and lack access to basic services.34 Health care
services, including antiretrovirals, are unavailable to undocumented migrants.\(^{35}\) Furthermore, the absence of material assistance means that there are no programs for undocumented children.\(^{36}\) There are no reliable figures for the numbers of unaccompanied minors and children among the Zimbabwean populations. However, extrapolating from the proportion of Zimbabwean refugees who are under age 15 would suggest that, based on the most conservative estimate of 40,000 undocumented Zimbabweans, there would be around 3,000 undocumented Zimbabwean children who have no access to protection or services such as education or health care.\(^{37}\)

**Congolese in Angola**

There is a long history of livelihoods migration from the DRC to Angola. However, with the collapse of diamond mines in the southern provinces of Bandundu and Western Kasai, the numbers crossing the border in search of a livelihood appears to have increased over the past decade. Many people who previously would have dug informally for diamonds in the southern provinces of the DRC are now forced to cross into the Lunda Norte region of Angola either to do the same or to find alternative sources of income. In the words of one MSF staff member in Kinshasa, “They have nothing. It’s a survival strategy; they earn less than an average of 10 dollars a month. The motive is hope and despair.”\(^{38}\)

The response of the Angolan government has been brutal. According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), at least 300,000 Congolese have been forcibly deported from the Lunda Norte region of Angola to the DRC in six main waves between 2003 and 2009. The first wave took place in December 2003 and around 20,000 expulsions were recorded in Bandundu and Western Kasai. The second wave (so-called Operation Brillante, linked to the Angolan elections) led to a recorded 80,000 expulsions to Bandundu and Western Kasai. In the third wave in September and October 2006, OCHA was able to record only 230 expulsions, but acknowledges that this was because it was “late on the scene.” The fourth wave in February 2007 involved around 6,000. The fifth wave in July 2007 led to around 33,000 being recorded in Western and Eastern Kasai and Katanga in the context of provincial elections in Lunda Norte. The sixth wave (Operation Crisis) led to around 160,000 recorded expulsions to Western Kasai, Bandundu, and Bas-Congo.\(^{39}\)

The waves have frequently been linked to the provincial and national elections and to Angolan concern about the historical relationship between ethnic Congolese and the role of the Union for the Total Independence of Angola (UNITA) in the Angolan civil war. There has been little documentation of these expulsions by academics, the media, or international organizations. However, in 2007 MSF recorded 100 testimonies from women who had been deported at its mobile clinics. These testimonies highlighted systematic and state-sponsored
rape, torture, and unsterile body cavity searches of those expelled, which were conducted by people who appeared to be acting as agents of the state.\textsuperscript{40}

As one of the few organizations to document the expulsions in detail, MSF has highlighted a pattern to the expulsions. Most of the women were victims of sexual violence, and many others were suffering from dehydration, malnutrition, sleep deprivation, malaria, and HIV-related diseases. However, one of the greatest protection challenges for MSF was that often the waves were small and difficult to monitor, and people dispersed back to their villages in the DRC rapidly.\textsuperscript{41}

The institutional response to the protection needs of these migrants has been extremely limited. On the Angolan side, NGOs like Human Rights Watch have been denied access to the sites of detention and deportation. Meanwhile, there has been limited interest from the government in Kinshasa except in 2009 when Angola expelled Congolese from Cabinda to Bas-Congo. There, the concern related not to human rights per se, but to a wider personal squabble between Eduardo do Santos and Joseph Kabila in the context of Kabila’s rapprochement with Paul Kagame of Rwanda.\textsuperscript{42} The only real sources of protection in the border regions have come from what might be referred to as “networked actors,” such as the church, MSF, and the Red Cross, which have been able to act through local contacts to offer basic assistance. More formal, UN-based, interagency missions have mainly focused on recording numbers and the major international organizations have been largely uninterested in playing a more active protection role. The UNHCR has argued that the issue falls outside of its mandate.\textsuperscript{43} OCHA has argued that it is not a priority compared to other challenges in the DRC.\textsuperscript{44} The International Organization for Migration (IOM) has tried, but failed, to obtain the funding to get involved.\textsuperscript{45}

\textit{Congolese in Tanzania}

The fourth case study relates to Congolese from South Kivu in the Kigoma region of Tanzania. The majority of Congolese in Tanzania are in the Nyarugusu refugee camp and have been in the DRC since the mass influxes of 1996 and 1998. The national and international response to survival migration represents something of a paradox. On the one hand, it is now widely recognized by the government and the UNHCR that there is limited generalized violence or persecution in South Kivu. Consequently, the government has suspended new RSD for the Congolese and it has sought to bring to an end its status as a refugee-hosting country. On the other hand, there is a general acknowledgment that conditions in South Kivu—in terms of livelihoods and social services—are too poor to actively promote return. Hence, there is a situation in which, in the absence of the cessation clause, Tanzania and the UNHCR are de facto protecting nonrefugee survival migrants.

On the one hand, there is an increasing recognition that people who leave South Kivu are not in need of international protection. While the government
initially provided prima facie recognition in the late 1990s, it shifted to individualized RSD. In the words of one representative of the Department of Refugee Affairs, “We reject them if they have socio-economic reasons; any other aside from persecution.”46 In theory then, RSD takes place through interviews coordinated by an ad hoc committee. However, as of September 2009, the Regional Commissioner’s Office in Kigoma has effectively suspended the work of the ad hoc committee and no new RSDs were taking place.47 Furthermore, the UNHCR openly acknowledged that the main problems in South Kivu no longer relate to conflict or generalize violence, but rather to the lack of infrastructure and social service provision.48

On the other hand, however, both the government and the UNHCR have fallen short of implementing the cessation clause and insisting on the return of the Congolese. In contrast to the Burundians, for whom “promoted return” is taking place, the UNHCR and the government are engaging only in “facilitated return” for the Congolese from South Kivu through offering support items and “go and see” opportunities, allowing them the choice to return or to remain. Yet, ultimately, the UNHCR concedes that “the reasons why they left may not exist anymore but the general situation—for example, in health and education—and the constant fear makes me agree that those that stay, have to stay.”49 In that sense, the UNHCR and the government of Tanzania are de facto protecting long-stay nonrefugee survival migrants, but paradoxically declining to offer protection on the same terms to new arrivals.

**Somalis in Kenya**

Following the collapse of the Siad Barre regime in Somalia in 1991, civil war led to the mass exodus of refugees from south and central Somalia into Kenya.50 Kenya, informally after 1991 and through its legislation since 2006, recognized all Somalis as a group on a prima facie basis, without making them go through individualized RSD. In 2006 when it adopted its Refugee Act, Kenya became the only country in Africa with legislation that allows for prima facie recognition on the basis of the Organization of African Unity convention refugee definition.51

In contrast to the other cases, this means that nonrefugee survival migrants from south/and central Somalia have been de facto protected by Kenya. Prima facie recognition has meant that all Somali survival migrants—irrespective of the cause of their flight—have received the same standards of international protection. Even people from Somalia who may not be directly affected by individualized persecution or generalized conflict are still recognized as refugees. Implicitly, this means that those affected by, for example, the economic or environmental consequences of the political situation—rather than by political persecution or conflict per se—nevertheless get access to protection.

The challenge in the case of Kenya, however, has been that although the refugee definition has been inclusive, the standards of protection available to
all Somalis have been extremely minimal. The majority of refugees have been confined within the insecure, arid, and inhuman Dadaab camps close to the Somali border, where there were around 270,000 people at the end of 2009. Despite massive overcrowding, the Kenyan government has refused to allow Dadaab to grow. Nevertheless, unlike the other cases, the UNHCR and other international actors have been in a position to provide material assistance within the camps. Meanwhile, a minority have lived as urban refugees in the Eastleigh estate of Nairobi, where international protection and assistance have remained more limited, but nevertheless available on a more or less inclusive basis.

What is interesting about the Kenyan case for the purpose of this article is that it highlights the only one of the case studies in which the Organization of African Unity convention has been used to address the gap between 1951 Refugee Convention refugees and survival migrants, and provide a more inclusive framework. Yet it simultaneously highlights how inclusivity may have diluted the standards of protection available to all or, at least, is not necessarily synonymous with effective protection.

Somalis in Yemen
In the case of Yemen, an increasingly restrictionist asylum policy has been adopted. As in Kenya, the government previously recognized all Somalis on a prima facie basis. However, with an increasing focus on mixed migration across the Gulf of Aden, there has been a recent shift toward a less tolerant set of policies, with a view to detaining and deporting nonrefugees. In that sense, the approach of Yemen has been a gradual shift toward a process of triage.

Yemen serves as a country of transit for Somalis wanting to go to Saudi Arabia and the Persian Gulf states. Although Yemen lacks national refugee legislation, it has a high-level National Committee for Refugees Affairs (NACRA) and a working-level National Sub-Committee for Refugee Affairs (NASCRA) as government bodies that deal with refugees. Migrants who arrive in Yemen by sea can go to Mafyaa and Ahwar reception centers to access temporary shelter and assistance. There, all Somalis are given travel passes valid for ten days to enable asylum seekers to go to Sana’a to apply for asylum. There, Somalis can register with the UNHCR. All are recognized as prima facie refugees by Yemeni authorities under their group recognition policy provided that they register with UNHCR. Of the 150,000 Somali refugees, only 14,000 Somali refugees live in the Al Kharaz camp, and the remainder live in urban areas in Sana’a and around the Basateen district in Aden, where they receive limited material assistance.

However, besides those who are recognized as refugees, the Ministry of Foreign Affairs estimates that there may be up to an additional 550,000 Somalis in the country. In the context of increasing political concern relating to the start of the civil conflict, Somalis have been detained on the grounds of
their involvement with Al-Qaida or Al Shabaab. The authorities have subsequently developed an increasingly restrictionist approach toward Somalis. There has been a growing debate on introducing RSD for Somalis—as is currently the case for all other nationalities such as Ethiopian asylum seekers. Furthermore, on 18 January 2010, the Yemeni authorities issued a two-month deadline for unregistered Somalis to register with the UNHCR, stating that those who have not registered will be deported. In conclusion, then, the case offers a contrast to the Kenyan response insofar as it represents a gradual shift away from an inclusive approach toward one that increasingly imposes significant restrictions on Somalis.

Explaining Variation in Response
The important analytical question is: How can we explain this variation in institutional response, especially at the international level? In order to explain variation in response, I use the concept of regime stretching. Within international relations, a regime can be defined as the norms, rules, principles, and decisionmaking procedures around which actor expectations converge in a given issue area. The idea that actor expectations and behavior can converge or diverge around the benchmark of a regime has largely been neglected by scholars of international institutions who have viewed regimes as fixed. In practice, though, few old regimes die and regime creation is rare. What happens is that existing regimes adapt or break down when faced with new sets of circumstances. The idea of stretching can be operationalized around the two core elements of a regime: (1) norms; and (2) the international organization, in this case international refugee law and the UNHCR.

Figure 2 illustrates the spectrum of regime stretching. Toward the right of the figure, in Kenya and Tanzania, the refugee regime has stretched to address nonrefugee survival migration. In the middle, there has been an ad hoc muddle through in Yemen and South Africa. Meanwhile, in the case of Botswana and Angola, there has been a protection vacuum.

The obvious null hypothesis to explain this variation would be that the conditions in the country of origin explain the variation. However, this is clearly not a sufficient explanation, given the way in which host countries with the same populations appear at different points on the spectrum. Instead, a tentative
explanation for stretching seems to require the presence of four variables, which are illustrated in Figure 3.

The left column of Figure 3 shows the two elements of the regime—the norms (in this case, international refugee law) and the organization (in this case, the UNHCR). The top row shows the logic of action underlying actor behavior—whether it is based on a “logic of appropriateness” (i.e., action in accordance with what is believed to be normatively correct) or a “logic of consequences” (i.e., action that is based on self-interest and rational cost-benefit decisionmaking).58

In relation to norms, at the level of appropriateness, stretching has required domestic legislation that enables a plausible argument to be made about the application of refugee law to a broader category of people. At the level of consequences, it has required a domestic political interest in stretching. In relation to the organization, at the level of appropriateness it has required that there be a functional spillover from the UNHCR’s core refugee protection mandate to the protection of other survival migrants.59 In other words, there has needed to be a clear link between the UNHCR’s core mandate of refugee protection and stretching into new protection activities. At the level of consequences, it has required the UNHCR’s country representative to have an interest in stretching.

To substantiate this claim, we can go through the variables in turn. In terms of domestic legislation, in Kenya and Tanzania, the national legislation allowed a plausible argument to be made that nonrefugee survival migrants could be protected with the refugee framework. In Kenya, the Refugee Act is the only one in Africa to explicitly include prima facie recognition defined under the Organization of African Unity convention. In Tanzania, the paradox of offering de facto protection to nonrefugee survival migrants has worked through refugee legislation. In contrast, the other cases have lacked applicable domestic legislation. In Yemen, there was a basis for prima facie recognition, but that was revoked. In South Africa, there have been thwarted attempts to

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**Figure 3 Conditions for Regime Stretching**

<table>
<thead>
<tr>
<th>Element of regime</th>
<th>Logic of appropriateness</th>
<th>Logic of consequences</th>
</tr>
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<tbody>
<tr>
<td>Norms</td>
<td>Domestic legislation</td>
<td>Domestic politics</td>
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<tr>
<td>Organization</td>
<td>Functional spillover</td>
<td>Country representation</td>
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create new legislation. In Botswana and Angola, there has been a legislative vacuum.

In terms of domestic politics, Kenya has been favorable to an expanded form of prima facie recognition, based around an encampment policy, in order to reduce the overall costs of protection and to devolve financial responsibility to the international community. Tanzania, meanwhile, has derived political capital from its historically generous role in refugee protection. In contrast, South Africa and Yemen have come under increasing domestic political pressure to limit mixed migration. Meanwhile, in Botswana and Angola, the political pressure for exclusionary policies has been strong.

In terms of functional spillover, the UNHCR role in protecting nonrefugee survival migrants in Kenya and Tanzania has been inextricably linked to its role in refugee protection. In South Africa and Yemen, there has been a more tenuous connection based on “protecting people in the context of mixed flows.” Meanwhile, in Botswana and Angola, there has been no such link to the refugee issue.

In terms of country representation, the national offices of the UNHCR have had different degrees of interest in an expanded role. In my interviews, it is widely acknowledged that the UNHCR’s national offices seek a degree of involvement that legitimizes, but does not overstretch, their existing staff capacity. In Tanzania, for example, the UNHCR has acknowledged that, if the Congolese from South Kivu go home, they will be wrapping up the operation. In South Africa and Botswana, for example, the UNHCR has expressed being “over-stretched” and unwilling to take on greater responsibility.

Reforming the International Protection Regime

So what should be evident from the analysis above is that there has been a significant degree of variation in national and international responses to nonrefugee survival migration. Both national and international institutional responses have been country specific, and led more by politics than by a coherent and clear international normative and legal framework. In theory, survival migrants have rights—which may sometimes include the right to nonrefoulement—under international human rights law. Yet what is evident from the case studies is that, at the moment, the institutional mechanisms to ensure individuals’ access to these rights do not exist.

In order to ensure that all survival migrants get access to their rights, a number of options exist at the normative and institutional level. None of these options for reform necessarily imply the creation of a new or far-reaching institutional framework. Rather, they imply that there are a number of ways in which existing institutions could be made to work better to enable states to collectively fulfill human rights obligations to which they are already committed. The options are derived logically from the idea of how existing normative and
institutional structures can adapt to meet new and emerging challenges. In that sense, they can be applied to both survival migration and also, potentially, other areas in which new challenges highlight institutional shortcomings.

On a normative level, three options for reform are available. Option 1 would be to work within the existing legal framework. The problem with this, however, is that the relevance and application of international human rights law to survival migration is poorly understood and rarely implemented. Option 2 would be to develop a soft law framework based on the consolidation of relevant international human rights law in a single set of guiding principles on survival migration. Such an approach would draw on the precedent of the UN Guiding Principles on Internal Displacement—a soft law framework based on application of international human rights law and international humanitarian law to internally displaced persons (IDPs).\(^6\) As in the IDP case, this might lead to regional hard law treaties (such as the African Union Convention agreed in Kampala in 2009) over time. Option 3 would be an additional protocol to the 1951 Refugee Convention, along the lines of that proposed by Antonio Guterres in his address to the Copenhagen Summit on Climate Change in December 2009.\(^2\) However, this would be problematic and possibly unnecessary. The most realistic and constructive option would therefore be to work within existing norms and simply consolidate them in a single nonbinding soft law document based on the IDP precedent.

On an institutional level, the case studies above highlight that there is a need for a much clearer division of responsibility between existing international institutions for the protection of nonrefugee survival migrants. Five options can be identified, which are options that can generally be considered for the improvement of interagency coordination to address institutional gaps. Option 1 would be to apply the “cluster” approach of the Inter-Agency Standing Committee (IASC) developed in the context of UN humanitarian reform. Option 2 would be to designate responsibility to a single agency (such as the UNHCR or IOM) that might expand its mandate to take responsibility for the protection of survival migrants. Option 3 would be to create a small, streamlined UN agency, along the lines of the UN Joint Programme on AIDS (UNAIDS), on a temporary basis with a mandate to address and coordinate across existing agencies on a clearly defined issue. Option 4 would be to create a special representative of the Secretary-General (SRSG) position that might oversee coordination between existing agencies and advocate on behalf of survival migrants. Option 5 would be to create an issue-based consultative process. At the moment so-called regional consultative processes (RCPs) are conceived on a geographical basis. However, there is no reason that the same model might not be applied to develop global discussion on particular issues, out of which new forms of coordination might emerge.

The obstacles to reform in the area of survival migration will be political. States are often reluctant to make new commitments, especially in the area of
the human rights of migrants. However, in this context, it is worth underscor-
ing two core messages. First, ensuring the protection of survival migrants does
not necessarily need new institutions; it simply requires a commitment to make
existing institutions work better. Second, in the context of climate change and
the related new drivers of forced migration, survival migration will happen any-
way and dealing with it within a clear institutional framework will offer host
and donor states greater guidance, predictability, and international reciprocity.

Conclusion
The concept of survival migration is increasingly important for highlighting a
set of new drivers of external displacement that are inadequately addressed by
the existing international refugee protection regime. While most policy de-
bates are currently sidetracked by an isolated focus on climate change refugees
and environmental displacement, the reality is that the real institutional gap in
the protection regime is broader than this and may be better subsumed under
the notion of survival migration. Most flight that is associated with processes
of slow-onset environmental change is not monocausal, but stems from the
complex interaction of a range of factors, including environmental disaster,
livelihood failure, and state fragility. Furthermore, what matters for any debate
on institutional reform in the context of climate change is not attributing
causality to movement, which is both virtually impossible and also irrelevant,
but rather identifying the sets of rights deprivations within a country of origin
that entitle a person to seek substitute protection in another country. Because
of its focus on rights rather than causes, the notion of survival migration pro-
vides a conceptual lens through which a more meaningful debate on institu-
tional reform can take place.

The case studies I examined in this article demonstrate that, in the sub-
Saharan African context, national and international institutional responses to
nonrefugee survival migration vary dramatically. In some cases, host states
have adopted inclusive policies and legislation that have incorporated all sur-
vival migrants; in other cases, nonrefugee survival migrants have received al-
most no national protection. Similarly, the response of the international refugee
regime has varied. In some cases, the regime that was created at a particular
historical juncture and to address a specific set of circumstances has stretched
to address nonrefugee survival migration. In other cases, however, it has not
stretched, leaving a significant protection void. The notion of regime stretch-
ing highlights that international institutions (like the refugee regime) cannot be
conceived as abstract entities that exist exclusively in Geneva and New York.
Instead, they have national and local manifestations, which often diverge from
the manifestation of the regime at the global level.

Although survival migrants have rights under international human rights
law, the institutional framework to ensure their application remains inadequate.
In situations in which the regime has not stretched beyond its original scope and purpose, it has left gaps that have had significant human consequences. There is thus a need for reform of the existing international refugee protection regime—at a normative and institutional level. A range of options for reform are available and, in this regard, the precedent of the adaptation of the international protection regime in relation to address IDPs is instructive, although not exhaustive of the options. From the options that I outlined in this article, the most straightforward way to address the emerging gap and to ensure protection in the context of survival migration would be the development of a soft law framework based on the consolidation of existing state obligations alongside a much clearer division of responsibility between existing international organizations to respond to the protection needs of nonrefugee survival migrants.

Notes
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5. This term was used, for example, by the UNHCR in the context of the International Conference on Refugees in Central America (CIREFCA) in the 1980s and 1990s.


12. See Conclusion 3 of the 1984 Cartagena Declaration on Refugees.

Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC.

14. Michelle Foster (2009), “Non-refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law,” New Zealand Law Review (forthcoming). The decision in Adam v. Secretary of State for the Home Department (House of Lords) provides a good example of the application of ECHR to cover economic and social rights. In that matter, the House of Lords held that an asylum applicant was subject to inhuman or degrading treatment when he was left without any support from the state because he failed to apply for asylum in the prescribed time period. Lord Bingham held that:

A general public duty to house the homeless or to provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. . . . When does the Secretary of State’s duty . . . arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all the relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life.

15. The idea of survival migration is not entirely new, and has been used in different contexts such as Oded Stark and Edward Taylors’ work on the “new economics of migration,” in which they see migration as part of a household “survival strategy.” However, this article’s application of the concept to consider institutional questions of response to externally displaced people is new. See, for example, Oded Stark and Edward Taylor, “Relative Deprivation and International Migration,” Demography 26, no. 1 (1989): 1–14.


18. Unless one buys into the normative and negative rights violations to distinguish “persecution” from other rights violations, such as generalized violence, then privileging basic security and basic liberty over basic subsistence is an arbitrary delineation. For the counterargument, see Matthew Price, Rethinking Asylum (New York: Cambridge University Press, 2009).

19. It is worth noting that this definition is not necessarily expansive and needs not necessarily imply permanent protection. Rather, it is intended to highlight the situations in which a fundamental set of rights is simply unavailable within the country of origin and can only be found in another country, but in a way that does not arbitrarily exclude certain types of rights violations.


32. Ibid.


35. However, there is currently an effort by some groups, non-UN, who are advocating for the private treatment of HIV-positive migrants, though it is expected that they will have difficulties getting government approval. They want to provide preventing mother-to-child transmission (PMTCT) to all pregnant HIV-positive mothers, legal or illegal. Personal correspondence with Roy Hermann, UNHCR representative to Botswana, personal communication (e-mail) with the author, Botswana, 25 May 2009.

36. Betts interview. “Marcus Betts interview” maybe better to distinguish interviewee from author

37. This is based on UNHCR statistics of the number of refugees and the proportion that are children. However, extrapolation from the refugee population to the undocumented migrant population is not unproblematic because the proportion of children may be higher in the refugee population, whereas undocumented migrants may be more likely to be individuals seeking employment than families.

38. Lame Papys, MSF Belgium, interviewed by the author, Kinshasa, Democratic Republic of Congo, 9 November 2009.


41. Emmanuel Lampaert, medical coordinator, MSF Belgium, interviewed by the author, Kinshasa, Democratic Republic of Congo, 9 November 2009.

42. Ebba Kalondo, freelance journalist, interviewed by the author, Kinshasa, Democratic Republic of Congo, 11 November 2009.
43. Mohamed Toure, assistant regional representative, UNHCR, interviewed by the author, Kinshasa, Democratic Republic of Congo, 10 November 2009.
44. Richard Guerra, head of coordination, OCHA, interviewed by the author, Kinshasa, Democratic Republic of Congo, 12 November 2009.
45. Toure interview.
46. Mr. Chuleha, assistant zonal coordinator, Department of Refugee Affairs, interviewed by the author, Kigoma, Tanzania, 15 September 2009.
47. Hans Hartmark, protection officer, UNHCR, interviewed by the author, Kigoma, Tanzania, 15 September 2009.
48. Mr. Konecko, head of UNHCR Field Office, interviewed by the author, Kasafulu, Tanzania, 16 September 2009.
49. Ibid.
50. See, for example, James Milner, _Refugees, the State, and the Politics of Asylum in Africa_ (Basingstoke, England: Palgrave-Macmillan, 2009).
54. Ibid.
60. Interviews were carried out with UNHCR staff in Botswana, Djibouti, the DRC, Ethiopia, Kenya, South Africa, and Tanzania between March and November 2009.
62. Antonio Guterres’ speech, in which he called for a supplementary agreement or additional protocol to the 1951 Refugee Convention, was documented in “La Distinction Entre Réfugiés et Déplacés est Depassée,” _Le Monde_, 16 December 2009.