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SURVIVAL MIGRATION

In the context of the changing nature of forced displacement, who should have an entitlement to cross an international border and seek asylum? Given that the refugee regime was a product of its time and mainly provides protection to only a narrow group of people fleeing targeted persecution, how can we conceptualize the broader category of people who today cross an international border and are in need of protection because of serious human rights deprivations? If "refugee" is a legal-institutional category defined by state practice, how can we stand apart from that and render visible the situation of the many millions of people crossing borders in failed and fragile states such as Zimbabwe, Democratic Republic of Congo, and Somalia, people who are often in desperate need of protection and yet frequently fall outside the refugee framework? Should these people also be entitled to asylum? In order to address these questions, this chapter sets out the core concept of survival migration on which this book is based. It is intended to serve as both a conceptual category for highlighting the situation of people fleeing desperate situations that fall outside the dominant legal interpretation of who is a refugee, and a normative framework for thinking about who should be entitled to asylum in a changing world.

The Purpose of Refugee Protection

Since the Peace of Westphalia in 1648 divided Europe into clearly bounded religious and administrative units, the nation-state has become the dominant unit

of collective organization. State sovereignty is the main organizing principle in world politics. The legitimacy of this system comes from the belief that states are able to uphold the rights of their citizens. Today this is recognized in the idea that states have ultimate responsibility for ensuring the human rights of their own citizens. By ensuring that everyone in the world has membership in a state that guarantees his or her access to these rights, the state system represents a legitimate and valid way of ensuring human welfare.

Occasionally, however, this state system breaks down and fails to live up to the assumed ideal of a seamless nexus between state, citizen, and territory in which people can live in dignity and get access to their fundamental human rights (Haddad 2008, 47–69). Sometimes states are unable to guarantee the human rights of their own citizens (as in Somalia). This may be due to a lack of state capacity or because of conflict or a serious natural or man-made disaster. In other cases, states are simply unwilling to guarantee the rights of citizens, as when an authoritarian or dictatorial government seizes control of a country (for example, North Korea).

International protection is intended to ensure that even when this kind of malfunction takes place, people can have their fundamental human rights respected (Martin 2010). The idea is contested but generally refers to "all activities aimed at respecting the rights of the individual in accordance with the letter and spirit of all relevant bodies of law, including international humanitarian law, international human rights law, or international refugee law."[1] The basic idea is that when a state fails its citizens, a substitute provider of rights can stand in, and responsibility transfers to the international community or to another state or group of states.[2]

Asylum is part of international protection (Goodwin-Gill and McAdam 2007, 355–417). One of the principal ways in which people in states unable or unwilling to ensure their human rights can access protection is by crossing an international border. In doing so, a person has access to a state that has assumed international obligations, enabling that state to serve as the substitute provider of rights. Asylum is a mechanism for providing international protection insofar as it creates a norm that states will not forcibly return people who are in need of protection—at least until the country of origin is willing and able to resume responsibility for guaranteeing that person's most fundamental human rights.

Using asylum to enable people to access substitute protection serves as the basic logic underlying the international refugee regime. Where a country of origin is unable or unwilling to provide certain entitlements, the refugee regime theoretically presents a uniform and reciprocal basis on which other states identify those people and the rights to which they are entitled. Most fundamentally, it guarantees the right not to be forcibly returned to any state where he or she

will be at risk of persecution. Reflecting its role as a corrective to the inevitable limitations of that system, the refugee regime has evolved in a dialectical relationship with the state system (Haddad 2008). Beginning in 1648, as people fled religious intolerance, revolutions, and state formation, an informal conception of asylum emerged in Europe. With the collapse of European empires following the First World War, a more formalized system was created as part of the League of Nations (Skran 1995). And finally, the modern global refugee regime emerged after the Second World War in order to guarantee that people fleeing desperate situations would henceforth have a right to seek international protection and asylum (Loescher 2001). The refugee regime as we know it was created as a safeguard against the inevitable limitations of the state system, to ensure that even when someone's own state was unwilling or unable to provide most of its citizens' most basic rights, there would be an alternative provider of those rights.

Limitations of the Existing Refugee Framework

The modern refugee regime is a product of its time. Today the regime only partly fulfills its underlying function. It protects people who flee the kinds of situations that required international protection and asylum in Europe in the 1940s and 1950s: targeted persecution by governments and by non-state actors when governments turn a blind eye. But it does very little to ensure that substitute protection is available in the kinds of situations that many people in the developing world flee today.

The modern refugee regime has two core elements: a multilateral treaty (the 1951 Convention on the Status of Refugees) and an international organization, the Office of the United Nations High Commissioner for Refugees (UNHCR). The convention defines who is a refugee and the rights to which people in that category are entitled and hence also the obligations that signatory states have toward refugees on their territory. The core norm within the convention is *non-refoulement*—the idea that states cannot forcibly return a refugee to his or her country of origin and should instead provide sanctuary to that person in the form of asylum, at least until a viable long-term solution can be found. UNHCR's role—as set out in its 1950 statute—has been primarily to oversee and support states' ratification and implementation of the 1951 convention.

This regime was created for a particular era and geographical context. It was designed to protect people who fall into this narrow definition of who is a refugee—as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear unwilling to avail himself of the protection of that country"—a definition that was intended to fit with the circumstances of displacement in postwar Europe.[3] Consequently, the scope of the convention was originally limited to events prior to 1951 and many of the signatory states chose to adopt a geographical limitation on the treaty, effectively confining its initial scope to Europe. Its creators did not anticipate that its obligations would be spread to the rest of the world. In fact, UNHCR's own role was originally intended by the UN General Assembly to be time-limited, in anticipation that the refugee problem in Europe would eventually be resolved.

During the Cold War, however, the refugee regime proved to be relevant and politically expedient for Europe and the United States. It served to discredit Communist regimes by enabling those fleeing from East to West to "vote with their feet." This led states to support an extended mandate for UNHCR and to expand its work. Furthermore, as refugee challenges began to emerge in other parts of the world, the UN General Assembly decided to expand the geographical scope of the convention to the rest of the world through a protocol to the convention in 1967. A treaty created for Europe was suddenly meant to cover the world.

The people who drafted the 1951 convention had envisaged that change would be needed over time. They foresaw a "living" regime, capable of adaptation and interpretation in context (Goodwin-Gill and McAdam 2007, 74). Rather than being indefinitely fixed, the meaning of a refugee was intended by the convention drafters to be something organic that could evolve over time if necessary, through the jurisprudence and decision making of national courts or supplementary international agreements. In different countries and regions, the precise meaning of a refugee therefore varies, and some countries have adopted more open or restrictive interpretations than others. Yet although the definition of a refugee has evolved, it has generally adapted conservatively and slowly. In practice, the dominant interpretation has remained closely aligned to the 1951 convention's focus on persecution. As a result, access to asylum has been decided primarily on whether or not a person has been actively pursued by a malevolent or persecuting government.

The problem with this definition is that it simply ignores many of the drivers of cross-border displacement in most of the developing world. Many people are in exile for reasons that are not reducible to individualized—or even group—persecution, and as a result they are denied access to international protection for reasons that are arguably arbitrary. This is nothing new—the refugee definition has for a long time left out many desperate people. But it is a problem that has renewed salience through growing recognition of new drivers of cross-border displacement, notably the complex interaction of factors such as environmental change, natural disaster, food insecurity, famine and drought, state fragility,

and collapse of livelihoods. All these can contribute to situations in which cross-border movement is the only available recourse and yet they all fall outside the 1951 refugee definition. Put most simply, the existing regime privileges asylum for people fleeing targeted persecution by governments over and above those fleeing other serious human rights deprivations, even where people may suffer the same threshold of underlying rights violations (Foster 2009, 5–20). This arbitrariness has major implications for human rights. It is increasingly acknowledged but has yet to attract a sustained and rigorous debate on what should be done to fill the gap.

States have been gradually trying to fill some of these gaps, but they have been doing so in very particular rather than overarching ways. In practice, the refugee regime has adapted in some geographical contexts to better fit today's circumstances. Sources of "complementary protection" have emerged to address the gray area between the extremes of "voluntary economic migrant" and "refugee" (McAdam 2006). The two main examples are regional normative frameworks and international human rights law treaties. Both, however, have enormous limitations—in terms of geographical scope, normative coverage, and implementation.

First, at the regional level, the 1969 Organization of African Unity (OAU) Convention on Refugee Problems in Africa incorporates people fleeing "external aggression, occupation, foreign domination or events seriously disturbing public order."[4] The 1984 Cartagena Declaration for Latin America incorporates people "fleeing generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[5] The 2004 European Union Asylum Qualification Directive provides subsidiary protection to people fleeing "serious harm," which consists of (a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[6] However, these three supplementary conventions have major limitations, even beyond their confined geographical scope. The African and Latin American conventions, although incorporated in national legislation, are often not applied in practice. The coverage for the potentially broader "events seriously disturbing public order" has almost never been invoked, and UNHCR remains reluctant to use it as a basis for recognition. Meanwhile, the Europe Union directive mainly serves to ensure that people who may not be refugees but face extreme forms of inhuman or degrading treatment are not forcibly returned, rather than to significantly expand the availability of protection to a much broader category of people.

Second, aspects of international human rights law have been applied to address the protection needs of people who may fall outside the 1951 convention

but may be nonreturnable to their country of origin. A range of jurisprudence has emerged, drawing notably 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 found that those who are not covered by 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.[7]

Despite its potential, complementary protection derived from international human rights law remains limited in its scope and application. First, its jurisprudence has been limited to the right to life and to situations in which people will face torture or inhuman and degrading treatment on return. 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 this jurisprudence tends to exclude economic and environmental causes of flight (Foster 2009).[8] While complementary protection, along with jurisprudence by particular states and particular regions, fills some of the gaps, it represents an inadequate response to the scale of the problem.

New Drivers of Displacement

States still generally view people who cross international borders as being 1951 convention refugees or voluntary economic migrants (Richmond 1993). Yet there is growing recognition of new drivers of cross-border displacement. In recent years, UNHCR has begun a debate about the complexities of protection in the context of migration, at different times subsuming the debate under labels such as the "asylum-migration nexus," "mixed migration," and "migration and refugee protection" (Crisp 2008). This debate has partly considered how to protect refugees in the context of wider migratory flows, given that many asylum seekers now use the same routes as other migrants. The same debate has also begun to recognize groups of people in need of asylum and international protection who may fall outside the refugee framework. These new drivers, increasingly recognized in public debates, include environmental change, food insecurity, and state fragility.[9]

However, the current debate on some of the new drivers risks missing the point. Although it is perfectly possible to highlight a range of emerging proximate causes of displacement that are excluded by the current refugee framework, it is important that those emerging causes are interpreted appropriately in relation to the broader question of who should be entitled to asylum. In particular, two problems arise with focusing in isolation on any specific new driver.

First, *attribution*: in many cases it will be challenging to assign movement to a single cause. Migration decisions are complex, and proximate causes of movement will often be hard to isolate. In some cases of acute crisis with sudden onset, the most proximate cause of movement may be discernible, but with more chronic, structural challenges, there is likely to be complex causality based on the interaction of a range of proximate causes. Second, *relevance*: if the aim is to identify who should be entitled to asylum, then isolating a particular cause of movement is unimportant. What should matter for allocating asylum is not identifying and privileging any particular proximate cause of movement but rather the underlying threshold of rights that, when unavailable in the country of origin, necessitate border crossing as a last resort.

Environmental Change

The most widely discussed new driver of displacement is climate change. As the global discussion of climate change has shifted from an exclusive focus on mitigation toward adaptation, it has incorporated a debate on the humanitarian and migration implications.[10] Academics, policymakers, and the media have made suggestions about the impact of environmental change on cross-border displacement, and the creation of so-called climate change refugees or environmentally displaced people. The literature on environmental migration divides between those who make alarmist claims about the migratory implications of climate change (Myers 1993, 1997, 2005; Myers and Kent 1995) and those who are more skeptical about attributing causality for migration directly to environmental factors, let alone climate change (Black 2001; Brown 2008; Castles 2002; Kibreab 1994, 1997; Suhrke 1994). In either case, though, it is clear that rapid-onset and slow-onset environmental change will have human consequences, including for the choices people make in terms of their mobility within states and across international borders.

Nevertheless, in looking at the new drivers of displacement, we must broaden our view beyond just environmental displacement. There are two reasons why it would be a mistake to focus narrowly on environmental displacement: it is rarely possible to attribute cross-border displacement exclusively to an environmental cause, and it is not desirable to allocate access to asylum on the basis of a singular cause of movement.

First, most cross-border displacement connected to environmental change will not be easy to attribute solely to environmental change, let alone climate change. While it may be possible to infer a significant environmental role in extreme cases of "sinking islands" (which will require resettlement) or rapid-onset natural disasters (which are more likely to require in-country humanitarian assistance), the kind of slow-onset environmental change that is likely to result in cross-border displacement will rarely be attributable to a single causal factor. Rather, it will in nearly all cases be mediated through the complex interaction of environmental change with other factors such as livelihoods collapse and state fragility (Betts 2010a; Boano, Zetter, and Morris 2008; Gemenne 2009; Martin 2010; McAdam 2012; Piguet 2008).

Second, and more important, it is arbitrary to allocate asylum based on the underlying causes of movement, whether environmental or otherwise. Instead, it makes more sense to focus not on causes but on the underlying rights that are not available in the country of origin and so can be restituted only in another state—irrespective of what the underlying cause may be. Whether someone's displacement is predominantly attributable to environmental change, state fragility, or livelihoods collapse is unimportant from a human rights perspective. What matters is whether certain sets of fundamental rights are not available in the country of origin.

Food Insecurity

According to the Food and Agricultural Organization (FAO), nearly 1 billion people around the world are chronically hungry due to extreme poverty, and up to 2 billion people lack food security intermittently due to varying degrees of poverty. This frequently contributes to chronic or acute malnutrition, often with significant health consequences. Whether alone or in interaction with other factors such as dictatorship, environmental change, and state fragility, food insecurity can be a significant cause of displacement. Zimbabwe is an example of a country in which famine, drought, sanctions, and political instability have contributed to chronic food insecurity in ways that have impelled large numbers of people to cross international borders in search of livelihood opportunities. In the Horn of Africa, the 2011 famine and drought led more than half a million Somalis to flee their country.

Historically, however, international protection has rarely been provided to people fleeing across borders for reasons predominantly relating to food insecurity or the absence of livelihood opportunities. Refugee protection has been based mainly on protecting people's civil and political rights rather than their economic and social rights (Price 2009). Yet from a human rights law perspective, one can argue that this is an arbitrary distinction because, beyond a certain threshold, those fleeing food insecurity will be equally in need of international protection (Foster 2009). Similarly, from an ethical perspective, those fleeing the absence of basic liberty or basic security cannot be privileged over those fleeing the absence of basic subsistence, since all represent "rights without which it is impossible to enjoy any other rights" (Shue 1980; Shacknove 1985).

This challenge is not a new one, but it is likely to be exacerbated by the interaction of food insecurity and livelihoods collapse, on the one hand, with environmental change and state fragility, on the other. The current delineation of refugee/migrant is based partly on a political/economic distinction in underlying motives, but there are many situations in which large-scale deprivations of economic and social rights—in Zimbabwe, for example—can be understood as economic consequences of an underlying political situation.

State Fragility

In most cases, however, what ultimately determines whether factors such as environmental change and food insecurity—and their complex interaction—necessitate cross-border movement is the quality of governance in a country. Strong governments will have the means to provide domestic remedy or resolution for a whole variety of threats to human security. People will be able to get access to their most fundamental rights without needing to leave the country. In states with weak governance, in which the most fundamental institutions of government have collapsed and neither property rights nor the judiciary function, domestic remedy or resolution may simply be unavailable, and so movement across an international border may be the only means for people to access fundamental rights necessary for survival.

The designation of states as "fragile" or "failed" is often criticized for lacking clarity, encompassing a disparate variety of situations, and being an overused political label that measures states against idealized Western standards of governance (Patrick 2011, 19–21). However, it highlights an emerging trend in weak states in developing countries. Fragility is often measured by a range of indicators of weak governance. The Fund for Peace's Failed State Index, for example, ranks states according to a variety of social, political, and economic indicators, highlighting Somalia, Zimbabwe, Chad, Sudan, and the Democratic Republic of Congo (DRC) as the world's most failed states. Stewart Patrick (2011, 51) ranks Somalia, Afghanistan, the DRC, Iraq, and Burundi as the top five weak states.

Patrick (2011) shows how failed states matter because of the implications they have not only for the welfare of their own citizens but for transnational security. He highlights how fragility correlates strongly with gross human rights abuses and refugee movements (2011, 46). Yet the 1951 Refugee Convention did not envisage state fragility to be a significant cause of external displacement. While the "events seriously disturbing public order" aspect of the OAU Refugee Convention may be argued to cover aspects of state fragility as a cause of cross-border displacement, its patchy use and weak jurisprudence continue to make its application to fragile states ambiguous and unreliable.

Recognizing state fragility as the most important underlying source of new drivers of cross-border displacement is crucial to the future of the refugee protection regime. Ultimately, it will not be factors such as environmental change that drive cross-border displacement and international protection but rather the governance capacity of particular states to domestically respond to those threats.[11] However, state fragility poses a conceptual challenge to the refugee regime. In addition to protecting people fleeing the acts of states against their own populations, the refugee regime must also protect people fleeing the omissions of states, whether due to the unwillingness or the inability to provide for their citizens' most fundamental human rights (Foster 2009; Martin 2010).

Beyond Arbitrary Causality

Recognition of the emergence of new drivers of cross-border displacement poses a dual challenge: to conceptually make sense of contemporary patterns of displacement and to normatively consider the basis on which asylum should be granted. As it stands, debate on how to respond to the emergence of new drivers of displacement is falling into an analytical trap of privileging particular causes of displacement. A central contention of this book is that the allocation of asylum should be based not on privileging particular causes of displacement—whether old or new—but rather on the underlying threshold of human rights, which when not available in the country of origin are available only through crossing an international border. The arbitrary privileging of particular causes of rights deprivation and displacement underlies both the existing refugee regime and current attempts to grapple with the new drivers of displacement.

Weak governance and state fragility are a qualitatively different kind of driver of forced displacement than other causes. Unlike, say, environmental change or food insecurity, state fragility creates the conditions under which wider threats come to be relevant to asylum. Where strong governance exists, people are usually able to seek domestic remedy or resolution for those threats. However, in chronically weak states, with governments that are unable or unwilling to ensure even the most fundamental rights, wider sets of threats may lead to very severe levels of rights deprivation that simply cannot be met without—as a last resort—leaving the country. Weak governance is the filter through which all other sources of rights deprivation beyond persecution do or do not become relevant to asylum.

Yet while there is relative legal precision relating to people fleeing persecution, there is legal imprecision relating to people fleeing deprivations. The 1951 convention offers a relatively unambiguous source of protection to people fleeing persecution. In contrast, sources of protection in international law for those fleeing

rights deprivations are less clearly defined and more contested. This means that people fleeing deprivations rather than persecution, the omissions rather than the acts of states, and humanitarian rather than clearly political causes, are less likely to get access to protection. They may be fleeing the same underlying rights violations, but the different proximate causes will shape the response of host states and international institutions. While international law at least offers some clarity on flight from persecution, the relative legal ambiguity in relation to flight from deprivation means that politics rather than law determines what happens to many desperate people with severe rights deprivations in fragile and failed states.

This recognition opens up the question of whether or not asylum should be available to people fleeing very serious human rights deprivations as well as those fleeing targeted persecution. Is the distinction arbitrary or does it have a valid normative basis? Matthew Price (2009) and James Hathaway (1997) are among the most prominent authors to defend the privileging of persecution as grounds for asylum. Price (2009) argues against widening who should qualify for asylum beyond those fleeing persecution. He suggests that persecution has a particular status because those who are specifically victimized or pursued by their own governments are in a normatively distinct position from those fleeing wider sets of deprivations caused by, for example, poverty or insecurity. His distinction rests on two core claims.

First, he argues that asylum has a particular meaning, being closely related to citizenship and providing surrogate political membership. For Price, people fleeing persecution need a form of membership because of the way in which discriminatory targeting by the state leads to severance of political membership. Price does not deny that other people fleeing other forms of human rights deprivations could still be entitled to assistance from other forms of humanitarian aid including temporary forms of protection and access to territory. Indeed, he is correct to observe that different groups of people fleeing different rights deprivations will obviously have different needs. Of course this is the case; someone fleeing torture will have different needs than someone fleeing a large-scale famine. However, if one conceives of asylum more broadly than Price, not as a form of political membership related to citizenship but simply as access to territory and juridical status on human rights grounds, then the privileged status of persecution over deprivations begins to look rather more arbitrary.

From an individual's perspective, whether one's source of human rights deprivation comes from a persecuting state or another source makes no difference. If one cannot survive or maintain the fundamental conditions of human dignity without leaving a country, then distinguishing between persecution and other causes is normatively meaningless. Whether the fundamental human rights

deprivation comes from acts or omissions by the state does not change the implications it has for an individual's access to rights. The only thing that matters is that a particular threshold of human rights is unavailable in the country of origin and the only means to access them is to cross an international border and seek territorial asylum.

Second, his argument rests on a claim about the nature of severance in the relationship between state and citizen that arises from persecution. Price suggests that persecution represents a particular form of severing of the state-citizen relationship and so—unlike other categories of rights deprivation—requires a form of surrogate political membership. However, this view is based on implicit distinctions between violations and deprivation, acts and omissions, and civil and political and socioeconomic rights. Irrespective of whether a state actually engages in persecution, it may—through inability or unwillingness to positively provide the minimum conditions for life—undermine the assumed relationship between state and citizen. Indeed, if one holds a conception of the state as having positive as well as negative obligations toward its citizens (however minimalist), then temporary or permanent surrogate protection may equally be required for those fleeing serious human rights deprivations for which there are no domestic alternatives.

Yet because weak governance tends to lead to omissions as well as acts, deprivations in addition to violations, and socioeconomic abuses as much as civil and political abuses, many of the sources of the human rights–related reasons for flight fall outside the persecution focus of the 1951 convention. This is an arbitrary distinction because the inability or unwillingness of a state to safeguard certain fundamental human rights can be just as much of a severance of the relationship between citizen and state as persecution. What should matter is not privileging any particular cause of displacement but rather focusing on the particular threshold of human rights which, when unavailable in the country of origin, necessitates substitute protection in another state.

Hathaway (1997) presents a slightly different defense of the persecutory bias of the status quo. His argument is based on the claim that any attempt to expand the entitlement to asylum would risk undermining the refugee regime. Given his observation that states are increasingly reluctant to provide asylum or admit immigrants onto their territory, he argues that it makes sense to safeguard the status quo rather than risk expanding in ways that might undermine protection for all.

There are a number of problems with Hathaway's position. First, it risks confusing "is" with "ought." While criticality requires an element of feasibility, recognizing that something would be politically challenging to achieve is not the same thing as arguing that it is not the right thing to do. Even if Hathaway's preservationist argument is based on an underlying recognition that asylum is a finite commodity and there are limits to how many people states can admit

onto their territory, his argument does not offer a compelling reason why the line should be drawn where it currently is and why persecution should always trump deprivation.

Second, the argument is based on the claim that we already have a legal framework relating to one group but not the other. Yet in reality, people fleeing persecution and people fleeing serious human rights deprivations both have rights under current international law. People fleeing serious rights deprivations have rights under international human rights law, even if they fall outside the framework of international refugee law. While the jurisprudence on the application of international human rights law to *non-refoulement* may be underdeveloped, the human rights that those fleeing deprivations have qua human beings are every bit as much a part of the status quo as international refugee law (Foster 2009).

The Need for a New Concept

It has been argued that the distinction between persecution and other sources of serious human rights deprivations is arbitrary as normative grounds for asylum. There is a strong case for grouping people fleeing persecution and people fleeing serious human rights deprivations under a single label. This leaves us with a choice. We would need either to radically change the scope of the old term—refugee—or to introduce a new term. There are good arguments for expanding the scope of the refugee concept. International refugee law was conceived to be adaptable and has in some jurisdictions begun to expand to include some people fleeing certain forms of rights deprivations other than persecution. There is no logical reason why, over time, jurisprudence could not expand to include all categories of people fleeing the most serious human rights deprivations. However, the reality is that jurisprudence is expanding slowly and the concept of refugee is a legal-institutional category, the boundaries of which are defined by state practice.

This book therefore chooses to adopt a new term for the broader category of people who should have a normative entitlement to asylum based on human rights grounds. It does so in order to render visible a population that is not currently recognized as refugees within the dominant interpretation of a refugee in international law, and yet are outside their country of origin because of a very serious threshold of human rights deprivations. Furthermore, there is an additional logic to introducing a new term if it offers a normative benchmark against which to assess the predominantly legal-institutional category of refugee.

The idea that people fall between the gaps of the dichotomy between refugee and voluntary economic migrant is not new, and a range of labels have already been adopted in academic and policy circles to capture this gap: "externally displaced people,"[12] "people in distress" (Goodwin-Gill 1986), "distress migration" (Collinson 1999), and "vulnerable irregular migrants" (Betts 2010a). Others have argued that the concept of a "refugee" needs to be interpreted in a more expansive and inclusive way than is currently the case (Shacknove 1985). Despite the different labels to describe people who cross borders in broadly difficult situations and who may require some form of protection or assistance, there continues to be a lack of consensus on how to conceptualize those people who cross international borders who have a human rights-based entitlement not to be forcibly returned to their country of origin.

In order to address this conceptual gap, this book develops the concept of "survival migration" 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.[13] Survival migrants can be 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 (Hathaway 2007). Second, they face "an existential threat." This need not be reduced to the literal right to life but includes the core elements of human dignity, and could be grounded either ethically or legally. Third, "access to a domestic remedy or resolution" implies the inability to find a solution in the domestic courts or through an internal alternative, making cross-border migration the only viable source of protection.[14] The point here is that border crossing is a last resort.

The most important element of this definition is the way one conceives of the threshold that defines an existential threat in the country of origin. From an ethical perspective, one way in which it could be grounded is in the concept of "basic rights" developed by Henry Shue (1980). A basic right can be defined as a right without which no other right can be enjoyed. Shue's (1980, 5) main concern in developing basic rights is to identify a nonarbitrary basis on which to prioritize human rights. The idea of basic rights was first applied to the refugee context by Andrew Shacknove (1985) to develop an ethical definition of a refugee distinct from the legal-institutional definition.

In developing basic rights, Shue (1980, 18–19) is attempting to identify what he regards to be the minimum conditions for human dignity and self-respect: basic rights are "the morality of the depths. They specify the line beneath which no one is allowed to sink . . . [they] are everyone's minimum reasonable demands upon the rest of humanity." He grounds the logic of basic rights by arguing along the following lines: (1) Everyone has a right to something; (2) Some things are necessary for enjoying the first thing as a right, whatever the first thing is;

(3) Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right (1980, 31). In other words, basic rights are the basic conditions for anyone to enjoy any other right. For Shue, 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. Shue (1980, 36–40) is able to explain why the distinction between security and subsistence, between positive and negative rights is arbitrary. He explains how very commonly in rights frameworks—such as international refugee law—there is an implicit assumption that the distinction between subsistence rights and security rights is sharp and significant, because the former are positive rights, imposing a correlative obligation on someone else to "do something," whereas the latter are negative nights, simply requiring others to refrain from a particular course of action. As Shue (1980, 37) explains, though, "the moral significance, if any, of the distinction between positive rights and negative rights depends upon the moral significance, if any, of the distinction between action and omission." When they are unpacked, though, he argues that there is no contrast of any moral significance. Security rights can rely on positive correlative duties of others while subsistence rights are equally often the result of human action rather than inaction.

To add conceptual clarity, figure 1 highlights the conceptual relationship of survival migrants to refugees and international migrants. It is adapted from a diagram presented by former International Federation of the Red Cross and Red Crescent Societies (IFRC) Special Envoy on Migration, Trygve Nordby. As we see, refugees are survival migrants, but not all survival migrants are refugees, and survival migrants are international migrants, but not all international migrants are survival migrants.[15]

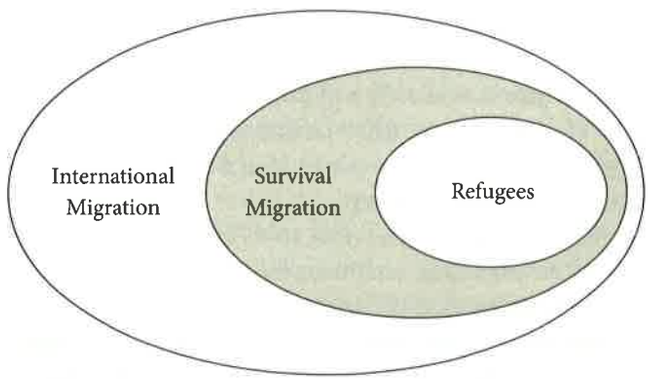

FIGURE 1. The conceptual relationship of survival migration to refugees and international migration.

The population that this book is primarily concerned with is the middle segment of figure 1, survival migrants who fall outside the refugee framework. The inner dividing line in figure 1 cannot be understood as fixed—over either time or space. Exactly where it is drawn changes over time and is subject to significant variation across different states. In theory, given the organic nature of the refugee definition, all survival migrants could be recognized as refugees—either universally or in a specific state. In practice, though, there is a significant global gap and usually some degree of gap in the practice of most states. Usually, as has been argued, the inner circle of refugees is limited to those people fleeing persecution while the middle circle relates to those fleeing other sources of serious human rights deprivations. Nevertheless, there is huge variation and inconsistency in where and how the line is drawn in different states. As the next chapter explains, one of the most interesting questions relates to when and how the refugee regime stretches so that the gap between "refugee" and "survival migration" diminishes or expands.

The second dividing line, between "international migration" and "survival migration" (see figure 1), relates to a very serious threshold of human rights deprivations that necessitate border crossing as a last resort. It is important to emphasize that although the term "survival migration" is more inclusive than "refugee," it is not intended to offer a carte blanche for anyone in a weak or fragile state to seek asylum. Rather, it remains a high threshold based on a threat to an individual or group in which the fundamental conditions of human dignity simply cannot be obtained in their country of origin. On the other hand, the designation of a line between survival migration and other forms of international migration should not be taken to imply that there are no other grounds for admission or that other international migrants do not also have human rights qua human beings. Rather, the distinction is between those who need territorial asylum and those who do not.

Survival migration is therefore intended to be an inclusive protection framework that highlights the range of people who have a human rights–based entitlement not to be returned to their country of origin, irrespective of whether they are refugees and of whether that right derives from international refugee law or international human rights law. The purpose is not to create a new concept for the sake of it, but to give language to an analytically distinct group of people for whom there currently is no widely recognized language. While the category of refugee covers people who are recognized under international refugee law, it is widely recognized that many people who fall outside international refugee law also have an entitlement under international human rights law to not be returned to their country of origin (McAdam 2007). However, there is no widely accepted language to describe the larger group of people who have a human rights–based entitlement to nonreturn, whether or not they are refugees. Hence "survival

migration" is used in order to fill that analytical gap—and to highlight the totality of people who might be considered to have a right to *non-refoulement* because of the absence of rights in their country of origin.

The use of the term "survival migration" is therefore not a neologism for the sake of novelty. Nevertheless, there are a number of possible objections to the concept, which are worth addressing up front.

First, *are there risks in developing new labels and policy categories?* Labeling has real-world effects. When a category of people is created and then used as the basis for bureaucratic decision making, it leads to exclusions and inclusions (Zetter 1991). The danger is that by including some people in a designated category, we exclude others from access to the resulting rights and entitlements. For example, in delineating the category of survival migration and using it as a basis on which to allocate asylum and the right to *non-refoulement*, one might be concerned that, at one end of the spectrum, this could dilute the rights of refugees while further marginalizing the human rights of other migrants at the other end of the spectrum. While this suggestion is not without foundation, two responses can be offered. First, all law and policy require drawing lines that distinguish people with different sets of entitlements and obligations based on their circumstances. It is better to develop frameworks for allocating entitlements that attempt to improve on the status quo than to persevere with old categories that are even more arbitrary. Second, the label itself need not necessarily undermine other categories. There is no inconsistency between highlighting that there is a broader category of people who have a human rights–based entitlement to *non-refoulement* and simultaneously working to uphold the human rights of all migrants.

Second, *why not include people who do not cross a border?* There are two reasons why survival migration focuses exclusively on cross-border displacement, one conceptual and the other institutional. Conceptually, borders matter. When people cross an international border, they have access to the international community, and the international community has access to them. This causes a host country to make a choice to make about whether to return a person to their country of origin or to recognize that person's right not to be returned. Institutionally, we already have an analogous framework for internally displaced persons (IDPs). While the "refugee" label is limited to people fleeing individualized persecution and generalized violence, the "IDP" label—defined with the so-called UN Guiding Principles on Internal Displacement—is much broader, including people who flee domestically because of, for example, the complex interaction of state fragility, livelihoods failure, and environmental change. The institutional gap is for groups of people who cross borders.

Third, *why ground the concept in rights rather than causes?* In much of the political debate on environmental displacement, there is discussion of developing

legal and normative frameworks that are exclusively for people fleeing a particular cause. In contrast, survival migration is based on the underlying rights deprivation that cannot be addressed in the country of origin. This is important because from both an ethical and a human rights law perspective, the underlying cause is arguably irrelevant. To develop a supplementary institutional framework to allocate asylum on the basis of particular causes would simply risk perpetuating further arbitrary exclusions. Rather, it makes more sense to base any criteria for allocating asylum and the right to *non-refoulement* (whether temporary or permanent) on the sets of rights that are unavailable in the country of origin and can be restituted only in another country. Of course, causes are a proxy for underlying rights violations, which can and must be used to identify survival migrants, empirically or institutionally. However, it is the underlying rights that matter and are hence coré to the definition of survival migrants. It is this suggestion to ground the concept in rights rather than causes that makes it more analytically useful and less arbitrary than increasingly common labels such as "cross-border environmental displacement."

Fourth, *could all survival migrants be better described as refugees?* The 1951 convention and other legal instruments relevant to defining the refugee in international law are "living" documents and are subject to reinterpretation and jurisprudence over time (Goodwin-Gill and McAdam 2007, 7–8). This means that the outer boundaries of who is a refugee are never normatively fixed but rather are inherently contested, both over time and across states. From this perspective, one might argue that many survival migrants who are not currently recognized as refugees might nevertheless be argued to be potential refugees. Similarly, some political theorists or social scientists might argue that away from a legal definition of a refugee, survival migrants might fit the vernacular definition of a refugee (Gibney 2004). This is true. However, the reality is that there is a significant group of people who are fleeing a serious threshold of human rights deprivation and yet are outside the dominant interpretation of a refugee within existing state practice. The concept of survival migration serves to draw attention to that gap. It is useful precisely because it highlights the fact that many people whom one might believe to be refugees fall outside the dominant legal interpretation of a refugee.

Fifth, *why use the word "survival"?* For some people, describing this type of movement as survival is problematic because it might be seen as a form of "miserabilism," in which people are portrayed as victims, lacking agency. Two responses can be given to this. First, the label is not as important as the underlying concept, and it could just as easily be described using another label. Second, however, the label is appropriate. Many survival migrants have agency, but they are, by definition, fleeing desperate conditions. The notion of survival thereby

reflects the reality. It is the word that many migrants themselves and the civil society organizations faced with these types of influx have used. Furthermore, the label has begun to be used in advocacy, being recognized as valuable because it makes visible a group of people who arguably have the right to *non-refoulement* under international human rights law, even if they are not refugees.

The next chapter outlines the book's explanatory framework for understanding national and international responses to survival migration. Having developed a conceptual basis on which to distinguish between the legal-institutional category of a refugee and the normative concept of survival migration, the book turns to examine the question of when and why the refugee regime, created to protect people fleeing persecution, stretches (or not) to protect people fleeing the wider set of human rights deprivations that constitute survival migration. In other words, what explains variation in the extent to which the inner line separating refugees and survival migration in figure 1 expands or contracts in different national contexts, and with what consequences?