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From political tool to humanitarian stalemate: a critical appraisal of international refugee law as a global protection mechanism

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FROM POLITICAL TOOL TO HUMANITARIAN STALEMATE:
A CRITICAL APPRAISAL OF INTERNATIONAL REFUGEE LAW
AS A GLOBAL PROTECTION MECHANISM

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By

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ABSTRACT

People migrate for a variety of reasons. Some choose to migrate and others are forced. To cross an international border, they need permission of the host state. The 1951 Refugee Convention creates the refugee as an exceptional category of international migrants that is entitled to international protection. This research seeks to explore whether international refugee law rationally protects vulnerable peoples in the contemporary world. This is done through examining the historical context through which the refugee was created as a legal subject in international law and evaluating the critiques of the current implementation of international refugee law. This thesis argues that the causes of migration from countries of the global south are linked with global inequalities of power and wealth, a condition that the human rights and humanitarian language of the international refugee regime fails to address.

INTRODUCTION

This paper begins with the idea that international refugee law is unhelpful in addressing displacement and migration in contemporary society. International refugee law developed as a reaction to massive displacement at the onset of the twentieth century, as empires were dissolving and new ideological regimes were developing, and when nations were forming and borders were being drawn. The laws and norms that developed in this period were effective for most of the twentieth century, but they only addressed the issue of displacement of Europe.

Currently refugees and asylum seekers represent only 10.5 million[1] of approximately 214 million international migrants.[2] Migration occurs as a result of various reasons including socio-economic conditions (poverty, unemployment, etc.), development projects, environmental disasters and degradation, generalized violence, and conflict, among others. Although there are a variety of reasons that compel a person to migrate, either voluntarily or by force, since 1951 the refugee has been categorized as an exceptional group of international migrants that is entitled to international protection. This exceptional group of international migrants are persons who are outside their country and,

> …owing to 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, is unwilling to avail himself of the protection of that country.[3]

This definition is found in the 1951 Convention relating to the Status of Refugees, and reflects the perceptions of its time with regard to political priorities and causes of forced migration. Although sixty years have passed and the geopolitics and nature of forced migration have changed significantly, the above definition is still largely used to determine which migrants fall into the exceptional category of refugeehood, and thus deserving of international protection.

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[1] This includes 597,300 persons UNHCR considers to be in 'refugee-like' situations, and does not include the some 4.8 million Palestinian refugees who fall under the mandate of the United Nations Works and Relief Agency. See *UNHCR Statistical Yearbook 2010: Trends in Displacement, Protection and Solutions*, 10th ed. (UN High Commissioner for Refugees, December 27, 2011), 6, http://www.unhcr.org/refworld/docid/4f06ecf72.html (accessed March 2, 2012).

[2] International Organization for Migration, "Global Estimate and Trends," IOM, http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en (accessed January, 4 2012).

[3] UN General Assembly, "Convention Relating to the Status of Refugees," *United Nations Treaty Series,* 189 (July 29, 1951): 137,http://www.unhcr.org/refworld/docid/3be01b964.html (accessed December 20, 2011).

Unlike the refugees of the past, today's refugee are no longer white, European, or ideologically significant.[4] In fact the vast majority of refugees and asylum-seekers, are produced from some of the poorest countries in the world, from what will be referred to as the global south.[5]

This paper will utilize dichotomies as a tool to draw on the differential treatment of refugees and other migrants, specifically through the use of the terms 'global north' and 'global south.' Such terms can be problematic as they create ridged geographic distinctions and imply that regions or peoples are homogeneous. In contemporary discourse, the dichotomies of global north and south have generally replaced the earlier terminology of West and East, or First and Third Worlds, but contemporary terminology carries with it the same problems. The global south refers to certain parts of the world that have been left behind in terms socio-economic development and success[6] and connotes images of "squalor, corruption, violence, calamities and disasters, irrational local fundamentalisms, bad smell, garbage, filth, technological 'backwardness' or simply lack of modernity."[7] The danger in using these dichotomies is that they create broad generalizations which fail to reflect the diversity of persons, societies and cultures in both the global north and south, as well as the economic prosperity of some people in the south and the impoverishment of some in the north.[8] What many states in the south do share is a common history and experience of colonialism and oppression by the north, which has shaped their political consciousness as well as placed them in a certain narrative that has been created and perpetuated by the north.[9] The danger in using these distinctions is that it further validates them and entrenches these false generalizations. While aware of this issue, dichotomies can also be a useful and strategic tool for challenging and re-shaping current understandings. For this thesis, the use of the global north and south can be useful because the 1951 Convention was created in a time when such dichotomies, as well as the East-West Cold War dichotomy, were influential in law making. As Steinbeck notes, the 1951 Convention is "both a product and a part

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[4] B.S. Chimni, "The Geopolitics of Refugee Studies: A View from the South," *Journal of Refugee Studies* 11, no. 4 (1998): 351.

[5] See *UNHCR Statistical Yearbook 2010.*

[6] Usha Natarajan, "The 2003 Iraq Invasion and the Nature of International Law" (PhD diss., Australian National University, 2008), 57-58.

[7] BalakrishnanRajagopal, "Locating the Third World in Cultural Geography," Third World Legal Studies 15, no.1 (1998-99):2.

[8] In terms of GDP, global south countries such as Brazil, India, Mexico, and Korea are listed among the top twenty countries. See The World Bank, "GDP Ranking 2010," The World Bank, http://data.worldbank.org/data-catalog/GDP-ranking-table(accessed May 1, 2012).

[9] Natarajan, "The 2003 IraqInvasion and the Nature of International Law," 57-58.

of history of the twentieth century."[10] Utilizing this dichotomy as a literary tool is important for this thesis as it enables addressing the divided understanding of the world in which these laws were created, and the divide that has been perpetuated through their use.

Moving into the twenty first century, international refugee law has been challenged on all fronts. For some governments, international refugee law prevents them from controlling (and restricting) entry into their countries. As Dauvergne argues, "in the present era of globalization, control over the movement of people has become the last bastion of sovereignty;"[11] the desire to maintain control over who can and cannot enter the territory of the state has been met with restrictive border polices, often times at the detriment of refugee protection. On the other hand, many refugee organizations and advocates believe that the definition of a refugee, as someone entitled to international legal protection, is far too narrow to fit with the contemporary realities of migration and those in need of international protection.

This paper will argue that international refugee law was formulated in a specific historical moment and time that is no longer relevant to the causes of migration and the changing demographic of the persons in need of protection, effectively making the current legal subject of the refugee an irrational exception in the larger context of migration. In utilizing this outdated and problematic distinction, the refugee regime[12] has created a system which utilizes the discourse of human rights and humanitarianism to exacerbate and further widen to socio-economic divide between the global north and south, maintaining, and even strengthening, the current international power dynamic, as well as compromising the real value of the protection that is currently offered.

As Legoux notes, "what tends to render the asylum law…ineffectual for the people of poor countries is the result of a particular conception of asylum, one with a long and complex history, and one which is becoming ever more stringent."[13] Utilizing this idea, Part I will trace the historical roots of international refugee law and its evolution into the current refugee regime,

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[10] Daniel J.Steinbock, "The Refugee Definition as Law: Issues of Interpretation," in RefugeeRights and Realities, ed. Frances Nicholson and Patrick Twomey (WestNyack, NY: Cambridge University Press, 1999), 19.

[11] Catherine Dauvergne, "Migration and the Rule of Law in Global Times," *The Modern Law Review* 67, no. 4 (July 2004): 1.

[12] The 'refugee regime' will be used to refer to the international, regional and domestic refugee laws and policies, UNHCR, and the various international and domestic assistance and aid refugee organizations.

[13] Luc Legoux, quoted in Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London: Taylor & Francis. 2005): 13. Originally this quote was specific to asylum procedures in France, however I believe that the main point of the statement is true for asylum procedures in the global north.

with attention to how the definition of a refugee was created, and a specific focus on *who* it was created for. Beginning in the formation of sovereign states and the ideals associated with sovereignty, the protections and rights that refugee law articulates are contextualized in a certain type of legal framework and individual-state relationship. Moving through the formation of the refugee definition and protection in World War I and II, and ending with the Cold War, one can see the way the definition was shaped by a certain kind of European displacement, as well as the political agenda of the time period. Through this progression it is evident that the legal subject of the 'refugee' was created in international law under exceptional circumstances of global war, and certain conditions of displacement.

Since the 1951 Convention was created, there has been an outflow of criticism and suggested reforms. Part II of the paper will discuss the major critiques and recommended reforms of international refugee law and the protection regime. Much of the current critique focuses on the restrictive measures and procedures for asylum in the global north, which is important to understanding the global north's desire to limit the entry of asylum-seekers (and more generally, international migrants) from the global south. This in turn sheds light on the problematic role the wealthier countries in the global north play in regulating (and largely controlling) global refugee protection.

Finally, Part III will engage with the reality of migration in the global south, which often falls outside of the purview of international refugee law. The global geopolitical shift since the end of the Cold War and the process of globalization has challenged international refugee law. The causes of migration – whether forced or voluntary – are becoming increasingly related to the state of global inequality, making the current legal category of the 'refugee' largely irrelevant. As this reality has emerged, this section will also discuss the global north's preference for regional refugee protection systems and the way in which the issue of refugees has been de-politicized and relegated almost entirely to the realm of humanitarianism. The paper will conclude with what can be done to understand the contemporary realities of forced migration and move forward to a more realistic and relevant framework for protection.

PART I: THE CREATION OF THE REFUGEE

Displacement is not a modern problem. Throughout history persons have moved (by force or by choice) due to war, famine, and other causes. However, human migration and movement has only become "categorized, politicized, qualified, quantified, studied and controlled with the growth of the contemporary nation-state."[14] The contemporary legal category of the refugee, and the regime that is charged with their protection, has been constructed predominately during the twentieth century, and especially influential has been the political and security agenda of the modern nation state.

Arguments have been made that refugee production today is rooted in the geo-political structure of the world, which is based on the idea of state sovereignty.[15] International refugee law and, more broadly, international law, have evolved with the modern state system reflecting changes and concerns in economics, ideologies, and balance of power.[16] In order to understand where international refugee law stands today, it is important not only to understand the history and development of refugee law and the refugee regime, but also the system of governance and political ideologies that it exists within a system built upon the foundational concept of state sovereignty.

The Rise of Sovereignty and Sovereign Borders

The notion of state sovereignty, as an international legal concept (and arguably the 'ideal' form of governance) was cemented in the Peace of Westphalia, which was signed in 1648.[17] Among other things,[18] this treaty brought forth a new form of governance in Europe based on a sovereign state. This system established a model in which all sovereign states were all

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[14] Alison Mountz, "Migration," in *Key Concepts in Political Geography*, Carolyn Gallaher, et al., (London: SAGE Publications, 2009), 174.

[15] Charles B. Keely, "The International Refugee Regime(s): The End of the Cold War Matters," *International Migration Review* 35, no. 1 (2001): 303-14.

[16] Laure Barnett, "Global Governance and the Evolution of the International Refugee Regime," *International Journal of Refugee Law* 14, no. 2 (2002): 239.

[17] The Peace of Westphalia marked the official end of the Thirty-Years War, which took place from 1618-1648. For more information, see Thomas H. Greer and Gavin Lewis, *A Brief History of the Western World*, 9th ed. (Belmont: Thomson Wadsworth, 2005), 398-400.

[18] The Peace of Westphalia also established a principle of tolerance by instating equality between Protestant and Catholic states and providing some safeguards for religious minorities, as well as mechanisms for conflict resolution between European powers. See Leo Gross, "The Peace of Westphalia, 1648-1948," *The American Journal of International Law* 42, no. 1 (January 1948): 20-41; and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 310.

theoretically equal in terms of international law and diplomacy.[19] Although states in Europe were not equal in population, territorial size, or military power, they were all entitled to the 'right to sovereignty.'[20] Westphalia was intended to signify the end of imperialism in some senses,[21] and the "abandonment of a hierarchal structure of society and [the] option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory."[22] It created a unified European political system and also led to the creation of international law.[23]

The conventional idea of a state's sovereignty is narrowly conceived as "the power of a State to exercise supreme authority over all persons and things within its territory," or "territorial supremacy."[24] In order for this territory to gain meaning, there must be borders that separate sovereign powers or states from each other and within these borders there must be persons who hold a sort of membership to the nation, or citizenship. Borders, as lines and limits of sovereignty, also largely decide citizenship. States are bound by rules of membership, in which citizens belong and all others are aliens.[25] In the legal sense, citizenship is a "formalized categorical designation,"[26] which, in theory, creates a sort of social contract in which states are legally responsible for the citizens of their sovereign state.[27] Within this relationship of rights and obligations is implied a territorial component, in which all states care for their own citizens within the borders of the country.

This model of the sovereign state, complete with territorial borders and notions of nationality or citizenship, gained its reinforcement as the norm and was the dominant model of political organization in the nineteenth and twentieth centuries. The dissolution of empires after World War I, the realignment of powers after World War II, the process of decolonization, and the break-up of the Soviet Union, all brought about new sovereign states formed in the

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[19] Gross, "The Peace of Westphalia."

[20] Gross, "The Peace of Westphalia," 29.

[21] This of course does not refer to colonialism, which was seen as a project of modernization, as well as an extension of the sovereign. For a critical analysis of how the 'civilizing mission' of the project of colonialism interacts with this idea of extending the sovereign, see Anghie, *Imperialism, Sovereignty and the Making of International Law.*

[22] Gross, "The Peace of Westphalia," 28.

[23]Ibid., 29.

[24]Lassa Oppenheim, *International Law: A Treatise, Vol. 1, Peace* (London: Longmans, Green, and Co., 1905), 170.

[25] Charles B. Keely, "How Nation-States Create and Respond to Refugee Flows," *International Migration Review* 30, no. 4 (Winter 1996): 1051.

[26] Catherine Dauvergne, *Making People Illegal: What Globalization Means For Migration and Law* (Cambridge: Cambridge University Press, 2008), 121.

[27]Antoine Pécoud and Paul de Guchteneire, "Migration Without Borders: An Investigation Into the Free Movement of People," *Global Migration Perspectives* no. 27, UNESCO, (April 2005): 8-9.

Westphalian Model, where borders marked the territory and the limits of these new or reformed sovereigns. Arguably, the "assumption that countries ought to be organized as nation-states is the key to understanding the political basis of refugee production and of policies towards refugees developed in the twentieth century."[28] Refugee protection is a surrogate protection provided by a sovereign state to a non-national when their own state fails to protect them. Thus, in the legal sense, without borders and sovereign states there can be no refugees.

The international response to refugee flows that developed from the events of World Wars I and II were founded on the sovereign state system.[29] Uncontrolled movements of persons who would normally be under the protection of their state threaten political stability, and "if the movement is caused by people who lack their state's normal protection, then a serious failure of the state system has occurred."[30] Understanding how the perceived failures of the First and Second World Wars led to the creation of international refugee law, and arguably created the refugee through defining it, helps explain the political motivations and limitations of the law as it operates today.

International refugee law, as is exists today, entered the international system as international law, through the 1951 Convention Relating to the Status of Refugees. Although the notion of a refugee, or rather people fleeing conflict or living in exile has existed throughout history,[31] as an international mechanism for protection, international refugee law is relatively new and was created during a specific moment in history. International Refugee Law represents developments from the period of 1921-1951 as a response to assist those displaced from the events of World Wars I and II.

The First and Second World Wars

Prior to 1920, world powers were unconcerned with creating a universal refugee definition. Before World War I, European empires still governed vast parts of the world, borders were fewer, and large numbers of Europeans could move to the Americas and other lands 'discovered' by Europe in Australia and New Zealand. However this changed when massive

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[28] Keely, "How Nation-States Create and Respond to Refugee Flows," 1046.

[29] *Ibid.,* 1051.

[30] *Ibid.*

[31] For information on the historic, pre-World Wars I and II treatment of asylum, see Barnett, "Global Governance and the Evolution of the International Refugee Regime," 239-41 and S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), 5-49.

groups of forced migrants began to exist starting with World War I.[32] As a result of World War I, new states were created that excluded many ethnic minorities from citizenship based on languages, ethnicity, location, or religious affiliation.[33] The creation of sovereign states allows governments to delimit their citizenry, which they did by defining "broad categories of people as belonging to the nation-state and relegated others to the ranks of outsiders and aliens who threatened national and cultural cohesion."[34] Here we can see how the creation of a sovereign state, as well as the power to define members of the state, can actually produce refugee flows deeming some citizens without a nationality, or stateless.[35]

Russian Displacement

Refugee law and the refugee regime have its roots in actions that were taken in the early twentieth century at the behest of the League of Nations.[36] The first major movement of this century that was recognized as needing protection were those who were displaced as a result of the Russian Revolution in 1917, as more than one million persons fled the Bolshevik Regime between 1917 and 1921.[37] The first organized efforts for refugee protection took place in 1921, when the League of Nations at the request of the International Committee for the Red Cross, established a High Commissioner for Refugees, Fredtjof Nansen, who was primarily charged with dealing with the issues of forcibly displaced Russians.[38]

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[32] James C. Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950," *The International and Comparative Law Quarterly* 30, no. 2 (April 1984): 348.

[33] Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, (New York: Oxford University Press, 1993), 34.

[34] *Ibid.,* 35.

[35] For example, after World War I and the breakup of the Ottoman Empire, the territory of the Kurdish people, referred to as Kurdistan, was divided between neighboring territories as they formed sovereign states, including Syria, Turkey, Iraq, Iran and the former Soviet Union. Due to their ethnic affiliation as Kurds, which includes a distinct language and cultural traditions, many Kurds became stateless, which has yet to be resolved. For more information on the issue of Kurdish statelessness and refugee status see Matthew J. Gibney and Randall Hansen. Eds., *Immigration and Asylum: From 1900 to the Present*, vol. 1 (Santa Barbara: ABC-CLIO, Inc., 2005), 368-373. Another example is the creation of states in Africa based on the colonial borders, which did not accurately represent the traditional borders of African peoples. As states were created conflicts erupted and many people were excluded from state protection, and many conflicts have arisen over issues of resource distribution and power between ethnic groups. Many governments in the region have also become unstable to the point of being considered a "failed state," such as Somalia and Liberia, which have in turn produced mass amounts of refugees. For more information on the issues of how the state contributes to refugee production in Africa see Ahmednasir M. Abdullahi, "The Refugee Crisis in Africa as a Crisis of the Institutions of the State," *International Journal of Refugee Law* 6, no. 4 (1994): 562-80.

[36] Keely, "The International Refugee Regime(s)," 304.

[37] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 241.

[38] *Ibid., 242;* Loescher, *Beyond Charity*, 36.

The creation of this Commissioner was the first time that the issue of refugees was recognized in international law. This Refugee Commissioner was given a temporary mandate with a limited focus on displaced persons from Russia, so there was no creation of a general definition for who was a refugee, but rather a category-oriented approach through which displaced persons were identified based on group affiliation and origin.[39] Russians were identified as a specific group of people that required protection based on certain political circumstances.[40] The task of this Commissioner was to organize repatriation, to allocate some refugees to resettlement countries, and provide general relief.[41]

However, this limited mandate was problematic, as many other groups were also facing severe problems. As issues for displaced Armenians escalated, protection was extended specifically to this group in conjunction with the efforts made for Russians.[42] In 1926, the League of Nations issued an arrangement that dealt with the issuance of identity documents for Russian and Armenian refugees and, rather than creating a generals definition, the groups eligible for these certificates were simply referred to as 'Russian refuges' and 'Armenian refugees', with simple, straightforward definitions:

> *Russian refugee:* Any person of Russian origin who does not enjoy the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired any other nationality.

> *Armenian refugee:* Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy the protection of the Government of the Turkish Republic and who has not acquired any other nationality.[43]

Although a definition of refugee is put forth, it is based on geographical origin rather than a general definition that can be applied to any person fleeing from any country.

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[39] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 242.

[40] *Ibid.*.

[41] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3d ed. (Oxford: Oxford University Press, 2007), 241-43.

[42] The Armenians were established originally in what is now north-east Turkey, and "since the late nineteenth century, [the Armenians] had been systematically persecuted and massacred by the Turkish Government as a result of its distinctive religion and culture. In February 1915, Turkey commenced a series of mass deportations and indiscriminate killings of Armenians. While the subsequent Allied occupation afforded a degree of protection to the Armenians, the massacres began again in October 1921 following the withdrawal of French troops. A mass exodus of Armenians to Greece, Bulgaria, Constantinople, Syria and Russia ensued during 1921 and 1922." See Hathaway, "The Evolution of Refugee Status in International Law," 352-354.

[43] *Report by the High Commissioner,* League of Nations Doc. 1926.XLII.2 (1926): 5, quoted in Hathaway, "The Evolution of Refugee Status in International Law," 353.

By the end of 1926 it was clear that Russians and Armenians were not the only persons in need of protection, so the League of Nations voted to extend protection to "other categories of refugees who, as a consequence of the war, are living under analogous conditions [to those of the Russian and Armenian refugees]."[44] After much debate and discussion over who should have protection,[45] as well as what can 'reasonably expected' of the League, the final definition that was reached extended protection to Assyrian, Assyro-Chaldeaen, and Turkish refugees.[46] The definitions for these groups is similar to the above definitions for the Russian and Armenian refugees, in which it delimits refugees as originating from specific territories and/or events.[47] These definitions did outline some general characteristics, on which refugee status was based, namely the "lack of protection and effective non-nationality."[48] That this extension of protection was given to only a fraction of those identified as in need of protection by the High Commissioner indicates the highly selective nature of the expanded definition. It also created a protection gap, which results when "refugee definitions become divorced from events—the social and political reality— which actually produces refugees."[49] Although refugee protection was granted to Russians, Armenians, Assyrians, Assyro-Chaldaeans, and Turks, the other groups that Nansen identified as in need of protection in his original proposal still went on with no official international mechanism or international responsibility for protection.[50]

In 1933, refugee protection for the groups mentioned in the 1926 and 1928 League of Nations arrangements (but primarily focused on Russian and Armenians) became regularized in the Convention Relating to the International Status of Refugees.[51] In outlining the protection that

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[44] *League of Nations O.J. 155,* 8, no. 2 (1927), quoted in Hathaway, "The Evolution of Refugee Status in International Law," 354.

[45] The initial proposition from Nansen included providing protection to some 155,000 persons that fell into seven categories, including 150 Assyrians, 19,000 Assyro-Chaldaeans, Ruthenians, a number of Montenegrins, 16,000 Jews, 150 Turks, and some 110,000 persons who were dispersed throughout Central Europe, predominately former Hungarians, however the League believed that this was too much, and it was reduced to the above extension in the text. See Hathaway, "The Evolution of Refugee Status in International Law," 354-355.

[46] Hathaway, "The Evolution of Refugee Status in International Law," 355.

[47] For full definition, see Hathaway, "The Evolution of Refugee Status in International Law," 356-357.

[48] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 242.

[49] Goodwin-Gill and McAdam, *The Refugee in International Law*, 17.

[50] The groups listed in Nansen's original proposal were also chosen selectively based on whether or not their conditions were analogous to that of the displaced Russian and Armenians who were already under international protection. So in effect even Nansen's rejected proposal for protection was based on limited criteria of those who fit into the general mold of conditions of displacement already configured by the League of Nations. Hathaway, "The Evolution of Refugee Status in International Law," 354-357.

[51]See League of Nations, "Convention Relating to the International Status of Refugees," *League of Nations Treaty Series*, Vol. CLIX, No. 3663, (League of Nations, October 28, 1933), http://www.unhcr.org/refworld/docid/3dd8cf374.html (accessed February 20, 2012).

was given to the defined parties mentioned above, this Convention was created also as an attempt to limit repatriation back to their home countries as well as provide some rights for the refugees while living in the country of asylum. These rights included education, employment, and the right to receive travel documents.[52] With this Convention came the regularization of identity documents called Nansen Passports,[53] recognized by most governments as valid. However, not all states were obligated to receive refugees that held these documents.[54] Here we see that states acknowledged that refugee protection was necessary and important. However, despite such recognition, many states were not willing to receive refugees and offer protection themselves, which is something that continues to plague the refugee protection system and will be addressed in Part II.

Forced Displacement from Germany

As the Nazi Party rose to power in Germany, an important population movement began as thousands of Jewish persons fled, who were in need of protection. In 1933, the Office for the High Commissioner of Refugees coming from Germany was established in order to coordinate relief efforts. However it was not until 1936 that efforts began to expand legitimate protection to refugees fleeing Germany.[55] When the Commissioner was established in Germany, the League of Nations instructed the Commissioner to "avoid discussing causes or stressing the political dimension of the refugee problem," so as to not antagonize Germany who was still a member of the League of Nations at the time.[56] Essentially, the Commission was restricted to providing relief, and not confronting the causes of movement. As the scale of the Jewish displacement problem continued to grow, states were reluctant to extend protection to them for reasons of finance, as the Great Depression was still affecting many countries, as well as the fear that this international obligation to protect would impede the nation's sovereign right to deport non-citizens.[57] In 1936, James G. McDonald, the High Commissioner for Refugees Coming from

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[52] Loescher, *Beyond Charity*, 38.
[53] League of Nations, "Convention Relating to the International Status of Refugees," Article 2, stated that "Each of the Contracting Parties undertakes to issue Nansen certificates . . . to refugees residing regularly in its territory," creating a regularized and internationally unified and recognized system of identity documents for displaced persons. See also Barnett, "Global Governance and the Evolution of the International Refugee Regime," 242; Goodwin-Gill and McAdam, *The Refugee in International Law*, 515.
[54] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 242-43.
[55] Hathaway, "The Evolution of Refugee Status in International Law," 363.
[56] Loescher, *Beyond Charity*, 43.
[57] *Ibid.*

Germany, quit his post stating the limitations of the current international response in his resignation letter, indicating that:

> The efforts of the private organizations and of any League [of Nations] organization for refugees can only mitigate a problem of growing gravity and complexity. In the present economic conditions of the world, the European States, and even those overseas, have only a limited power of absorption of refugees. The problem must be tackled at its source if disaster is to be avoided.[58]

For McDonald, assistance only met part of the problem, but did not confront the causes that created the situation of displacement. Additionally, in his letter, McDonald drew attention to the human rights abuses that were the cause of refugee movement from Germany, calling for states to set aside their concerns of state sovereignty in order meet humanitarian necessities, stating that "when domestic politics threaten the demoralization and exile of hundreds of thousands of human beings, considerations of diplomatic correctness must yield to those of common humanity."[59] However, calling for countries to meet humanitarian needs failed to spark an international intervention.[60] Without a broader definition and established international obligations, the situation in Germany evidenced that countries will likely not provide support if political or economic interests dictate otherwise. In this case, the unavailability of other countries to take in refugees and to assist monetarily in the Commission's effort resulted in a lack of effective protection for displaced Jews.

In 1936, it was decided that steps should be taken to meet the needs of the displaced persons coming from Germany. In the process of planning the Conference for Provisional Arrangement concerning the Status of Refugees Coming from Germany in 1936, although the official Convention would not be signed until 1938, the High Commissioner prepared a Convention draft, defining the German refugee as:

> any person having left German territory who does not enjoy or no longer enjoys the protection of the Government of the Reich and who does not possess any nationality other than German nationality.[61]

The definition that was adopted in the 1936 Conference (mentioned above) was then incorporated into the 1938 Convention concerning the Status of Refugees coming from Germany,[62] which was slightly different, defining the German refugee as:

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[58] Quoted in Loescher, *Beyond Charity*, 43.
[59] *Ibid.*
[60] *Ibid.*; Goodwin-Gill and McAdam, *The Refugee in International Law,* 423.
[61] *Draft Provisional Agreement regarding the Status of German Refugees,* League of Nations. Conf./S.R.A./1(1936), quoted in Hathaway, "The Evolution of Refugee Status in International Law," 363.

a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government.

(b) Stateless persons not covered by previous Conventions or Agreements who have left Germany territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the Germany Government.

This definition differs from the initial proposal in that it extends protection to stateless persons who were either living in Germany or outside of Germany, offering a liberalized version of the proposed refugee policy, in that it broadens the scope of who can be covered. However, like German nationals, it suggests the stateless persons must prove that they do not enjoy protection of the German regime.[63] There is also the addition of Article 1(2) of the 1938 Convention, which excludes some from protection, stating "Persons who leave Germany for reasons of purely personal convenience are not included in this definition."[64] The minutes of the meeting for the draft process of this Convention indicate that the persons in mind for the exclusion clause were those who "persons who had left Germany for economic reasons but without being compelled to do so, or [who] had gone abroad in order to evade taxation".[65] This article indicates that there must be evidence of persecution based on specific types of violence, not generalized violence or wartime conditions. Whereas in the past a category-oriented approach was utilized, this definition was comparatively strict,[66] making refugee status more difficult to obtain.

It is interesting to note that the United States took little notice of the refugee problem coming from Germany, failed to increase their immigration quotas to account for the increasing need for persons to be resettled, and failed to sign any of the drafted Conventions.[67] However, in July 1938, US President Franklin D. Roosevelt called a meeting in Evian in France, to discuss

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[62] "Convention concerning the Status of Refugees coming from Germany," *League of Nations Treaty Series,* Vol. CXCII, No. 446, (League of Nations, February 10, 1938): 59, http://www.unhcr.org/refworld/country,,LON,,DEU,,3dd8d12a4,0.html, (accessed February 21, 2012).

[63] Hathaway, "The Evolution of Refugee Status in International Law," 365.

[64] League of Nations, "Convention concerning the Status of Refugees coming from Germany."

[65] *Provisional Minutes of the International Conference for the Adoption of a Convention Concerning the Status of Refugees Coming from Germany,* League of Nations Doc. Conf./C.S.R.A./P.V.5 (1938): 7, quoted in Hathaway, "The Evolution of Refugee Status in International Law," 365.

[66] Also note that this protection was extended to those also fleeing from Austria, in an additional provision to the 1938 Convention. "Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany," *League of Nations Treaty Series,* Vol. CXCVIII No. 4634, (League of Nations, September 14, 1939): 141, http://www.unhcr.org/refworld/docid/3dd8d1fb4.html, (accessed February 21, 2012).

[67] Loescher, *Beyond Charity,* 44.

the increasing issue of resettling refugees coming from Germany and Austria.[68] This meeting failed as it achieved little in terms of actual change in resettlement policies, but rather "reaffirmed the extreme reluctance of the United States and the rest of the world to offer a lifeline to Jewish refugees."[69] From this meeting, one can see how the financial burden of refugees and asylum seekers entered discourse, as Germany was not allowing Jews to leave with their assets and many countries were concerned with the economic cost of taking in resettled refugees as unemployment was high in many countries and finances were unstable as a result of the Great Depression.[70]

The Interwar Organizations

However, the Evian conference did result in the creation of another new refugee mechanism, the Intergovernmental Committee on Refugees (IGCR), which operated outside the sphere of the League of Nations and was tasked with negotiating with Germany about Jewish migration,[71] in order to facilitate involuntary migration for

> 1) persons who have not already left their country of origin (Germany, including Austria), but who must emigrate on account of their political opinions, religious beliefs or racial origin, and (2) persons as defined in (1) who have already left their country of origin and who have not yet established themselves permanently elsewhere[72]

Here, protection was extended to potential refugees who have not/or were unable to leave the country, qualifying them as refugees in need of protection.[73] However, this definition also limited assistance to those that were fleeing on account of political opinion, religious beliefs, or issues of racial origin. It based decision-making on individual consideration of the merits of claims, rather than assumption of *de jure* or *de facto* lack of protection for certain categories.[74] The IGCR attempted to work with Germany to "achieve an orderly exodus of Jews, *who would be allowed to take their property and possessions with them,*"[75] yet in actuality the Germans did not let Jews leave without sacrificing most of their possessions. With the states in West unwilling

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[68] Gilbert Jaeger, "On the History of International Protection of Refugees," *International Review of the Red Cross* no. 843 (September 30, 2001): 731.

[69] Loescher, *Beyond Charity,* 45.

[70] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 243.

[71] Loescher, *Beyond Charity,* 44.

[72] Jaegner, "On the History of International Protection of Refugees," 731; Hathaway, "The Evolution of Refugee Status in International Law," 371.

[73] *Ibid.*

[74] Hathaway, "The Evolution of Refugee Status in International Law," 371

[75] *Ibid.,* emphasis added.

to finance a resettlement program, the exit from Germany and entrance to Western countries was effectively closed.[76] Essentially, the mass murder of Jews that happened at this time was "tacitly tolerated" by much of the Western world until it was too late:[77] "Jews were victim of international complacency and diplomatic priorities".[78]

After World War II, the League of Nations had dissolved, as had its High Commissioner for Refugees. To continue the Commissioner's efforts, the United Nations Relief and Rehabilitation Administration (UNRRA) was created by Allied powers in November 1943.[79] The UNRRA was primarily concerned with providing assistance to "civilian nationals of the allied nations and to displaced persons in liberated countries, and with the repatriation and return of prisoners of war", and was *not* authorized to resettle displaced persons or find 'solutions' for refugees who were unable to return home.[80] Initially, those persons that were unable to return home were referred to the IGCR for assistance. However, in August 1945, the UNRRA Resolution 71 created the expansion of the UNRRA focus to include refugee protection, with the statement that aid may be extended to "other persons who have been obliged to leave their country or place of origin or former residence."[81] Over the next year there was debate over how to define the persons to whom this protection should be extended to, primarily between the Washington and London offices of the UNRRA. There was also criticism from the Eastern Bloc, who resented UNRRA efforts that facilitated the emigration of their nationals.[82] This definition was not based on subjective determinants, so the definition meant that "only persons suffering from objectively demonstrable incompatibility with their State of origin could receive the benefits of refugee status."[83]

Although the UNRRA and IGCR were both working to provide assistance to some forced migrants in Europe, three years after the end of the war there were still over three million displaced Europeans who had yet to find a solution to their problem. Thus, another organization

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[76] Loescher, *Beyond Charity,*45.

[77] *Ibid.*

[78] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 243.

[79] Goodwin-Gill and McAdam, *The Refugee in International Law*, 109; Hathaway, "The Evolution of Refugee Status in International Law," 372.

[80] Goodwin-Gill and McAdam, *The Refugee in International Law*, 109.

[81] "UNRRA Journal 152 for the text of Resolution 71" (1945), quoted in Hathaway, "The Evolution of Refugee Status in International Law," 373.

[82] For further discussion of the Eastern-Western dynamics in the UNRRA debate, see Hathaway, "The Evolution of Refugee Status in International Law," 373-74.

[83] *Ibid.*

was created to take over the task of finding a solution to the situation in Europe, the International Refugee Organization (IRO). The UNRRA was primarily funded by the US, which contributed approximately 70 per cent of the UNRRA funds. However, the US was very critical of the UNRRA operations, particularly their repatriation and rehabilitation efforts in the Eastern Bloc.[84] In order to remedy their concerns, the US pulled their funding from UNRRA, effectively ending the organization, and worked to create the IRO in December 1946.[85] The US believed that the UNRRA was potentially empowering and consolidating the Eastern Soviet powers by sending back persons and providing aid through rehabilitation programs. Thus, to rectify this, the primary function of the IRO was to be for resettlement of displaced persons, not repatriation.[86]

Prior to the creation of the IRO, refugee organizations had dealt with specific groups of refugees. However, the IRO mandate was the first time that a more general definition was put forward for 'refugee'.[87] The IRO was the first time that refugee status was based on individual rather than group determination, as well as the acceptance of the individual's right to flee from persecution.[88] The IRO utilized an individual determination procedure for persons who were victims of the Nazi government or similar regimes, as well as victims of persecution for reasons of race, religion, nationality, political opinion, and refugees of long standing,[89] who "in complete freedom and after receiving full knowledge of the facts…expressed valid objections to returning to [their countries of origin]."[90] A 'valid objection' could be a demonstration that the person feared persecution on grounds of race, religion, nationality or political opinion; if the individual raised political objections, the IRO would then judge the validity of the objection.[91] Persons who were involved with movements hostile to any of the United Nations' member states were excluded from this protection, as well as "[r]efugees returning to their country of origin, acquiring a new nationality, becoming firmly established, unreasonably refusing to accept IRO repatriation or resettlement proposals, failing to make a substantial effort towards earning a living when able to do so, or otherwise exploiting the IRO ceased to be of concern to the

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[84] Loescher, *Beyond Charity*, 49.
[85] *Ibid.*
[86] *Ibid.,* 51; Dennis Gallagher, "The Evolution of the International Refugee System," *International Migration Review* 23, no. 3 (1989): 579.
[87] Loescher, *Beyond Charity*, 50.
[88] *Ibid.*
[89] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 244.
[90] Quoted in Hathaway "The Evolution of Refugee Status in International Law," 374.
[91] *Ibid.*, 375

[IRO]."[92]

Although the IRO was utilizing a more general definition of a refugee, the organization was targeting those displaced by World War II, as well as some of the new Cold War refugees. The definition was the most comprehensive and functional definition when compared with other refugee organizations at the time. Thus, by mid-1947, the IRO took over the operations of the UNRRA, the IGCR, and the former activities of the League of Nations High Commissioner for Refugees.[93]

The 1951 Convention and the creation of the UNHCR

When the war came to an end in 1945, it left some 30 million people uprooted and displaced, 'soldiers and displaced people who did not want or could not return home because of border changes, including more than 12 million ethnic Germans who were expelled from the Soviet Union.'[94] The IRO was able to resettle over one million refugees between 1947 and 1951 (primarily in the United States, Canada, Australia, Israel, and other Western European countries).[95] The IRO was meant to complete its activities in June 1950, however when this time approached it was clear that the 'problem' of refugees was not solved, especially with the new refugees arriving from East and Central Europe;[96] in its final report to the United Nations General Assembly, they cautioned that the temporary problem they were tasked with targeting was quickly becoming a permanent issue.[97]

The United Nations High Commissioner for Refugees (UNHCR) was created during the height of these tensions on 1 January, 1951, taking over where the IRO left off.[98] UNHCR was created to '"provide international protection' and 'permanent solutions for the problem of refugees'". Its activities were to be "of an entirely non-political character—it is to be 'humanitarian' and 'social' and to relate, as a rule, to groups and categories of refugees."[99] In July 1951, drawing on their experiences of international efforts to assist refugees, reaching back

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[92] Hathaway "The Evolution of Refugee Status in International Law," 375-76.

[93] *Ibid.,* 376

[94] Tony Kushner and Katharine Knox, *Refugees in an Age of Genocide* (London: Frank Cass, 1999), quoted in Barnett "Global Governance and the Evolution of the International Refugee Regime," 243.

[95] Gallagher, "The Evolution of the International Refugee System," 579.

[96] Jaegner, "On the History of International Protection of Refugees," 732.

[97] Loescher, *Beyond Charity*, 52.

[98] Barnett "Global Governance and the Evolution of the International Refugee Regime," 245.

[99] UN General Assembly, "Statute of the Office of the United Nations High Commissioner for Refugees," A/RES/428,V (December 14, 1950), http://www.unhcr.org/refworld/docid/3ae6b3628.html (accessed February, 2 2012).

to 1920, the United Nations created the 1951 Convention Relating to the Status of Refugees,[100] which was to be supervised by UNHCR, further regularizing refugees and setting out several rights that refugees are entitled to. The 1951 Convention does not explicitly grant the right to obtain asylum, as its purpose is to define the scope of the right to seek and enjoy asylum which is found in Article 14 of the Universal Declaration of Human Rights.[101] The 1951 Convention, in the series of treaties pertaining to displaced persons, was more comprehensive than previous Conventions and arrangements. This Convention outlines the refugees' right to remain in the country of asylum, the right to return to their home country, the principle of *non-refoulement*, as well as minimum standards for treatment by the host country, an outline for determination procedures, and eligibility criteria for asylum.[102] Although it is out of the scope of this paper to discuss every aspect of the 1951 Convention in detail, a brief overview of refugee rights and state obligations, and special attention to how a refugee is defined is pertinent to the present discussion.

The most contentious portion of the 1951 Convention is arguably article 1, which defines who can and cannot become a refugee. According to this article, a refugee is someone who is outside their country of residence and,

> As a result of events occurring before 1 January 1951 and owing to 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, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[103]

Due to a disagreement between the drafters of the Convention, governments were also given the option of limiting refugee protection to those coming from Europe, or had the option to open it to those coming from "Europe and elsewhere."[104] Following the IRO, this definition was "individual-oriented and emphasized the causes of flight rather than relying on the more categorical approach that focused on the origin of specific groups", which most groups prior to

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[100] Hereafter referred to as the 1951 Convention

[101] Article 14 states: (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. UN General Assembly, *"Universal Declaration of Human Rights,"* (December, 10 1948), http://www.unhcr.org/refworld/docid/3ae6b3712c.html (accessed February 11, 2012).

[102] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 247.

[103] UN General Assembly, "Convention Relating to the Status of Refugees," Article 1.

[104] Loescher, *Beyond Charity*, 57.

the IRO utilized.[105] Looking at the previous sections, one can see that the definition has its roots in the conditions used by IRO. These five categories/grounds of persecution (race, religion, nationality, membership of a particular social group, and political opinion) that were included in the 1951 Convention definition have ties to the period during and in between World War I and II, in which most persons were persecuted for these reasons.[106] Additionally, the emphasis on persons being 'outside the country of his former habitual residence' "emphasizes the territorial nature of the refugee regimes, reinforcing respect for sovereignty, and the inability of an international organization to look within a nation's borders."[107] This notion will be discussed further in Part II.

The restrictions in the definition were likely done, first and foremost, because, as previously stated, the definition was created with a particular group of persons in mind, but also to restrict the numbers of persons who qualified for protection as well as to identify those individuals, within the larger context of forced displacement, who required special international legal protection.[108]

Those asylum-seekers that are found to fit into the definition listed in Article 1 of the 1951 Convention are entitled to certain rights while in the country of asylum, including, but not limited to, the right to access courts[109] the right to gainful employment,[110] the right to housing,[111] and the right to public education,[112] as well as the right to move freely within the territory of the state[113] and obtain identity papers and/or travel documents.[114] Many of these rights were in addition to the rights granted under the aforementioned Conventions dealing with displaced persons.

States are able to make reservations to parts of the Convention (i.e. access to public services or to employment). However they cannot make reservations to the definition, as well as the principle of *non-refoulement,*[115] in which no state "shall expel or return ('refouler') a refugee

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[105] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 246.
[106] Gallagher, "The Evolution of the International Refugee System," 580.
[107] Barnett, "Global Governance and the Evolution of the International Refugee Regime," 246.
[108] Gallagher, "The Evolution of the International Refugee System," 581.
[109] UN General Assembly, "Convention Relating to the Status of Refugees," Article 16.
[110] *Ibid.,* Articles 17-19.
[111] *Ibid.,* Article 20.
[112] *Ibid.,* Article 22.
[113] *Ibid.,* Article 26.
[114] *Ibid.,* Articles 27 and 28.
[115] *Ibid.,* Article 33.

in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."[116] To ensure this, Article 31 stipulates that "Contracting States shall not impose penalties, on account of their illegal entry or presence on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1,"[117] as obtaining the required legal documents may not be possible in their country of origin.

In addition to granting the above rights to refugees, signatory states also have the responsibility to cooperate with UNHCR in its functions and applying the convention, including providing reports on the condition of refugees, the implementation of the Convention, and on national legislation or decrees that enter into force regarding refugees.[118] Unlike previous treaties, the 1951 Convention was more detailed and broad, as it did not take a nationality-specific approach to providing asylum, however it was also more restrictive in that the asylum-seeker must 'prove' their need for protection based on certain criteria.

UNHCR, the organization charged with implementing and overseeing the 1951 Convention, was initially provided with a three year mandate, with a small budget and restricted fundraising capacity[119]; this also accounts for the temporal limitation of the Convention, as it was likely assumed that when the mandate of UNHCR ended, the convention would cease to be necessary. However, as the Cold War continued to produce refugees, UNHCR quickly moved away from post-War reconstruction into involvement in the Cold War.[120] The first crisis that UNHCR dealt with was the Hungarian Revolution of 1956[121] and in the following years, persons from many countries in the Eastern Bloc.

The political scene in the 1950s was very polarized, between the East and the West, between communism and capitalism, and arguably the refugee definition centered on this ideological opposition.[122] With Communist refugees, resettlement was less of an issue, as communist refugees were ideologically significant to Western policymakers, specifically in the United States, and in fact Western governments encouraged refugee movement from the Eastern Bloc, "in order to weaken their rivals ideologically and to gain political legitimacy in their Cold

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[116] UN General Assembly, "Convention Relating to the Status of Refugees," Article 33 (1).
[117] *Ibid.*
[118] *Ibid.,* Articles 35 and 36.
[119] Gallagher, "The Evolution of the International Refugee System," 580.
[120] Barnett, "Global Governance and the Evolution of the International Refugee Regime,"247.
[121] *Ibid.*
[122] Loescher, *Beyond Charity*, 55.

War struggle."[123] The United States government became very involved in refugee resettlement and aid, even setting up the United States Escapee Program to facilitate defections from the Soviet countries.[124]

With some states taking control of much of the refugee protection and resettlement during the Cold War, the implications of which will be discussed in Part II and III, UNHCR was free to become involved in other refugee movements.[125] During the Cold War, two refugee regimes emerged: the first was among the industrialized countries of the First World[126] accepting refugees from Communist states; and the second was for forcible displacement in the rest of the world, namely the Third World.[127] As discussed previously, refugees coming from the Soviet countries during the Cold War were a political tool for the anti-communist regimes of Western Europe and North America, particularly the United States. During the Cold War, persons fleeing were effectively "voting with their feet,"[128] and added to the ideological battle that was ensuing between the West and East. The logic of this regime was to utilize refugee movement to *destabilize* governments and cause states to fail, reflected in the domestic policies that encouraged refugees to flee the Eastern Bloc.[129] Throughout the Cold War, these two regimes existed side by side, as the one regime instigated Eastern instability and insecurity, while the other regime was a protection and containment mechanism for civil wars and proxy wars happening in the Third World.[130] During this time, UNHCR became an organization that focused much of its work in the Third World.[131]

Through the 1960s and 1970s, UNHCR's attention was on territories in Africa and Asia that were experiencing many civil wars as they went through the process of decolonization,

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[123]*Ibid.,* 59; see also Chimni, "The Geopolitics of Refugee Studies."

[124] Loescher, *Beyond Charity*, 59.

[125] *Ibid.,*71.

[126]Referring to the Cold War usage of 'First World,' meaning the countries allied with the United States against the Soviet Union, including most notably Canada, Australia, and most of Western Europe. The 'Second World' refers primarily to the Soviet Union and China, and the 'Third World' refers to the non-aligned or neutral countries, primarily in Central and South America (excluding Cuba), the African Continent (excluding South Africa), the Middle East, and South and East Asia.

[127] Keely, "The International Refugee Regime(s)," 305.

[128] *Ibid.*

[129] *Ibid.*, 308.

[130]Keely, "The International Refugee Regime(s)," 311, argues that the extension of UNHCR services into the third world, specifically in Africa, was to prevent Soviet influence in these countries.

[131] The first UNHCR operation outside of Europe was 1962 in Burundi; Keely, "The International Refugee Regime(s)," 307.

perhaps evidencing the failure of the Westphalian state outside of the First World.[132] Some of these wars were independent from the Cold War, while others were proxy wars[133] between the West and East, such as those in Indochina, Afghanistan, Central America, the Horn of Africa, and Southern Africa.[134] During this period UNHCR was involved in operations on three different continents, and as they became increasingly independent, they were given a larger budget.[135] However, unlike in Europe, the functions of the Third World refugee support during this time were not legal or diplomatic, but rather "they concerned the monetary support for and the development of direct assistance programs for refugees

In Africa specifically, refugees were more often self-settled and were able to integrate into the host communities with little or no problems, so much of UNHCR assistance in the 1960s was targeted at emergency aid rather than repatriation.[136] However, as these new refugees began to emerge, the temporal limit of the 1951 Convention, which made protection limited to those displaced prior to 1951, started to become problematic to UNHCR efforts.[137]

In 1967, in response to the "globalization" of the refugee issue, a protocol was added to the 1951 Convention, [138] which made the Convention apply to persons displaced after 1951 and allowing them to benefit from its protections. The 1967 Protocol, however, was a separate instrument, which required a separate signature and ratification process. States are not required to sign the protocol, although most have. Overall the 1951 Convention did not change, although more persons (namely non-Europeans) were now included under its protection. Other regional definitions were created based on the 1951 Convention definition which broadened the definition of who can be a refugee, acknowledging the regional needs (and the realities of refugee production), the most important of which is the definition adopted in the 1969 Organization of African Unity (OAU) Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, signed by the Organization of American States in

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[132] Loescher, *Beyond Charity*, 76.

[133] Due to the nuclear power on both sides of the Cold War conflict, proxy battles in the non-aligned Third World served another purposes in this ideological battle: to win political allies and forge alliances in developing countries – supporting opposing sides in civil wars within the Third World. Keely, "The International Refugee Regime(s)," 308.

[134] Gil Loescher, "The UNHCR and World Politics: State Interests vs. Institutional Autonomy," *International Migration Review* 35, no. 1(Spring 2001): 40-42.

[135] *Ibid.*

[136] Gallagher, "The Evolution of the International Refugee System," 583.

[137] Loescher, *Beyond Charity,* 80; Barnett, "Global Governance and the Evolution of the International Refugee Regime,"248.

[138] Hereafter referred to as the '1967 Protocol'

1984. Both of these documents, and specifically their refugee definitions, will be discussed in Part III.

The 1951 Convention is one of the most widely-ratified international law instruments. Through previous sections, which traced the various definitions and approaches to refugee protection during the thirty year period of World War I and World War II, one can see that the concept and definition of a refugee is a "malleable legal concept which can take on different meanings as required by the nature and scope of the dilemma prompting involuntary migration."[139] However, the 1951 Convention definition that was created for refugees displaced in Europe as a result of war has proved the most enduring and is still used today, with no changes to the original text. So one must then ask, has the legal concept of refugee ceased to be as malleable, flexible and responsive to contemporary realities as it was before 1951? Is it possible for such an instrument to properly protect non-European peoples that are forcibly displaced?

PART II: CRITIQUES AND REFORMS

The consequences of demarcating the concept of 'refugee' are more than merely definitional. The definition affects political processes, shapes legal discourse, highlights certain motivations of governments, attributes causality and responsibility for displacement, and asserts the priorities and limits of humanitarianism, among other things. As Shacknove states, 'refugeehood' goes beyond a simple definition, as having this definition is predicated on the moral idea that there is a minimal, normalized "relation of rights and duties between the citizen and the state, the negation of which engenders refugees." as well as an empirical claim in which the consequences of this bond being broken is persecution and alienage.[140]

However, since the end of the Cold War, refugees are no longer necessarily in easily defined 'acceptable categories' that were envisioned upon drafting the 1951 Convention. International refugee law was created as a response to assist the victims of World War II, and has not been able to accommodate the "contemporary realities of mass exodus," which are predominantly a matter of economics and governments' political strategies.[141]

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[139] Hathaway, "The Evolution of Refugee Status in International Law," 380.
[140] Andrew E. Shacknove, "Who Is a Refugee?" *Ethics* 95, no. 2 (January 1985): 275
[141] Jack I. Garvey, "Toward a Reformulation of International Refugee Law," *Harvard International Law Journal* 26, no. 2 (Spring 1985): 500

The refugee definition found in the 1951 Convention was a product of World War II and the Cold War, and is Euro-centric in its focus, as the displaced persons in question were European, displaced within Europe.[142] Upon its creation states did not contemplate (or intend) for it to be a universally applicable instrument or standard, as the Convention was limited to the events happening prior to 1951. The definition was created to fit a "foreseeable number of beneficiaries who fell in the acceptable categories."[143] The system of refugee protection that was designed for post-World War II refugees is still used today. However, the 1951 Convention and 1967 Protocol, [144] which are the cornerstone of international refugee law, have arguably failed to meet the needs of the ever-changing demographics of affected populations seeking protection.

Since the end of the Cold War, although more migrants and displaced persons began to arrive in the countries of the global north from the global south, the Convention has not been applied so as to offer adequate protection to these migrants. Instead, since the Cold War ended, the definition has been interpreted more strictly by northern states, creating the phenomenon of the non-entrée state.[145] These persons represented different situations of displacement when compared to Europe during World Wars I and II and the Cold War, and in response a change occurred in the regime charged with the protection of refugees. In an attempt to make the 1951 Convention relate to contemporary displacement, refugee status and protection has acquired various new definitions, standards, and labels. However, many of these labels and standards come at the cost of meaningful protection. As a reaction to the policy changes regarding refugees, many academics have proposed ways in which refugee law can be enhanced, usually either through underscoring the human rights and humanitarian element of international refugee law, or through reconfiguring communication within the refugee regime.

In order to see the holes within international refugee protection, it is important to understand the dominant critiques and varied interpretations of meaningful protection. The critiques also shed light on the reality of the refugee regime, specifically that most of the policy and financial control lies in the global north. This power divide has direct impacts on the protection of refugees originating from impoverished countries of the global south.

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[142] Jerzy Sztucki, "Who is a Refugee? The Convention definition: Universal or Obsolete?," in *Refugee Rights and Realities,* eds. Frances Nicholson and Patrick Twomey *(West Nyack, NY:* Cambridge University Press, 1999), 55-56.

[143] *Ibid.,* 57.

[144] Hereafter '1951 Convention' will imply both the Convention and the 1967 Protocol, unless otherwise specified.

[145] Chimni, "The Geopolitics of Refugee Studies: A View from the South."

The Post-Cold War Change and the Non-Entrée Regime

Prior to the mid-1980s, towards the end of the Cold War, the obligation to help refugees, as victims of war, was for the most part unchallenged, as a 'refugee' was well-defined as a person outside of their country of residence due to a well-founded fear of persecution, and there was no question as to *who* the persecutor was.[146] Up until the mid-1980s, most of the refugees that made their way into Western Europe shared similar cultural and ideological values, namely anti-Communism and anti-fascism, and according to many scholars, this ideological affiliation was enough for the host society to be generally accepting of refugees,[147] and the refugee movement in the Third World was largely contained there. However, during the 1980s an increasing amount of asyulm seekers were arriving from the Third World, or more specifically, from countries that were impoverished and culturally different, compared to the refugees that had previously arrived in Western Europe, the United States, Canada, Australia, and New Zealand during the periods after and during World War II, as well as during the Cold War.[148]

These new refugees that were entering the First World "no longer possessed ideological or political value,"[149] as many were fleeing conflicts that had less direct impact or geopolitical relevance on the host society; there was also a less clear indication of persecution and persecutor than there was in the past. Rather than ideological and political assets, these new refugees were now considered liabilities,[150] and were unwanted by the host societies, as their presence did not service a larger political goal.

The arrival of these new refugees marked a shift in international refugee law, which worked through the construction of the "myth of difference," which is the idea that "the nature and character of refugee flows in the Third World were represented as being radically different from the refugee flows in Europe since the end of the First World War," and in so doing an image of a 'normal' refugee was constructed as "white, male and anti-communist," which contrasted sharply with the new refugees that were entering from the global south.[151]

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[146] Garvey, "Toward a Reformulation of International Refugee Law," 484.
[147] See for example B.S. Chimni, "The Geopolitics of Refugee Studies"; Garvey, "Toward a Reformulation of International Refugee Law," 483-500; Loescher, *Beyond Charity*, 32-52.
[148] Chimni, "The Geopolitics of Refugee Studies," 351.
[149] *Ibid.,* 350.
[150] Grover Joseph Rees, "Refugee Policy in an Age of Migration," *Journal of Refugee Studies* 9, no. 4 (1994): 249-62.
[151] Chimni, "The Geopolitics of Refugee Studies," 351.

After the Cold War, and the dissolution of the Soviet Union, travel was much easier as borders were easier to cross, which also meant that the number of refugee claims increased.[152] In response to the increase in international migration, states began to tighten their border controls and immigration policies, as well as restricting asylum policies. The increasing amount of migrants and refugees from the global south and Eastern Europe that were different in terms of culture, ethnicity, religion, or language, in comparison to the inter-war periods, made a more clearly defined migrant 'other' in the mind of the public, and challenged the cultural identity of many countries as migration rates rose.[153] Concerns for security became the justification behind many of these border restrictions at the forefront of immigration control, and the terrorist attacks that took place in 2001 gave governments the further justification to put concerns of security at the forefront of the immigration debate, and develop policies that matched these concerns.[154] With the advancement of border and visa technology and territories reconfigured in terms of immigration responsibility, we have created what is often referred to as the "non-entrée regime," [155] which describes the reformulation of refugee policy in the post-Cold-War era, consisting of restrictive measures that prevent asylum seekers and international migrants from entry into the territory, as well as limiting the number of recognized refugees.

Many refugees enter territory in the same way as international migrants, and seeking protection is now more difficult as many states have minimized claims to refugee status by enforcing stricter visa, transportation and other access controls into the territory.[156] Today, governments are concerned with how porous their borders are, and are constantly developing new measures to better manage borders.[157] Going hand-in-hand with the rhetoric of the non-entrée regime is the way in which some countries have 'expanded' their borders or utilized 'remote control' mechanisms by implementing extraterritorial immigration control mechanisms.

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[152] Barnett, Laura. "Global Governance and the Evolution of the International Refugee Regime," 249.

[153] See Roger Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization," *Journal of Refugee Studies* 20, no. 2 (2007): 172-92.

[154] See for example, Jef Huysmans, "Politics of Insecurity, Technology and the Political," "Security Framing: the Question of the Meaning of Security," and "Displacing the Spectre of the State in Security Studies: From Referent Objects to Techniques of Government," in *The Politics of Insecurity: Security, Migration and Asylum in the EU* (London: Routledge, 2006): 1-44.

[155] Chimni, "The Geopolitics of Refugee Studies," 350

[156] For a general overview of the development of visa policies (and restrictions) in the United Kingdom and Australia, which reflects policies similar to other Western European Countries and the United States, see Bernard Ryan, "Extraterritorial Immigration Control: What Role for Legal Guarantees?," in *Extraterritorial Immigration Control: Legal Challenges,* ed. Bernard Ryan and Valsamis Mitsilegas. (The Netherlands: Brill, 2010), 3-38.

[157] Pécoud and de Guchteneire, "Migration Without Borders," 3.

State authorities use these expansions "[t]o check the legality of people's movement before they embark, with the help of the local authorities and with air or land carriers, avoid[ing] the painful and expensive problems in sending them back if they are not the one who should be travelling."[158] The most well-known systems of this sort are the most sought after destinations of asylum-seekers of the European Union countries, the United States, and Australia. The EU's external border agency, known as FRONTEX, is tasked with protecting the external borders of the EU states, namely the southern Mediterranean border, to prevent irregular migrants entering primarily from North and West Africa.[159] In the United States this can be seen with the interdiction policies it has with countries in the Caribbean, namely Cuba, Haiti and the Dominican Republic, which began in the 1980s. These policies allow the US to intercept boats with migrants coming from these countries, and send them back to that particular country or detain them in facilities such as the notorious Guantanamo Bay until their claim for protection has been heard.[160] Similar to the US, is Australia's 'Pacific Solution', which is "mainly concerned with vessels arriving from Indonesia, and typically involved migrants with plausible claims to protection as refugees",[161] coming mainly from Pakistan, Afghanistan, and Sri Lanka, with extraterritorial processing taking place in Nauru and on Manus Island in Papua New Guinea.[162]

For many persons coming from refugee producing countries, whether they are migrants, refugees, or even just tourists, obtaining a visa to legally enter countries of the global north, particularly within the EU, US and Australia, is difficult, as restrictions are imposed on the applicant, including proof of the financial resources to maintain a temporary stay in the

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[158]Elspeth Guild and Didier Bigo, "The Transformation of European Border Controls," in *Extraterritorial Immigration Control: Legal Challenges,* ed. Bernard Ryan and Valsamis Mitsilegas. (The Netherlands: Brill, 2010), 1.

[159] For more information regarding the operations of FRONTEX and the implications of many of their coordinated efforts, see: Guild and Bigo, "The Transformation of European Border Controls," 14-27.

[160] Ryan, "Extraterritorial Immigration Control: What Role for Legal Guarantees?," 3-38.

[161] *Ibid.,* 28

[162] The 'Pacific Solution' came about after a controversial incident that took place in 2001 in which the Norwegian commercial ship, the Tampa, entered into Australian waters with 433 migrants, who were primarily Afghan and Iraqi, which was refused entry into the harbor; the government eventually took control of the ship and took the migrants to New Zealand and Nauru for processing, which began the policy of extraterritorial processing. This policy was changed in 2008, and extraterritorial processing now occurs on Christmas Island, however it still lies outside of the territory of Australia, meaning that claims to asylum are still assessed outside the standard legal mechanisms. For more information see: Ryan, "Extraterritorial Immigration Control: What Role for Legal Guarantees?," 3-38. and Karin Fathimath Afeef, "The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific," Refugee Studies Center Working Paper Series no. 36 (October 2006): 4.

country.[163] These new restrictive measures, including extraterritorial processing, have led asylum to become increasingly treated like irregular migration, as legal entry into the country is more difficult, however, it is important to maintain that refugees are *not* irregular migrants.[164] Refugee law, in theory, has protection mechanisms[165] in place to ensure that persons entering territory who have a claim to refugee status should be attended to in accordance with international law; and with these protections, it is "completely inappropriate to stigmatize refugees arriving without visas as law breakers when a treaty we have freely signed provides exactly the contrary."[166] With the exception of international refugee law, international law largely ignores issues of migration,[167] and states are free to open and close their borders as they see fit. As the world continues to globalize and become more open in terms or trade and capital, control over population movement has become the last stronghold of territorial sovereignty, which wealthy refugee receiving countries in the global north guard with fierce politics and large budgets.[168]

In response to the general increase of international migrants, states have prioritized ideas of state sovereignty, security and cultural preservation over international obligations to protect and provide asylum to refugees. The establishment of refugee law was to legitimate the protectionist norm, while also creating a "reasonable accommodation between the inevitability of special claims and the sovereignty of the states to which those claims are addressed."[169] However, placing asylum-seekers into the broader category of international migration has had devastating effects on the protection that they are able to receive; when asylum seekers are treated as international migrants, the 'protectionist norm' inherent in refugee law is lost.

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[163] Catherine Dauvergne, Making People Illegal: What Globalization Means For Migration and Law (Cambridge: Cambridge University Press, 2008), 54.

[164] *Ibid.,* 50.

[165] See UN General Assembly, "Convention Relating to the Status of Refugees*,*" Article 31 which states "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[166] James C Hathaway, "Why Refugee Law Still Matters," *Melbourne Journal of International Law* 8 (2007): 92.

[167] See "Chapter Three: Migration in the Globalization Script," in Dauvergne, Making People Illegal, 29-49.

[168] The states of the EU, as well as the United States and Australia, have a huge annual budget for their immigration and border operations.

[169] James C. Hathaway, "Reconceiving Refugee Law as Human Rights Protection," *Journal of Refugee Studies* 4, no. 2 (1991): 114.

International refugee law is based on a humanitarian premise.[170] However, today the refugee regime in the global north is "fundamentally concerned with the protection of powerful states."[171] The discussion of refugees is no longer one of protection for the refugee, but rather protection of the state, through policies (or at least policies in practice) that reinforce the sovereignty of the nation state, as mentioned above. Refugee law and policy has moved from its humanitarian foundation to the preservation and reaffirmation of State's power, many times at the cost of protection. With the increase (and perceived fear) of international migration and refugee movement towards the global north, as well as the 'undesirable' socio-economic make up of these movements, and the real difficulties in distinguishing between those who are refugees and those who are economic migrants, keeping in mind that two categories are not mutually exclusive. Governments have begun to treat migration policy and refugee policy as though they are one.

Definitions, Labels and Navigating the System

According to Rees "refugee and asylum laws arise precisely from the recognition that there may be people whom [the global north] would otherwise not admit as immigrants, but who need protection".[172] Given that contemporary migration policies work to restrict entry to specific types of migrants, as well as the lack of consistency in application of refugee status determination procedures across states, it seems that refugee law, rather than a tool for protection, is potentially being utilized to deny entry and/or legal stay in the country.

The right to leave a country where there is a well-founded fear of persecution, and seek asylum[173] in another country is, in theory, still there, but has become more difficult to implement and realize.[174] Rather than a right, refugee status is now a privileged status, as governments have become more restrictive in who can claim this status, arguing that asylum claims are abused by economic migrants to gain entry into the host country.[175] Now, rather than simply being a 'refugee,' there is a wide array of labels that an asylum-seeker can receive in many countries.

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[170] Garvey, "Toward a Reformulation of International Refugee Law", 483.

[171] Hathaway, "Reconceiving Refugee Law as Human Rights Protection", 2.

[172] Rees, "Refugee Policy in an Age of Migration," 250.

[173] The right to seek asylum, although implied in the 1951 Convention, is explicitly found in Article 14 of the Universal Declaration of Human Rights, stating that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

[174] Anthony H. Richmond, "Refugees, Racism and the New World Order" (paper presented at, XIII Congress of Sociology, Bielefield, Germany, July 1994), 4.

[175] Rees, "Refugee Policy in an Age of Migration," 253.

Zetter discusses this issue at length in terms of the "refugee label," or rather the difficulty in receiving this label.[176] Several countries in the global north have remade the refugee label, and rather than a tool for protection, it has become much more blurred, as it has been "buried in the apparently neutral, apolitical requirements of immigration procedures and bureaucracies which are part of the much larger apparatus of state power and state interests,"[177] essentially intertwining the refugee process into the larger body of migration, and are "the tangible representation of [government] policies and programs."[178]

Further "burying" the refugee label is the creation of new labels in the processing chain, most notably "temporary protection." Temporary protection is sometimes viewed positively, as it fills the protection gap for those forced migrants who do not fit into the 1951 Convention criteria, often fleeing generalized violence, as this protection is often granted on an *ad hoc* basis to specific groups of refugees.[179] However, the reality is that in some countries temporary protection is often used as a substitute protection and as a "restrictive mechanism to reduce refugee rights and prevent integration."[180] Persons who receive temporary protection often receive fewer rights than 'Convention refugees,' and these actions could arguably be seen as a threat to the 1951 Convention, and can "form part of a strategy to de-legalize refugee protection and to relocate it in the realm of politics and humanitarian assistance."[181] Temporary protection thus has the potential to make refugee protection, and the rights granted in the 1951 Convention, cease to be an international legal obligation through creating a loophole of sorts, which can "intercept access to the most prized claim:" refugee status.[182]

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[176] Zetter, "More Labels, Fewer Refugees," 172-92.

[177] *Ibid.,* 188.

[178] *Ibid.,* 180.

[179] Emma Haddad, *The Refugee in International Society* (Cambridge: Cambridge University Press, 2008),206.

[180] Fethi Mansouri, Michael Leach, and Amy Nethery, "Temporary Protection and the Refugee Convention in Australia, Denmark, and Germany," *Refuge* 26, no. 1 (2009): 136.

[181] Joan Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime," *The American Journal of International Law* 94, no. 2 (April 2000): 281.

[182] Zetter, "More Labels, Fewer Refugees," 189. For more information on the history and the development of temporary protection see Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime," 279-306. For a comparative analysis of temporary protection in Australia, Denmark, and Germany, see Mansouri, Leach, and Nethery, "Temporary Protection and the Refugee Convention in Australia, Denmark, and Germany," 135-147. For discussion of temporary protection in the United States, see: Donald M. Kerwin, *The Faltering Us Refugee Protection System: Legal and Policy Responses to Refugees, Asylum Seekers, and Others in Need of Protection* (Migration Policy Institute, May 2011), 23-25, http://www.migrationpolicy.org/pubs/refugeeprotection-2011.pdf (accessed February, 12 2012).

However getting access to the prized label of a 'refugee' (or any label for that matter) means navigating through a system that was created for a very different type of displacement situation than those experienced by current refugee flows. As stated previously, since the end of the Cold War, refugee flows have been predominately coming from the global south, and those that do make it to the territory of the wealthier countries of the global north, often differ culturally, religiously, and linguistically than the host society. The refugee definition found in the 1951 Convention was written at a time and under conditions that were different. This creates questions of whether or not the 1951 Convention and the rights granted therein can be *practically* applied in today's society.

Some will argue that the definition is not out of date because it is broad enough to encompass any type of persecution, as well as the fact that the 1951 Convention "remains the sole, legally binding, international instrument providing specific protection to refugees."[183] The 1951 Convention has, in fact, created the basis of the international response to forced migration and is one of the most widely accepted international legal instruments.[184] In order for a definition to be universal, as this refugee definition is supposed to be it must not be too detailed or precise, in order to be flexible. However one can also argue that the drafters of the definition "eventually abandoned efforts to be more precise, because they already had a clear understanding of whom they had in mind [for protection]."[185]

When mass flows of refugees and forced migrants move from, for example, Burma to Thailand, from Rwanda into Burundi, or from Sudan to Chad, "we are prepared to assume that they are refugees, or even that they should be considered as such despite not fitting within the letter of the law." However, when movements happen closer to home, countries in the global north often assume the opposite.[186] As discussed previously, governments have worked hard and spent a lot of money to try to limit entry by undesirable migrants which, also limits entry to asylum-seekers. If the asylum-seeker does reach the territory, he/she must navigate themself through a complicated, formalized and individualized system to determine their status.

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[183] Jean-Yves Carlier, "The Geneva Refugee Definition and the 'Theory of the Three Scales,'" in *Refugee Rights and Realities*, ed. Frances Nicholson and Patrick Twomey (*West Nyack, NY:* Cambridge University Press, 1999), 37.

[184] Steinbock, "The Refugee Definition as Law,"13. As of a list updated in April 2011, 147 states are party to either one or both the 1951 Convention and 1967 Protocol; the list can be found at http://www.unhcr.org/3b73b0d63.html.

[185] Sztucki, "Who is a Refugee?," 58.

[186] Dauvergne, *Making People Illegal*, 53.

Interpreting the definition

The process of receiving one of many labels in the global north, as well as in many countries in the global south, is marked by a lengthy court hearing, in which facts are checked, stories are tested, and all efforts are made to ensure that the person who is claiming asylum is a *bona fide* refugee. Asylum-seekers often find themselves in a system that is over-legalized, and "often mires the process in a legal formalism that divorces procedures from humanitarianism."[187] What is lacking in the current systems of refugee status determination (RSD) is consistency and predictability, which is important to any legal system being implemented in an effective manner. Without consistency and predictability, questions arise as to fairness, as well as the effectiveness of the protection system.

The first obstacle is whether or not the asylum-seeker fits into the parameters set forth in the 1951 Convention definition, which is the definition utilized in most refugee systems in the global north.[188] Interpreting the refugee definition is a recognized problem. The definition used in the 1951 Convention has become more muddled than ever, as *who* is defining and *why* creates a wide array of definitions. Definitions vary as governments, lawyers, and others "manipulate the interpretation within relatively complicated legal terms."[189] In theory, the definition in the 1951 Convention *could* be interpreted more broadly to offer protection to wider array of persons, but the reality is in fact the opposite.

Due to the fact that the refugee definition found in the 1951 Convention could be interpreted broadly, as well as restrictively, "virtually every work of the core phrase of the refugee definition has been subject to interpretive dispute"[190] in order to ensure that all possible

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[187] Eduardo Arboleda and Ian Hoy, "The Convention Refugee Definition in the West: Disharmony of Interpretation and Application," *International Journal of Refugee Law* 5, no. 1 (1993): 67.

[188] The African and American regional systems of refugee protection utilize a definition that is based on the 1951 Convention, but are much broader and encompass a broader range of cases of forced migration. In 1969 the Organization of African Union (OAU) drafted the "Convention Governing the Specific Aspects of Refugee Problems in Africa," with the definition found in Article 1(2), stating that a refugee is a person "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." The Cartagena Declaration on Refugees, adopted in 1984 by the Organization of American States, adds to the 1951 Convention and OAU Convention, by including "among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

[189] Arboleda and Hoy, "The Convention Refugee Definition in the West", 77.

[190] Steinbock. "The Refugee Definition as Law," 14.

meanings (and restrictions) are understood. To understand how the definition is now applied, it is important to go over the main portions that are interpreted. Generally speaking, a person must meet three interrelated conditions in order to garner refugee status:[191] being abroad,[192] the fear of persecution, and the lack of protection.

The beginning of the refugee definition in the 1951 Convention states that a refugee is a person who has a "well-founded fear of being persecuted."[193] The meaning of 'persecution' and 'well-founded fear' are constantly challenged and analyzed. As these terms are not defined clearly in the 1951 Convention or other international instruments, academics, lawyers, and others are constantly working out what meaning should be attributed to the terms 'well-founded fear' and 'persecution.' The element of a well-founded fear of persecution "is clearly the most important factor concerning the determination of refugee status", as the "other elements of the definition i.e. outside the country of origin, nationality, or habitual residence, coupled with unwillingness to return are essentially questions of fact."[194] Thus persecution and well-founded fear are the elements that indicate whether these questions of fact are relevant to receiving protection.

The term 'persecution' first entered international relations with regard to refugees in the Constitution of the International Refugee Organization (IRO) which, as discussed in the previous chapter, was an organization created in 1946 to deal with the issue of World War II refugees.[195] There seems to be no apparent or specific reason for the use of the word 'persecution' in the IRO draft constitution, but its purpose was to define those persons who would have valid objections to returning to their home country and thus would allow them to fall under the mandate of the

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[191] Atle Grahl-Madsen, "Refugees Within the Competence of the United Nations," paper read at the 22nd AWR Congress in Geneva, October 13, 1972, published in *AWR Bulletin* 12, no. 21 (1974): 16-22. In *The Land Beyond: Collected Essays on Refugees Law and Policy*, edited by Peter Macalister-Smith and Gudmundur Alfredsson, (The Hague: Kluwer Law International: 2001), 89.

[192] The first part of the definition found in Article 1(A)2, indicates that a person must be outside the country of his nationality." This issue will not be discussed at length in this chapter, as it will be dealt with later, however, in the view of Hathaway alienage, or being outside of one's home country, is a key component to refugeehood/receiving protection, because the "international community can only make a real guarantee of rights to persons who are outside their own country - the notion of alienage is key to the making of real guarantees of protection is built into the definition of a refugee." Hathaway, "Why Refugee Law Still Matters," 98.

[193] UN General Assembly, "Convention Relating to the Status of Refugees," Article 1(A)2

[194] Paul Weiss, "The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis," *Cambridge International Document Series* 7, The Refugee Convention, (1995): 7.

[195] Ivor C. Jackson, "1951 Convention Relating to the Status of Refugees: A Universal Basis For Protection," *International Journal of Refugee Law* 3, no. 3 (1991): 405.

IRO.[196] The term 'persecution' was also included in the UNHCR Statute and the 1951 Convention, "almost automatically, and without any discussion of its substantive meaning."[197] However, today this term has been given much attention. It is out of the purview of this paper to fully explore this issue. However it is important to have a general understanding of what this term implies (or does not imply) in international legal procedures. The international refugee law academic community gives much weight to the works of Alte Grahl-Madsen, James C. Hathaway and Guy Goodwin-Gill.[198] However, among these leading scholars, a unified understanding of 'persecution' is not evident.

The more conservative reading of the meaning of 'persecution' is a threat to life or freedom (i.e., death/execution, arbitrary detention, torture, etc.), predominately for a political reason (in line with the idea of refugees as 'political refugees'),[199] whereas the more broad interpretation of 'persecution' is any sort of sustained violation of human rights.[200] There is no consensus to what this term *exactly* means, however certain general ideas accepted by most scholars[201] is that persecution indicates a failure of state protection, risk to civil and political rights[202], and risk to (some) economic social and cultural rights.[203]

When analyzing the construction of the 1951 Convention definition, Jackson adds to this discussion, stating that "[i]n any event, the notion of 'persecution' was not introduced in order to

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[196] The term 'persecution' was introduced by the was introduced by the Special Committee on Refugees and Stateless Persons, established by the Economic and Social Council in 1946, and although no specific reason for this word choice is evident, Jackson believes that perhaps it was simply to ensure that persons claiming this status had more than just a 'general dislike' for their home governments, but rather had a tangible fear upon return; see also Jackson, "1951 Convention Relating to the Status of Refugees: A Universal Basis For Protection," 405-406.

[197] Jackson, "1951 Convention Relating to the Status of Refugees: A Universal Basis For Protection," 406.

[198] See Alte Grahl-Madsen, *The Status of Refugees in International Law, Volume 1 and 2 ,* ed. A.W. Sijthoff (Leyden: 1966 and 1972); James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 91-134; and Goodwin-Gill and McAdam, *The Refugee in International Law.*

[199] See for example, Alte Grahl-Madsen, *The Status of Refugees in International Law, Volume 1 and 2,* and Paul Weis, "The Concept of Refugee in International Law," *Journal du Droit International, 87,* (1960): 929-1001.

[200] See for example Hathaway, *The Law of Refugee Status,* 101. For Hathaway, 'persecution' should be defined as "the sustained violation of basic human rights demonstrative of a failure of state protection."

[201] For a further explanation of the following list, including examples see Hathaway, *The Law of Refugee Status,* 99-134.

[202] See the *International Covenant on Civil and Political Rights*, which includes rights around issues such as executions, assault, torture, slavery, arbitrary arrest, detention, denial of freedom of movement, as well as the denial of freedom of opinion, association and privacy.

[203] See the *International Covenant on Economic, Social and Cultural Rights,* however the rights issued in this Convention are different than civil and political rights as they are to be realized and worked towards by the host governments, whereas civil and political rights are more or less non-negotiable. The primary economic social and cultural right found in refugee cases in the issues of 'discrimination'

restrict the refugee concept as hitherto understood."[204] Perhaps the debate is simply a game of semantics, a pointless exercise into the 'true meaning' of a word, especially as Weis, who was present at the drafting of the Convention has stated, "[a]s one who participated in the drafting of the convention, I can say that the drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered a political refugee."[205] This is probably the case as 'political refugees' were *the* refugees that the 1951 Convention was written for.

Persecution, regardless of what it means, must be proven to be real, which is done through the notion of having 'well-founded fear.' In discussing the concept of well-founded fear, Weiss summarizes the viewpoint of Grahl-Madsen, stating that "the adjective 'well-founded' connoted a fear based on reasonable grounds of persecution . . . this term suggests that it is not the frame of mind of the person concerned which is decisive for her or his claim to refugee status, but that this claim should be measured with a more objective yardstick."[206] This 'yardstick' measures elements such as fear, understood as a "forward-looking expectation of risk", and "[o]nce fear so conceived is voiced by the act of seeking protection, it falls to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case."[207] Fear is then evaluated as to whether or not it is valid, or 'well-founded', through looking at "all forms of material evidence" (i.e. news media, human rights reports, and other available and reliable country information), as well as personal testimony from the individual, if it is found to be credible.[208] There have also been substantial court cases in

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[204] Jackson, "1951 Convention Relating to the Status of Refugees," 406.

[205] Dr. Weis, quoted in Jackson, "1951 Convention Relating to the Status of Refugees," 406; this quote also demonstrates Weis' opinion that persecution includes things that are of a political nature, not general human rights violations, as indicated in the above note 62.

[206] Grahl-Madsen, *The Status of Refugees in International Law, Volume 1,* 173, summarized in Weiss, "The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis," 7.

[207] "The Michigan Guidelines of Well-Founded Fear," *Third Colloquium on Challenges in International Refugee Law, The Program in Refugee and Asylum Law*, University of Michigan Law School, Ann Arbor, Michigan, March 26-28, 2004), http://www.refugeecaselaw.org/documents/Well-Founded_Fear.pdf (accessed March 1, 2012). The Michigan Guidelines are the product of a colloquium meeting of lawyers, academics and policy workers in the field of refugee studies, in order to "develop the intellectual framework for resolution of cutting-edge problems facing international refugee law." For more information on the Michigan Guidelines, including guidelines on other refugee-related issues, see http://www.law.umich.edu/centersandprograms/pral/Pages/guidelines.aspx.

[208] "The Michigan Guidelines of Well-Founded Fear."

several countries that have shaped and structured how the concept of a well-founded fear of persecution is tested and tried.[209]

This attention to every detail of the definition, more particularly to this short phrase, "owing to a well-founded fear of being persecuted," may also indicate that the definition does not work for *all* groups of refugees, particularly modern refugee flows. Every part of the definition is manipulated and reconfigured, including how a well–founded fear of persecution relates to the five grounds of persecution: race, religion, nationality, membership of a particular social groups, and political opinion.[210]

Perhaps it was the intention of the drafters to leave the definition of a refugee, and the terminology used ambiguous, in order to maximize its breadth. However, its effect today has been the opposite, as many governments, particularly in the global north utilize this ambiguity to apply the convention definition restrictively. RSD procedures and the application of the convention definition are now caught up in a legal formalism, that have "fallen prey to an emphasis on legal abstraction, often in disregard of the reality that exists in the asylum seeker's country of origin . . . [t]he asylum seeker's personal reality, crucial in refugee status determination, is under-emphasized . . . [and] one dangerous consequence is that determination systems become vulnerable to politicization."[211] Rather than the humanitarian aims of the definition, and for that matter the Convention, facts are now the key to protection, rather than need or fear of the person seeking said protection. This is not to say that facts are not useful, but in many asylum cases, facts are difficult to prove. According to Barsky, the purpose of contemporary RSD hearings is to[212]

> narrow the refugee claimant down to the stated grounds for his/her claim so that a decision can be made on the case, so the legal grill or template which is applied to evaluate the legitimacy (the kind of persecution suffered) is limited in such a way that

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[209] In the US case, *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the US court set a precedent that asylum claims need to demonstrate "reasonable likelihood" of persecution if returned home, as opposed to withholding deportation which requires a higher burden of proof. In case *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, decided that state complicity in persecution was not required in order to receive asylum, as the state was 'unwilling or unable' to protect him, and thus it amounted to persecution. In the Australian case, *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*, HCA 62; (1989) 169 CLR 379 F.C. 89/034, the court held that an asylum seeker must have a "real chance" (substantial chance, high probability) of facing persecution if returned to their country of origin.

[210] For an overview of the five grounds for claiming refugee status and relevant court cases see Goodwin-Gill and McAdam, *The Refugee in International Law*, 70-89; Hathaway, Chapter 5, "Nexus to Civil and Political Status," in *The Law of Refugee Status*, 135-188.

[211] Arboleda and Hoy, "The Convention Refugee Definition in the West," 83.

[212] Robert F. Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (Amsterdam: John Benjamins Publishing Company, 1994), 4.

it produces a narrative which speaks of a very small and extremely problematic segment of the refugee's experience.

The legal sphere in which RSD hearings are heard creates a space in which a decision is made on limited facts, sometimes separated from the larger picture or produces a picture victimization which is dehumanizing (as will be discussed further later in the thesis), but is often central to either receiving protection or being rejected.

Barsky's central argument is that in order to be successful in obtaining refugee status the person must match their description of events as closely as possible to what the legal authorities deem to be admissible; a claimants hearing "will be successful to the degree that he is able to create an Other[213] (as Convention refugee) that is productive within the context to which he is speaking."[214] Essentially, persons wishing to seek asylum must make their claim fit within the definition found in the 1951 Convention, constructing a narrative that fits pre-set criteria based on facts. The problematic issue associated with the "policy of haggling over tiny details with dramatically persecuted persons . . . is that the veracity of the entire claim is put into question by ultimately inconsequential (but verifiable) details."[215] As a result of this fact-finding tactic, "decision-makers often fail to link the purely structural legal criteria with the level of background and information necessary to allow these concepts to acquire a relevant content,"[216] essentially making it more difficult to have a neutral decision. Although Barsky wrote specifically of the Canadian system, his analysis rings true for many of the systems in global north. The systems in place attempt to formalize and make the subjective objective, while often ignoring the perceptual differences between the applicant and decision-makers. Barsky explains it best, stating that,[217]

> [r]efugee hearings are a peculiar hybrid of courtroom-style interrogation, loosely structured story-telling, and inter-cultural discussions involving bureaucrats (who rarely exhibit an understanding of the Third World countries from which most refugees come) and claimants (who generally exhibit as little understanding of the host country as the bureaucrats do of the country of origin).

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[213] For Barsky, the 'Other' moves beyond the typical notion of generalized stranger or foreigner. As a 'productive Other,' this involves "culturally-imposed confines that hinder or bind the refugee as constructed Other;' the process in making a claim then is one of "creating a 'productive other,' a satisfactory stand-in for the purposes of the hearing." In other words, this 'Other' must be created in order to fit into the appropriate refugee definition, and it is 'productive' in that the process is one of self-representation for a clearly defined end.

[214] Barsky, *Constructing a Productive Other,* 19.

[215] . *Ibid.,* 149.

[216] Arboleda and Hoy, "The Convention Refugee Definition in the West," 83.

[217] Barsky, *Constructing a Productive Other,* 65.

As national governments in the global north handle the refugee processing independent from UNHCR, labels that are created and given may represent a wider political agenda, which in contemporary times is aimed at limiting entry to undesirable foreigners or meeting ulterior political and policy motives. Arboleda and Hoy argue that in order to truly abide by the 1951 Convention refugee definition, states, particularly northern states, must agree on "standards for fair, predictable and effective refugee determination systems" which is contingent on a *clear* refugee definition and interpretation.[218] Rather than being driven by legal and political desires, RSD procedures should be reformulated outside of the legal formalism that is has been built around, as well as the issue that concern for the numbers associated with recognition rates tends to trump the need for consistent and fair application and implementation of the 1951 Convention.[219]

Making Refugee Protection Meaningful

Although states freely sign the 1951 Convention, the discussion about reformulating refugee policies is taking place because states see the current policies as "insufficiently attentive to their sovereign right to exclude aliens." [220] For other groups working in refugee aid and advocacy, the current refugee definition is seen as limiting and too restrictive to account for all those who should benefit from protection.[221] Refugee law is in crisis as most interested parties, despite their disparate interests, agree that the international refugee law system as it exists today is problematic and needs reform. Several academics have suggested ways in which refugee law should be reframed or readdressed to better protect refugees, which are reviewed below.

Reform through Human Rights

Hathaway suggests that refugee law should be reassessed in terms of human rights protection.[222] The current refugee definition found in article 1 of the 1951 Convention, in the view of Hathaway, is limiting as these grounds are not adequate enough to encompass all those

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[218] Arboleda and Hoy, "The Convention Refugee Definition in the West," 67.

[219] *Ibid.,* 84.

[220] Hathaway, "Reconceiving Refugee Law as Human Rights Protection," 115.

[221] Pécoud and de Guchteneire, "Migration Without Borders,"19-20.

[222] See the following articles by Hathaway:, "Reconceiving Refugee Law as Human Rights Protection," 113-31; "Why Refugee Law Still Matters," 89-103; and James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal For Collectivized and Solution-Oriented Protection," *Harvard Human Rights Journal* 10 (1997): 115-211.

who require protection because they have been forced to migrate. This author asserts that the drafters of the 1951 Convention "intentionally left the meaning of 'persecution' undefined because they realized the impossibility of enumerating in advance all of the forms of maltreatment" which might legitimate a person's claim to foreign protection.[223] Hathaway suggests that fear of persecution can remain a meaningful concept if reinterpreted more towards the failure of basic state protection, demonstrated through the denial of fundamental, internationally recognized human rights, and that "any person whose basic human dignity is at risk in her home state must be empowered to leave the abusive situation. Refugee law should be an effective means of enabling persons to disengage from states which have forfeited their claim to international legitimacy by failure to adhere to basic standards of human rights law."[224]

In this human rights model, persecution is seen as failure of state protection. This is similar to Shacknove, who states that "persecution is but one manifestation of a broader phenomenon: the absence of state protection of the citizen's basic needs."[225] For Hathaway, the conceptual weakness of the 1951 Convention definition is the requirement that the well-founded fear of persecution be derived from reasons of race, religion, nationality, membership of a particular social group, or political opinion.[226] Hathaway goes into more detail regarding the fundamental concepts in this reformulation, including the problem areas, specifically the issue of the willingness of states to broaden the current parameters for defining a refugee, as that would create a higher rate of "Convention refugees" in the state, which is not something that most states would deem as desirable.

The 1951 Convention does grant certain rights to refugees that are articulated in other human rights instruments including freedom of religion,[227] non-discrimination,[228] freedom of association,[229] freedom of movement,[230] employment and labor rights,[231] as well as the obligation of states to issue identity papers and travel documents[232] and facilitate assimilation

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[223] Hathaway, "Reconceiving Refugee Law as Human Rights Protection," 122.
[224] Hathaway, "Reconceiving Refugee Law as Human Rights Protection," 120.
[225] Shacknove, "Who is a Refugee?," 277.
[226] Hathaway, "Reconceiving Refugee Law as Human Rights Protection," 123.
[227] UN General Assembly, "Convention Relating to the Status of Refugees," Article 4.
[228] *Ibid.,* Article 3.
[229] *Ibid.,* Article 15.
[230] *Ibid.,* Article 26.
[231] *Ibid.,* Articles 17-19.
[232] Ibid., Articles 27-28.

and naturalization.[233] Re-emphasizing the human rights side of the 1951 Convention and of refugee protection is important in preventing refugee law and RSD procedures from becoming over-legalized or buried within immigration procedures and policies, as was discussed earlier. Thus, drawing attention to the human rights roots of the 1951 Convention has the potential, according to some academics, to make refugee protection more meaningful, without changing the actual text of the Convention.[234]

Reforming through communication and burden sharing

Garvey suggests that in order for the refugee system to be relevant and effective, it must rest on inter-state accountability,[235] creating a "binding regime of international burden-sharing."[236] Unlike Hathaway, Garvey does not see human rights as the best option to better protect refugees, although he recognizes that "refugee crises are naturally infused with the rhetoric of human rights," he believes that "human rights principles embody ends, not means," rather today's refugee crisis must address state-to-state relations.[237] In Garvey's view, refugee law "reaches a dead end" as human rights law because it clashes with the principle of national sovereignty, and the misuse of human rights law "as the exclusive legal basis for dealing with mass exodus leads only to unproductive rhetoric and recrimination."[238] Generally speaking, human rights law is consistently compromised because the principle of national sovereignty in international law gives states exclusive control over the individuals within its territory.

On the other hand, Chimni's reform represents the view of the global south. Chimni believes that a fundamental issue in international refugee law and policy today is that laws and policies have been predominantly drafted and shaped by states and scholars from the global north, without consultation with governments and scholars of the global south and, most significantly, silencing the voices of refugees themselves.[239] Likewise, UNHCR has moved away

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[233] Ibid.*,* Article 34.

[234] Alice Edwards, "Human Rights, Refugees, and the Right 'to Enjoy' Asylum," *International Journal of Refugee Law* 17, no. 2 (2005): 328-30. Edwards' , main argument is that "[i]n the face of eroding standards of treatment for refugees and asylum seekers,[international human rights law] serves to reinforce refugee protection and to define and give meaning to the 'right to enjoy asylum' component of Article 14 of the UDHR."

[235] Garvey, "Toward a Reformulation of International Refugee Law," 494-499

[236] Hathaway, "Reconceiving Refugee Law as Human Rights Protection," 120.

[237] Garvey, "Toward a Reformulation of International Refugee Law," 500.

[238] *Ibid.,* 487.

[239] B.S. Chimni, "Reforming the International Refugee Regime: A Dialogic Model," *Harvard International Law Journal* 12, no. 2 (2001): 151-68.

from its past positions on important issues, such as voluntary repatriation, and involved itself more with internally displaced persons without "entering into a sustained dialogue" with states and scholars in the global south or southern NGOs.[240] The unilateralism of the global north and UNHCR has had a profoundly negative impact on refugee protection. To improve refugee protection, Chimni suggests a "dialogic model" that proposes communication "on a continuous and institutionalized basis between States, the civil society and UNHCR, within UNHCR, and between concerned NGOs and governments."[241] Opening a stronger dialogue between the various elements of the emerging transnational society, there is potential, according to Chimni, to safeguard core protection principles for refugees. Chimni's reforms and ideas are rooted in the social inequalities between the global north and south, representing one of the few reforms that emphasize the effects the current state of global inequality has on refugee protection, which will be discussed further in the following Part III.

Chimni argues that the refugee regime today, with UNHCR at the fore, has moved towards the policy of containment, through which they encourage regional containment of refugees (such as in neighboring countries) and repatriation, over resettlement or movement to the global north.[242] Voluntary repatriation is seen as the ideal solution, and has been identification as *the* humane solution, often leading to its pursuit even when it is not appropriate (i.e. without full research of safety and security in the country of origin) or indeed voluntary.[243] Chimni also articulates the changing role of UNHCR within refugee policies in the global north, specifically how they have coped with the fact that refugees are no longer welcome in the global north. The northern states are the largest donors to UNHCR, and the UNHCR mandate and policies have been adjusted, showing that "UNHCR is an uncritical consumer of concepts and theories which support a particular (northern) vision of the global refugee order."[244] As UNHCR is arguably the 'guardian' of refugee law and policy, their seeming alliance with the global north by remaining silent, or at least not openly criticizing, the way in which policy is implemented in these countries can be very problematic. The dependence that UNHCR has on donations from the states in the global north also shows the limitations of the organization's sphere of influence and ability to influence policy in the north.

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[240] *Ibid.,* 151.
[241] *Ibid.*
[242] Chimni, "The Geopolitics of Refugee Studies."
[243] Chimni, "The Geopolitics of Refugee Studies."
[244] Chimni, "The Geopolitics of Refugee Studies," 364.

The majority of refugee movement (flight and asylum) takes place in states located in the global south, and many states in the global north are working to keep that movement contained in the south and away from their countries' borders. With this reality in place, as well as the shift of UNHCR's policies, as discussed above, reformulations on how 'burden sharing' and resource allocation can be better distributed have emerged. Kritzman-Amir addresses the issue of burden sharing by asking the question "when refugees leave their country of nationality, which country is responsible for protecting and providing for them?"[245] For many refugees coming from the global south, they first seek refuge in a neighboring country, which is not likely to provide them functional protection, and the ability to exercise their human rights and the reality is that only a small percentage of refugees are able to reach countries that have the resources to provide them with adequate protection.

Kritzman-Amir proposes several mechanisms for burden-sharing, all of which are connected to a state's moral obligation to assist. Refugee protection is expensive, as it requires countries to allocate resources to meet the basic needs of refugees, which is something that many countries in the global south do not have. In the opinion of Kritzman-Amir, there is "no moral justification for these costs to be disproportionately borne by some countries and not others," however there are not incentives for states to create fair responsibility-sharing mechanisms, which is primarily the result of the lack of political influence that many of the refugee hosting countries in the global south.[246] Overall, this article addresses an important sub-issue in many of the other proposals to reformulate how refugee issues are addressed by host countries, drawing out the disconnect between the global north and south, specifically regarding resources.

Hathaway and Neve produced another reformulation of refugee law that proposes a "solution oriented protection" that is based in a human rights framework. Rather than addressing or reformulating the status quo of the refugee regime, recognizing that states will not adhere to policies that will potentially increase migration into their countries, they propose ways in which better protection can be realized in regional protection schemes.[247] Recognizing that refugee status is intended to be a temporary status, not a "back door to permanent immigration," this proposal also advocates for temporary protection, as it is "concerned to safeguard human dignity

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[245] Tally Kritzman-Amir, "Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law," *Brooklyn Journal of International Law* 34, no. 2 (2009): 355-94.

[246] Tally Kritzman-Amir, "Not in My Backyard," 392.

[247] Hathaway and Neve, "Making International Refugee Law Relevant Again," 207.

only until and unless the home state is able to effectively resume its primary duty of protection," therefore if temporary protection is conceived in a "rights-regarding and solution-oriented manner" refugees will be able to return home when it is appropriate.[248]

Hathaway and Neve's proposal also rests on enhanced burden sharing between states, and the "duty to equitably share the responsibilities and burdens of refugee protection."[249] Under this proposed "regime of common responsibility," certain countries (what is called the "interest-convergence" group) agree in advance to contribute to protect refugees who arrive to the territory of any of the member states.[250] The idea behind this 'interest-convergence group' is to disassociate the site of arrival from the country of asylum. The idea is that if the protection mechanisms in the global south are strengthened, the global north will have a significant reduction in asylum claims, particularly fraudulent asylum claims, and would be able to dismantle some of the 'non-entrée' mechanisms. The savings from the reduction of money spent on asylum claims could then be directed to the protection of refugees in the global south.[251] In other words, the global north has the resources for better protection and the south as the capacity (in regards to the regional proximity to the refugee flows) to absorb the refugees.

However this 'solution-oriented' proposal has some essential flaws, which have been discussed by Chimni, Anker, Fitzpatrick, and Shacknove. [252] Of particular concern is the emphasis on regional protection. By advocating for regional protection and reducing the amount of asylum claims in the global north, this system allows the states of the global north use the structural inequalities between the north and south, which they have constructed and sustained, to their advantage;[253] the north is able to reduce asylum claims and responsibility to protect refugees on their territory. Also, the regional protection proposed by Hathaway is dependent on consistent funds from states in the global north. However, once the refugees are contained in a regional protection framework, it is not likely that the states in the global north will feel as compelled to fund the operations.[254] The conception of burden sharing, or the "refugee-resource transaction" in this proposal "turns the refugee into a commodity which can be 'traded' on the

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[248] *Ibid.,* 210.
[249] *Ibid.,* 211.
[250] *Ibid.,* 145.
[251] *Ibid.,* 145-149.
[252] Chimni, "The Geopolitics of Refugee Studies," 358-60; Deborah Anker, Joan Fitzpatrick, and Andrew Shacknove, "Crisis and Cure," *Harvard Human Rights Journal* 11 (1998): 295-310.
[253] Chimni, "The Geopolitics of Refugee Studies," 360.
[254] Anker, Fitzpatrick, and Shacknove, "Crisis and Cure". 300.

world market,"[255] removing the asylum seeker from the sphere of law. The additional fear is that the emphasis on temporary protection in poorer countries of the global south will erode the human rights and welfare standards in the 1951 Convention rather than strengthen them.[256] In general, this model moves away from the core of the Convention, which is the right to personal protection and to regain human dignity, as it "suppresses the moral individuality of forced migrants," which has "moral costs."[257]

Moral and Humanitarian Arguments

The moral, humanitarian argument for refugee protection is something that can be seen in many proposals (as indicated above) for bettering refugee protection. Most governments will in fact acknowledge the importance of refugee protection, but they do not want it happening on their soil. Gibney articulated this disjunction in his book, stating that

> a kind of schizophrenia seems to pervade Western responses to asylum seekers and refugees; great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the state where they could receive protection.[258]

This excerpt suggests that the recognition for the need and purpose of asylum is one shared by most states, and suggests that it is possible to base a reformulation of refugee law on this shared moral value. All of the above suggestions for readdressing refugee law and policy rest primarily on increased burden-sharing and communication among states, and Gibney's book, *The Ethics and Politics of Asylum* adds to this literature by grounding this reformulation in the ethical, primarily utilizing the idea of 'humanitarianism,' and interacting with issue of what *duties* states have towards refugees. Gibney suggests that the principle of humanitarianism in relation to refugee protection, holds that "states have an obligation to assist refugees when the costs of doing so are low," understanding 'low costs' as "a way of keeping the sacrifices required of citizens at a minimum to reduce the likelihood of backlash."[259] This is a simplified description of Gibney's ideas, however the basic claim is clear, which is that this approach will better

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[255] Chimni, "The Geopolitics of Refugee Studies," 362.
[256] Anker, Fitzpatrick, and Shacknove, "Crisis and Cure," 302.
[257] *Ibid.,* 306.
[258] Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004), 2.
[259] Gibney, *The Ethics and Politics If Asylum,*231.

realistically call on states to uphold this 'moral duty,' as it is flexible enough to be applied differently from state to state. Gibney sees the flaws in this idea, as calling upon humanitarianism will not account for the other political realities that compromise and shape this ethical responsibility, however he believes that "the humanitarian principle might move these states closer to realizing the values they claim to live by now."[260] However, this idea has the potential to suffer similar criticism as Hathaway and Neve, as the as obligation to protect is put in terms of cost and benefit, and moves away from legal responsibilities, as well as removing the refugee from law.

Is it enough?

Many of these reforms and critiques, aside from Chimni, neglect the externalist component of refuge protection or, in other words, they have neglected to place the responsibility that the global north has in creating conditions that generate refugee flows. The externalist explanation assigns "blame between the state from which refugees flee and states responsible for authoring policies or undertaking action leading to the outflow of refugees."[261] The focus on the internal cause of refugee flows and forced migration creates a lack of international accountability and a system in which "prevention is preferable to cure."[262] The methods of 'prevention,' namely human rights and humanitarianism, are problematic in reaffirming a focus on internal causes of refugee production, among other problems, which will be discussed in Part III.

Many of the proposals for reformulating refugee protection are in line with the idea of the "Convention Plus" approach adopted by UNHCR. This initiative acknowledges that, although important in defining state responsibilities to refugees, the 1951 Convention "cannot address all the pressing issues pertaining to refugee protection in today's changing world."[263] The Convention Plus agreement includes multilateral special agreements, targeting development assistance,[264] among other things, but with focus on enhancing protection without any suggestion of altering the initial Convention. However, as most of these reforms are created and proposed

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[260] Gibney, *The Ethics and Politics If Asylum*,260.
[261] Chimni, "The Geopolitics of Refugee Studies," 261.
[262] *Ibid.*
[263] "Convention Plus at a Glance," 2005, http://www.unhcr.org/403b30684.pdf (accessed February 20, 2011).
[264] For more information on these development assistance initiatives, see Alexander Betts, "International Cooperation between North and South to Enhance Refugee Protection in Regions of Origin," *Refugee Studies Center Working Paper* no. 25 (July 2005).

without making a change to the Convention, will the call to reignite the moral force of human rights law create actual change? Rees suggests that "the moral force of refugee policy varies with the extent to which we identify with the refugee."[265] As discussed in the outset of this Part, the characteristics of the current asylum-seeking population that enter the global north are often culturally different from the host society, and if the populations of the global north do not identify with asylum-seekers, then the law and Convention, as it stands today, will not acquire a strong moral force.

Most of the aforementioned attempts to re-formulate law have all done so under the premise of working within the current system, which is the same system that much of this literature also indicates is failing. Using the key elements that these important academics have constructed will be a starting point to analyze a realistic and rational system of refugee protection, which might include starting over and responding to the contemporary situation, rather than remaining tied to the specific historical event that the 1951 Convention is grounded in. The above existing critique is an important starting point from which I articulate my own critique of current policies and suggested directions of reform in order to continue to usefully rethink how refugee protection can best protect the vulnerable .

PART III: FORCED MIGRATION IN CONTEXT

In Part II and II of this paper we have seen how the refugee was created in international law, the critiques and problems associated with the current approach to refugee law, and the global north's role in international refugee policy. This section aims to discuss the situation of forced displacement in the context of global inequalities, via globalization, and the un-productive discourse that refugee protection is mired in. Refugees have indeed become an issue of the global south, as this is the location of the vast majority of refugee production and protection programs. Just as 'genuine' refugees have become more difficult and complex to identify, so have the causes of their displacement. What seems to be evident is that forced migration has the potential to become yet another "part of a western project of global dominance" operating under the

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[265] Rees, "Refugee Policy in an Age of Migration," 252.

banner of globalization.[266] Part III will finish with the argument that international refugee law has become irrelevant and an irrational system of protection in contemporary society and suggest ways in which this issue must be rethought.

Issues of Definition

In the early years when the first treaties pertaining to refugee protection were developed, and international efforts were coordinated for relief, an *ad hoc* approach was taken to classifying certain migrants as 'refugees.' The definition evolved and new conventions were created that reflected the needs of the displaced populations specific to their circumstances, or in many cases their geographic origin.[267] From the progression that was outlined in Part I, the argument can be made that the definition of a refugee was not rigid, but rather a fluid category that reflected the prevailing realities of displacement, as well as the perceived protection needs of that time period.

The post-World War II refugee definition was formulated during a period of global divide between the capitalist West and the communist East. Under this backdrop, refugees were conceptualized by the drafters of the 1951 Convention as a product of a certain kind of political rule, namely "oppressive, totalitarian regimes," such as that which existed in Nazi Germany or the states that were forming in the communist Central and Eastern Europe.[268] In this dichotomy, the political undertone of the Convention suggests that all communist countries were repressive, and that Western states were the only place of sanctuary for such asylum seekers.[269] As European refugee movement in this period was rooted in this divide, stateless persons and refugees produced as a result of repressive communist regimes were welcomed in the democratic states of the West.

Although sixty years have passed since, the 1951 Convention has remained largely unchanged. The only major change was the addition of the 1967 Protocol, which removed the temporal and geographic limitations of the refugee definition, effectively making the law universal. However, the world has shifted dramatically since 1967 and the refugee definition,

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[266] B.S. Chimni, "The Birth of a 'Discipline': From Refugee to Forced Migration Studies," *Journal of Refugee Studies* 22, no. 1 (2009): 20.

[267] Isabelle R. Gunning, "Expanding the International Definition of Refugee," *Fordham International Law Journal* 13, no. 50 (1989-1990): 40.

[268] Gibney, *The Ethics and Politics of Asylum,* 6; The discussion in Part I also discusses how the refugee definition found in Article 1 of the 1951 Convention is clearly aligned with those fleeing the Nazi regime and the Soviet Union.

[269] Giorgio Grappi, "Refugees and Partition in a Migrants' World," *Refugee Watch* no. 35 (June 2010): 67

based on alienage and an individual claim to a well-founded fear of persecution based on reasons of race, religion, nationality, political opinion, or membership of a particular social group, is irrelevant for much of the forced migration occurring in the twenty-first century. In this Part the term 'forced migrant' will be used in place of 'refugee' because the reality is that most displaced persons are not refugees, in the legal sense, as they do not fall into the categories of the 1951 Convention or in the extended definitions of the regional definitions found in the African and Latin American systems. Even the term 'forced migrant' can be a problematic as what really constitutes force is an important question: does force imply physical violence, or is poverty, unemployment and lack of state welfare a reasonable conditions to constitute force? The latter is a push factor for much of the domestic and international migration in the global south, however, if they are not threatened for convention reasons, they are not refugees and not entitled to international protection. It is clear that it is time to reassess the international refugee regime so that it can more rationally protect vulnerable migrants. Today's causes of migration transcend simple categories such as political opinion or religious belief, but have their source in entrenched and increasing global social and economic inequalities.

A Southern Issue?

The global refugee population peaked after the Cold War with 18.2 million at the end of 1993.[270] Since then, the number of recognized refugees has fluctuated, but has not reached this peak thus far. At the end of 2010, UNHCR estimated that the global refugee population to be 10.55 million persons.[271] The vast majority of these refugees originate in the global south, and the enhanced border security and immigration procedures in the global north, as well as the policy of containment implemented by UNHCR, have kept 80% of the world's refugees (8.5 million persons) in the global south.[272] When looking at the figures, one might deduce that refugees are not a northern issue, as the majority of refugees are produced in and remain in the global south.

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[270] See Stephen Castles, "Towards a Sociology of Forced Migration," *Sociology* 77, no. 1 (2003): 14.
[271] This includes 597,300 persons UNHCR considers to be in 'refugee-like' situations, and does *not* include the some 4.8 million Palestinian refugees who fall under the mandate of the United Nations Works and Relief Agency. See *UNHCR Statistical Yearbook 2010: Trends in Displacement, Protection and Solutions*, 10th ed. (UN High Commissioner for Refugees, December 207, 2011), 6, http://www.unhcr.org/refworld/docid/4f06ecf72.html (accessed March 2, 2012).
[272] *Ibid.*

The aforementioned numbers only take into account those who have been recognized under the 1951 Convention as refugees, and do not accurately capture the present reality of forced migration in the global south. In fact, refugees are part of a larger, increasingly complex phenomenon of forced migration. In addition to the grounds outlined in the1951 Convention, persons are forced to migrate for a number of reasons including generalized violence, war and conflict, natural and man-made disasters, and as a result of unequal development trajectories. Although northern states have remained firm on not expanding the definition, as it is believed to broad enough for those who need protection (as discussed in Part II), the states in what is now the global south have embraced more inclusive definitions for the protection of forced migrants.

Regional Definitions

The refugee was created out of a certain global dichotomy between the East and West. The 1951 Convention largely did not reflect the reality of forced migration and displacement in the Third World that was occurring during the same time period, as it was an instrument created for European displacement. While the First and Second World countries were engaged in the Cold War, much of the non-aligned Third World was experiencing large amounts of forced displacement, particularly on the African Continent and it was soon clear that the refugee problem was not limited to Europe. As previously discussed, the 1967 Protocol was adopted, removing the temporal and geographic limitations of the 1951 Convention, so that the protections offered in the Convention can be utilized in the rest of the world. However, as soon as the concept of refugee was placed within the confines of the 1951 Convention, the definition proved to be inadequate for many countries of the global south, where issues of forced migration manifested differently. Soon after this definition was adopted, it needed to be changed.[273]

In the 1960s, many states on the African continent had either recently decolonized, or were in the process of doing so. This struggle for independence and decolonization, as well as the process of conforming to colonially drawn borders and types of government and statehood,[274]

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[273] David Turton, "Conceptualizing Forced Migration," *University of Oxford Refugee Studies Center Working Paper Series* no. 12 (October 2003): 13.
[274] The legal doctrine of *uti possidetis juris*, related to the process of decolonization, means that the new states must maintain the same borders that were established by the colonial powers. However, as colonial borders were drawn without regard for pre-colonial indigenous political structures, or ethnic or cultural divisions among peoples, this policy made it difficult for post-colonial states to assert their unity. See Anghie, Chapter 4 "Sovereignty and the Post-Colonial State," in *Imperialism, Sovereignty and the Making of International Law*, 196-244.

led to population displacement that was different from the five grounds listed in the 1951 Convention. In 1969 the Organization of African Unity (OAU) created the Convention Governing the Specific Aspects of Refugee Problems in Africa.[275] In addition to the 1951 Convention definition, the OAU Convention included as a refugee:

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[276]

In 1984, the Latin American states created a similar definition in the Cartagena Declaration on refugees.[277] This declaration was made in response to the large number of persons displaced as a result of the political and military upheavals in Latin America during the late 1970s and 1980s.[278]

The 1951 Convention and the regional definitions reflect different historical contexts, as one was a response to European totalitarianism, and the other to the realities of the struggle for independence, the dilemmas of the postcolonial state with artificially imposed borders and forms of governance, political turmoil, and generalized violence. These definitions encompass the individual-based persecution of the 1951 Convention, as well as groups who were fleeing from generalized violence and civil strife. The intent of this Convention was to create a regional definition of refugee. However, the OAU Convention in particular was also farsighted about the world's future challenges when it came to forced migration.[279] In addition to the inclusiveness of this definition, the OAU Convention also challenges the notion that individual persecution is an

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[275] Organization of African Unity, "Convention Governing the Specific Aspects of Refugee Problems in Africa," 1001 *U.N.T.S.* 45 (September 10, 1969), http://www.unhcr.org/refworld/docid/3ae6b36018.html (accessed January, 3 2012).

[276] *Ibid.,* Article 1(2)

[277]"Cartagena Declaration on Refugees," *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, (22 November 1984),http://www.unhcr.org/refworld/docid/3ae6b36ec.html (accessed January 8, 2012). the expanded definition included This expanded definition utilized the 1951 Convention and included: "among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." See also Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism," *International Journal of Refugee Law* 3, no. 2 (1991): 187: Unlike the OAU Convention, which created a regional law, the Cartagena Declaration is a non-binding instrument that created customary rules on how to define a refugee.

[278] *Ibid.*; see pages 187-209 for a more comprehensive analysis of the conditions that led to this declaration.

[279] Gunning, "Expanding the International Definition of Refugee," 44.

essential criterion of refugeehood as "the normal bond between the citizen and the state can be severed in diverse ways, persecution being but one."[280]

The OAU Convention and Cartagena Declaration were both created to meet regional needs and respond to logical considerations, namely the inability to handle large waves of displaced persons on an individual, case-by-case basis.[281] Today, while some of the causes of migration and displacement continues to result from political persecution (as included in the 1951 Convention definition), generalized violence and civil strife (as included in the OAU and Cartagena definitions), other causes are increasingly prevalent that do not fit into existing international or regional legal categories.

Internally Displaced Persons

One of the most striking issues related to forced migration today is the amount of internal displacement. At the end of 2010, UNHCR had 33.9 million persons under its protection mandate, of which only 10.55 million (approximately 31%) were Convention refugees.[282] The largest population that UNHCR offers protection to is Internally Displaced Persons (IDPs), amounting to 14.7 million persons (approximately 43%).[283] A refugee, as discussed previously, must be outside the territory of their home state, an element which IDPs lack. In the view of UNHCR, IDPs have undergone similar experiences as Convention refugees, the only difference being that they have not crossed an international border and thus are not considered a refugee in the legal sense.[284] An IDP is not just any person displaced within their home country. There are specific parameters for this status, similar to gaining refugee status. Although only 14.7 million IDPs receive attention from UNHCR, they estimate that there are approximately 27 million IDPs around the world.[285]

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[280] Shacknove, "Who is a Refugee?," 275.

[281] Arboleda and Hoy, "The Convention Refugee Definition in the West," 76.

[282] *UNHCR Statistical Yearbook 2010*, 6.

[283] In addition to the 10.55 million refugees and 14.7 million IDPs, UNHCR offers protection to this includes 837,500 asylum seekers (those who have not had their refugee status determined), 197,600 returned refugees, 2.9 million returned IDPs, 3.5 million stateless, and 1.3 million other persons of concern, including unaccompanied minors. See *UNHCR Statistical Yearbook 2010*, 6.

[284] UNHCR, "Internally Displaced People," UNHCR: The UN Refugee Agency, http://www.unhcr.org/pages/49c3646c146.html (accessed April 2, 2012); Castles, "Towards a Sociology of Forced Migration," 3.

[285] UN High Commissioner for Refugees, "Internally Displaced People."

Unlike refugees, there is no legal definition for IDPs.[286] The general definition in the *Guiding Principles on Internal Displacement* includes:

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[287]

The inclusion of IDPs under the mandate of the UNHCR is an insight into the weaknesses and limitations of the 1951 Convention: that many people made vulnerable through forced displacement do not fall under its definition. IDPs are included in the protection scheme of UNHCR and other organizations, which construct camps and distribute aid to the best of their ability and available resources. However, there is no clear and stable internationally-mandated legal responsibility or protection regime for IDPs as they have not crossed an international border.[288] They fall under the legal responsibility of their home state. Thus, to some extent, providing internal protection for those suffering as a result of war and conflict prevents them from seeking legally secure, stable, long-term asylum outside their home country as is their legal right.

Prior to the adoption of the 1951 Convention, there was no agreement that a refugee necessarily had to be outside their country of origin.[289] However, as the Convention was written during the emergence of the Cold War, this necessity for border crossing makes sense, as the "crossing of the 'Iron Curtain' was considered to be of critical importance" and it was unlikely that the communist control in the Soviet Union was to produce internal displacement.[290] Although this division is no longer present, many authorities in the field of refugee studies believe that alienage is paramount to providing persons with international protection,[291] and with the current legal framework of international refugee law, this is true. As it stands, those who are

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[286] See Luke T. Lee, "Internally Displaced Persons and Refugees: Toward a Legal Synthesis," *Journal of Refugee Studies* 9, no. 1 (1996): 28-29 for a list of some of the proposed definitions for IDPs from various institutions and organizations.

[287] UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement*,(July 22, 1998):1, http://www.unhcr.org/refworld/docid/3c3da07f7.html (accessed April 4, 2012).

[288] Lee, "Internally Displaced Persons and Refugees," 30.

[289] *Ibid.,* 30.

[290] *Ibid.*, 32.

[291] James C. Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?" *Journal of Refugee Studies* 20, no. 3 (2007): 353: Alienage is key to making real protection, as having left their county, refugees are "special ethical responsibility towards refugees follows not just from the gravity of their predicament, but also from the fact that it is always possible to address their plight in ways that, regrettably, we still cannot for those who remain inside their own country."

in similar circumstances to refugees, but have not crossed an international border have had their bond and relationship with the state severed, but have no new sovereign to depend on. Refugee law is premised on the idea of host states/states of asylum providing surrogate state protection where the state of nationality has failed.[292] However, in the case of IDPs, their basic rights remain dependent on the ability and resources of UNHCR or some other humanitarian organization.

The New Context of Displacement

The dominant discourses of our era privilege globalization and human rights, operate under the assumption that democratic rule is the norm. Regardless of the reality, most states claim to be democratic or at least moving towards democratization. As democracy and human rights have become the global norm,[293] the ideological battle of the Cold War that gave refugee status its political charge and significance is no longer present. In this 'new world order' the West is now the global north, and the 'enemy' is no longer as easily defined, making refugees less politically and ideologically significant.[294] Refugees are no longer being produced by "defunct and defeated regimes,"[295] but come from sovereign and sometimes democratic nations.[296]

The 'New World Order'

The 'political refugee' was the dominant character in forced migration for much of the twentieth century, constructed through an important global political and social paradigm for much of that century.[297] Today the 'humanitarian refugee' fleeing the destitute global south has replaced the political refugee.

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[292] Dauvergne, *Making People Illegal*, 63, 87.
[293] For discussions on this idea see Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000).
[294] Chimni, "The Geopolitics of Refugee Studies," 351.
[295] During the formative years of the refugee definition, persons were displaced by multi-state "regimes," such as the Nazis and other fascist regimes, and the communist regime of the Soviet Union; see Part One.
[296] Garvey, "Toward a Reformulation of International Refugee Law," 483.
[297] Gunther Beyer, "The Political Refugee: 35 Years," *International Migration Review* 15, no. 1/2 (Spring-Summer 1981): 26-34.

With the end of the Cold War the world embarked on a "new world order", in which the world was no longer divided by ideology, and was united by law and democracy.[298] The intrinsic ideas of this new era were expressed by then President George HW Bush in his speech to Congress on March 7, 1991:[299]

> Until now, the world we've known has been a world divided, a world of barbed wire and concrete block, conflict and cold war. And now, we can see a new world coming into view. A world in which there is the very real prospect of a new world order. In the words of Winston Churchill, a "world order" in which "the principles of justice and fair play . . . protect the weak against the strong." A world where the United Nations, freed from cold war stalemate, is poised to fulfill the historic vision of its founders. A world in which freedom and respect for human rights find a home among all nations.

The reality is that this new world order has ushered in a new global divide, not between the West and the East, but the north and south. Rather than a geographical separation, this is a social divide[300] and an expression of the current state of global inequality.[301] Since many of the countries of the global south became independent sovereign states, predominantly through the process of decolonization, they have not reached the prosperity of the global north, as many regions of the global south are plagued by the legacy of slavery, colonization, economic exploitation and underdevelopment, internal conflict, and generally a lower realization of basic human rights.

These inequalities are exacerbated by the process of globalization, which is the post-communist era's universal ideology of progress.[302] In an economic context, globalization is often used analogously with free trade, referring to "the reduction and removal of barriers between national borders in order to facilitate the flow of goods, capital, services and labor,"[303] which allows for countries to reduce costs of imports and bring more goods into the domestic economy.

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[298] For more info on the idea of the 'new world order' in relations to globalization and development see: Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Rist, Gilbert. *The History of Development: From Western Origins to Global Faith.* 3d ed. London: Zed Books, 2008. For this idea in relation to refugees see: Richmond, "Refugees, Racism and the New World Order."

[299] Transcript of President Bush's Address On End of the Gulf War, *New York Times*, March 7, 1991. http://www.nytimes.com/1991/03/07/us/after-war-president-transcript-president-bush-s-address-end-gulf-war.html?pagewanted=all&src=pm (accessed April 7, 2012).

[300] Refer to note 5 above for why this distinction is utilized and what it implies.

[301] Stephen Castles, "Towards a Sociology of Forced Migration and Social Transformation," *Sociology* 77, no. 1 (2003): 16.

[302] See Raphael Kaplinsky, *Globalization, Poverty and Inequality: Between a Rock and a Hard Place* (Cambridge: Polity Press, 2005).

[303] ESCWA. "Annual Review of Developments in Globalization and Regional Integration in the Countries of the ESCWA Region," Economic and Social Commission for Western Asia. (New York: United Nations, 2002).

However, as international law and organizations have moved towards regimes for free movement of goods, capital, and services,[304] there is no such regime for the free movement of labor. In fact, migration has become more restrictive than in the past, as witnessed in the phenomenon of 'fortress Europe,' as mentioned in Part II.[305]

Globalization, however, is not a neutral process and does not affect all equally: "some may prosper and others will be left behind…those who sit at the top of social and economic hierarchies, both countries and individuals, are more likely to see gains from globalization."[306] The reality is that the countries that constitute the global south entered at the bottom of the social and economic hierarchies, and have struggled to move out of this position, resulting in uneven progress and an increased divide between the global north and south.

New players in displacement

The increasing amount of forced migration has not happened in a vacuum. There are other socio-economic conditions that create the 'root causes' of displacement. These conditions provide the impetus to move or conditions in which forced displacement is probable. As the world is on the path to globalization, the global south has not been left out. International financial institutions, such as the International Monetary Fund (IMF) and the World Bank (WB), have had an increasing role in shaping the development trajectory of the global south. The IMF and WB are charged with the mission to reduce poverty and increase development through advising on economic policies and international investment, and generally overseeing the international economy.[307]

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[304]International agreements and organizations have been formed to regulate this free movement, such as the World Trade Organization and trade-related aspects of intellectual property rights (TRIPS). For a discussion on the place of the WTO in contemporary society, see Dani Rodrik, "The Global Governance of Trade as If Development Really Mattered," *United Nations Development Program* (October 2001): 5: Although created to maximize global trade and promote development , "the WTO and multilateral lending agencies have come to view these two goals—promoting development and maximizing trade—as synonymous, to the point where the latter easily substitutes for the former." For more information on TRIPS, see Peter Drahos, "An Alternative Framework For the Global Regulation of Intellectual Property Rights," *Center for Governance of Knowledge and Development, Working Paper* (October 2005): 1-32, which states that "TRIPS is part of an evolving structure that directly impacts on the design freedom of all countries when it comes to intellectual property rights."

[305] For more information on the concept of 'fortress Europe,' see Andrew Geddes, *Immigration and European Integration: Towards Fortress Europe?* (New York: Manchester University Press, 1999).

[306] Joyce Gelb and Marian Lief Palley, *Women and Politics around the World: A Comparative History and Survey*, (Santa Barbara: ABC-CLIO, 2009): 18.

[307] "About the IMF," International Monetary Fund, http://www.imf.org/external/about.htm (accessed April 10, 2012); "The World Bank," The World Bank, http://www.worldbank.org (accessed April 10, 2012); in fact the slogan of the WB is "working for a world free of poverty."

The IMF and WB are "rhetorically committed" to the achievement of democratization and human rights in the state's that they operate in, but their involvement in many of the state's key affairs violate the achievement of these goals. In order to receive funds from these financial institutions, states must comply with certain conditions. These institutions often decide on state budgets, the value (and devaluation) of national currency, and the price of food and energy.[308] In addition to denying democratic participation on issues that deeply effect the local economy,[309] many of the structural adjustment loans have conditions requiring "the cutting of public expenditure on health and education, labor market deregulation, export-oriented production, and privatization, [which] have led to increased income disparity, human rights abuses, and marginalization of the poor and rural populations in many countries."[310] Here we can see that the power lies in the desires of the northern-backed international institutions, not the needs and realities of the state.

> According to Chossudovsky,
>
> The restructuring of the world economy under the guidance of the Washington-based international financial institutions increasingly denies individual developing countries the possibility of building a national economy: the internationalization of macro- economic policy transforms countries into open territories and national economies into 'reserves' of cheap labor and natural resources [for the benefit of the global north].[311]

In reality, these policies do not work towards ending poverty, put rather towards a "globalization of poverty."[312] These institutions are often portrayed as the leader of global economic liberalization, however in reality they are responsible for exacerbating existing conditions of poverty and conflict. The policies implemented also prevent governments from effectively honoring commitments to social welfare and as well as preventing a relationship of social responsibility through democracy between the state and citizens. These policies can have direct impact on further widening the divide between the global north and south and in creating environments in which migration is to likely result.

International financial institutions, in cooperation with international corporations, have also influenced policy and advised funds for development projects that cause massive amounts of

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[308] Anne Orford, "Locating the International: Military and Monetary Interventions After the Cold War," *Harvard International Law Journal* 38, no. 2 (Spring 1997): 468

[309] *Ibid.*

[310] *Ibid.,* 470.

[311] Michel Chossudovsky, "Reforms and Social Unrest in Developing Countries," *Economic and Political Weekly* 32, no. 29 (July 19-25, 1997): 1786.

[312] *Ibid.*

displacement. These projects are varied, and include dams, urban development, mining and mineral extraction, mega-events, and agri-business. There are no concrete numbers on many persons have been displaced by development projects. However, many experts estimate that in the past twenty years over 250 million people have been displaced in the name of development,[313] reaching some 15 million people annually,[314] a number much larger than those fleeing war and conflict.

These "forced resettlers," as Turton calls them, are persons displaced in the name of the "national interest" to make way for a development project and have no option of ever returning 'home.'[315] The persons displaced in these projects are typically amongst the "poorest and politically most marginal members of a society" (subsistence farmers, indigenous groups, etc.) and are likely to become more vulnerable and fall further into poverty as a result of displacement.[316] These persons are an example of victims of displacement that have no formal protection regime as they fall outside of the limited scope of international refugee law, and although internally displaced, they are not considered IDPs. Victims of development-induced displacement are potentially more vulnerable than IDPs, as there are limited organizations dedicated specifically to assisting those affected by these projects, and have few avenues for legal recourse.[317]

The most recent trend in foreign development projects is agricultural investment, or 'land grabs.'[318] The Food and Agriculture Organization estimates that from 2007 to 2010, foreign investors acquired 20 million hectares of land in Africa alone, many times with leases of up to 99 years;[319] the conditions of these investment deals are often facilitated by the World Bank

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[313] Kate Hoshour and Jennifer Kalafut, "Development-Induced Displacement & Resettlement", *Issue Paper*, (International Accountability Project: February 2007).

[314] Michael Cernea, "Development-Induced and Conflict-Induced IDPs: Bridging the Research Divide," *Forced Migration Review*, Special Issue: Putting IDPs on the Map, (2006): 25-27, http://www.fmreview.org/FMRpdfs/BrookingsSpecial/15.pdf (accessed April 4, 2012).

[315] David Turton, "Refugees and 'Other Forced Migrants,'" *University of Oxford Refugee Studies Center Working Paper Series* no. 13 (October 2003): 5-6.

[316] *Ibid.,* 6.

[317] Cernea, "Development-Induced and Conflict-Induced IDPs."

[318] 'Land grab' refers to the current trend of foreign investors acquiring large land leases in countries of the global south, but can be conceptualized as "the purchase or lease of vast tracts of land by wealthier, food-insecure nations and private investors from mostly poor, developing countries in order to produce crops for export." Shepard Daniel and Anuradha Mittal, *The Great Land Grab: Rush For World's Farmland Threatens Food Security for the Poor, (*Oakland: The Oakland Institute, 2009), 1.

[319] David K. Deng, *The New Frontier: A Baseline Survey of Large-Scale Investment in Southern-Sudan,* (Norwegian People's Aid, 2011): 8.

policies.[320] Many of these investments, and other similar projects, come with promises of local development, however these promise are rarely fulfilled. A report issued in September 2010 by the World Bank states that:

> Many investments…failed to live up to expectations and, instead of generating sustainable benefits, contributed to asset loss and left local people worse off than they would have been without the investment. In fact, even though an effort was made to cover a wide spectrum of situations, case studies confirm that in many cases benefits were lower than anticipated or did not materialize at all.[321]

This statement shows that these projects that are directly facilitated by international financial institutions are further exacerbating socio-economic issues in countries of the global south, and creating conditions of internal displacement and the potential to create conditions that have potential to create conflict.[322]

The mission to spread these values associated with globalization, namely democracy and neo-liberal economics has a similar connection to colonialism. Historically, the discourse of democracy was used to "announce, argue, and promote the cultural superiority of colonizing states" to justify their actions,[323] and also access foreign resources. In fact, the process of globalization, led by neo-liberal economics, has continued to reinforce a historical global power dynamic[324] and threatens to "recolonize" the global south.[325]

Human Rights and Humanitarianism

As the world has become more connected through globalization, so have the responsibilities for the causes of forced migration and displacement, as discussed above. However, the global north has effectively been able to refrain from taking responsibility for

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[320] For more information on the World Bank's involvement in facilitating these investments and domestic land policies, as well as other issues associated with this new land grab trend, see Daniel and Mittal, *The Great Land Grab: Rush For World's Farmland Threatens Food Security for the Poor.*

[321] World Bank Group, *Rising Global Interest in Farm Land: Can it Yield Sustainable Benefits,?* (WBG, September 2010).

[322] A particularly interesting situation is in the newly created country of South Sudan, which upon independence, foreign investors had acquired at least 2.64 million hectares (26,400 km^2) of land in South Sudan, equivalent to the size of Rwanda. For more information on how these investment have the potential to affect the formation of this post-conflict country, see Deng, *The New Frontier.*

[323] Orford, "Locating the International,"463.

[324] In the past this dynamic was between the colonizers and colonized, then the First World and Third World, and not the global north and global south; the terminology changes, but the effect remains the same.

[325] B.S. Chimni, "Third World Approaches to International Law: A Manifesto," *International Community Law Review* 8 (2006): 1; this term is used by Chimni to indicate several things including: "the reconstitution of the relationship between State and international law so as to undermine the autonomy of third world States and to the dis advantage of its peoples" and "the relocation of sovereign economic powers in international trade and financial institutions."

displacement. The myth of difference discussed in Part II, has constructed the idea that the contemporary refugee flows in the global south are distinctly different from those of the past.[326] This idea of this difference effectively consigns the blame of refugee production to the governments and societies of the global south. This is done through the use of human rights and humanitarianism, which not only removes the blame from the global north, but also maintains the current power dynamic between the global north and south.

Refugees and the Human Rights Discourse

As discussed in Part II, when forced displacement occurs between states in the global south "we are prepared to assume that they are refugees, or even that they should be considered as such despite not fitting within the letter of the law." [327] Essentially, as long as they remain within the global south, northern states are not reluctant to acknowledge either their refugeehood or, in the case of IDPs, their inclusion under UNHCR's mandate. The international refugee regime has become intertwined with the discourses of human rights and humanitarianism. One could even argue that the international refugee regime has become part of the larger international human rights law regime that functions to prevent, monitor and deter abuses. In this sense, the international refugee law regime provides surrogate protection for some human rights, if victims of abuse are able to cross international borders and seek protection[328] However, the discourse of human rights, while it has benefits, also has inherently problematic aspects.

Some believe that merging international refugee law with human rights law is the logical step towards a greater realization of human rights for displaced persons.[329] There is a connection between refugee law and human rights law, as the right to asylum was first codified in the Universal Declaration of Human Rights.[330] However, rights are difficult to claim because refugees fall outside of the normative nation-state framework in which there is territory, government, citizens and non-citizens. The refugee does not fit in this framework, as they are

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[326] Chimni, "The Geopolitics of Refugee Studies," 351.

[327] Dauvergne, *Making People Illegal*, 53.

[328] Anker, "Refugee Law, Gender, and the Human Rights Paradigm," The Harvard Human Rights Journal 15 (2002): 135.

[329] This is a view most strongly advocated by Hathaway. See also Edwards, "Human Rights, Refugees, and The Right 'To Enjoy' Asylum."

[330] UN General Assembly, *"Universal Declaration of Human Rights,"* Article 14.

located within the "strange territory of estrangement" between a citizen and a foreigner.[331] In other words, an in-between space in which one is not quite 'human,' in the sense that they are not entitled to rights and agency, or to have their actions and opinions hold significance.[332]

In some lines of thought, the 1951 Convention can be seen as an attempt to place the refugee, as a person who falls outside of the normative understanding of the state, back into the state system, to restore the individual as political subject and allowing them to access their "right to have rights." As Arendt expresses "[w]e became aware of the existence of a right to have rights… and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation."[333] Although Arendt wrote under the context of World War II and the Cold War, this statement is still relevant. In a way, the refugee's subjectivity is overshadowed by the citizen-state relationship that is essential to the current system of sovereign states; as non-citizens there is no direct accountability to any power to uphold their rights. This issue is particularly evident in the global north, where the increasing use of temporary protection further limits the displaced person's access to rights, as discussed in Part II.

The discourse of human rights is seductive as the language of human rights offers an ostensibly apolitical cure all for countries in the global south, a "mantra" that the north promotes in displacement-inducing and post-conflict societies.[334] Human rights hold promises of empowerment,[335] and "give marginalized populations a universal language in which to present their particular demands as something more than subjectively felt grievances . . . a technique of articulation to which the rest of the world is bound, in principle, to listen." [336]Although human rights have the potential to offer this empowerment, it often fails to attend to the root causes of the displacement, as discussed above. When claims to human rights are made, "the systemic

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[331] Michael Dillon, "The Scandal of the Refugee: Some Reflections on the "Inter" of International Relations and Continental Thought," in *Moral Spaces: Rethinking Ethics and World Politics*,eds. by David Campbell and Michael J. Shapiro (Minneapolis: University of Minnesota Press, 1999), 101.

[332] Hannah Arendt, *The Origins of Totalitarianism*, 2nd ed. (Orlando: Harcourt Inc., 1967), 296.

[333] *Ibid.*, 297

[334] B.S. Chimni, "Third World Approaches to International Law," 17.

[335] Brown, "The Most We Can Hope For...: Human Rights and the Politics of Fatalism," *The South Atlantic Quarterly,* 103, no. 2/3 (Spring/Summer 2004): 455.

[336] Beckett, "Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project," *German Law Journal* 7, no. 12 (2006): 1063.

context of abuses and vulnerabilities is largely removed from view" as human rights are often documented, but not explained.[337]

This lack of explanation is dangerous because without making an effort to understand the root causes of the problem, human rights really can only be a forum for grievances rather than an effort towards structural change. Thus, Douzinas states that "[i]t follows that as human rights become the lingua franca of the New Times but are unable to eliminate conflict, the formal struggle over human rights will revolve predominantly around their interpretation and application. As always, the universal is placed at the service of the particular: it is the prerogative of a particular to announce the universal."[338] The human rights discourse, while incredibly powerful in that most states are signatory to many of the conventions and laws, fail to have much influence on real change. In other words, the language of human rights have allowed the global north to remain largely un-attached from the root causes of refugee production, but as the abovementioned section suggested, this is not the reality.

Humanitarianism

The international refugee regime operates differently in the global north and in the global south. As discussed in Part II asylum procedures in the global north have merged with immigration, creating serious protection concerns. However, the reality is that most refugees and asylum seekers do not reach the territory of the global north, and this is not likely to change. Many authors advocate for expanding the definition of a refugee to be similar to the regional definitions utilized in Africa and Latin America in order to accommodate those fleeing generalized violence and civil strife.[339] Although this would potentially be a positive step in protection, it is unlikely that the states of the global north will approve such a change, as they will not agree to an increase in the number of asylum claims they must accept.

Even if the definition is expanded to include more persons and diverse forms of displacement, through the language of human rights or other inclusions, it does not touch at remedying the root causes of displacement or deal with the core issues of international refugee law. As international refugee law developed in a period where there was no accountability between the West and the existing (and defeated) totalitarian regimes, and thus "refugee law is

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[337] Susan Marks, "Human Rights and Root Causes," *The Modern Law Review* 74, no. 1 (2011): 75, 77.
[338] Costas Douzinas, "The End(s) of Human Rights," *Melbourne University Law Review* 26 (2002): 453.
[339] For example, Gunning, "Expanding the International Definition of a Refugee."

not aimed at holding [refugee producing] states responsible, but rather its purpose is remedial."[340] The claim can be made that this is where human rights law's role is important, as states are signatory to many conventions and treaties which in theory protect their citizens from the need to flee their state. However, the reality on the ground is that it is difficult to hold states accountable to these principles, as human rights and sovereignty are often clashing concepts.[341] Thus refugee law is aimed at 'helping,' not fixing the problem, and is increasingly being pushed to work exclusively under the banner of humanitarianism.

'Humanitarian' is defined generally as "concerned with or seeking to promote human welfare."[342] The guidelines for humanitarian action that are most referenced are the seven fundamental principles created by the International Committee for the Red Cross (ICRC)[343] in 1965: humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.[344] The ideals associated with humanitarianism and politics are usually conceptualized as clashing, so traditionally they have been kept as separate.[345] In the battle to keep these ideas separate, the principles of impartiality and neutrality seem to recurrently become an issue. Generally speaking, this issue has created two camps of thought regarding humanitarianism: the 'classicists,' who are most aligned with the principles of the ICRC, which believe that humanitarian work can and should be completely separated from politics, and 'political humanitarians' who believe that humanitarianism cannot and should not be separated from politics.[346]

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[340] Anker, "Refugee Law, Gender, and the Human Rights Paradigm," 135.

[341] Haddad, The Refugee in International Society, 82.

[342] B.S. Chimni, "Globalization, Humanitarianism and the Erosion of Refugee Protection," *Journal of Refugee Studies* 13, no. 3 (2000): 244.

[343] The humanitarian actions in the realm of international politics gained prominence with the creation of the International Committee for the Red Cross (ICRC) in 1863 and codified in the Geneva Convention of 1864.[343] This law created a neutral space in times of war and violence that allowed for any person, despite the power they aligned with, permitting humanitarian organizations (namely the ICRC) to give medical treatment; here we see the beginning of 'humanitarian' separated from 'politics.' The ICRC played a crucial role in the humanitarian aid and medical assistance in both World War I and II, and continues to provide these services today. For more information on the history of the ICRC, visit http://www.icrc.org/eng/who-we-are/history/founding/overview-section-founding.html .

[344] Costas Douzinas, "The Many Faces of Humanitarianism," *Parrhesia* no. 2 (2007): 11, http://www.parrhesiajournal.org/parrhesia02/parrhesia02_douzinas.pdf (accessed March 1, 2012).

[345] For the purposes of this paper, the term 'politics' will refer to "the domain outside the system of rules . . . which may assume the form of either the language of power or morality," as described by Chimni, in "The Geopolitics of Refugee Studies," 32.

[346] Thomas G. Weiss, "Principles, Politics, and Humanitarian Action," *Ethics and International Affairs 13*, no. 1 (March 1999): 2.

According to Chimni, who aligns with the 'political humanitarians,' the word 'humanitarianism' is "omnifarious and lacks conceptual boundaries" as the term has not been defined explicitly in international law, and thus a wide range of acts are often considered or claimed to be 'humanitarian.' The 'ideology'[347] of humanitarianism is that "the human has the same needs, desires and traits everywhere and these (ought to) determine the rights we have."[348] To be impartial and neutral (and thus humanitarian) implies "helping and protecting victims irrespective of who and where they are and why they are in need." [349]

Refugee protection is, in theory, premised on humanitarian principles, as the 'problem' of refugees is seen to be a humanitarian issue. The preamble to the 1951 Convention states that the Convention signifies that by signing this document, states are "recognizing the social and *humanitarian* nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,"[350] and the Statute of UNHCR states that "the work of the [UNHCR] is *humanitarian* and social and of an entirely *non-political* character."[351] In theory, then, international refugee law is founded on the principles of humanitarianism, not politics. Yet law is created and implemented by states that remain entrenched in politics. This "ideology of humanitarianism" is something that, according to Chimni, belongs to hegemonic states (or states in the global north), which "mobilizes a range of meanings and practices to establish and sustain global relations of domination," an ideology that is also "facilitating the erosion of the fundamental principles of refugee protection."[352]

Humanitarianism has had a place in international politics largely since the creation of the ICRC in 1863, but today it holds a greater salience than in the past.[353] Today humanitarianism is

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[347] Here 'ideology' is understood "in the meaning or service of power," as understood by "Globalization, Humanitarianism and the Erosion of Refugee Protection." Journal of Refugee Studies 13, no. 3 (2000): 244

[348] Douzinas, "The Many Faces of Humanitarianism," 11-12.
[349] Weiss, "Principles, Politics, and Humanitarian Action," 11.
[350] UN General Assembly, "Convention relating to the Status of Refugees," preamble; emphasis added.
[351] UN General Assembly, "Statute of the Office of the United Nations High Commissioner for Refugees," A/RES/428(V),(December 14, 1950), http://www.unhcr.org/refworld/docid/3ae6b3628.html (accessed April 5, 2012); emphasis added. The UNHCR Statue, Introductory note, also reaffirmed in Chapter 1 (2), states: "The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees."
[352] Chimni, "Globalization, Humanitarianism and the Erosion of Refugee Protection," 244.
[353] Ibid.

the '"left hand of the empire [or global north]"[354] and "overlaps with and contributes to the end of politics, instantiated by the unchallenged rule of world police and the rescue of ''victims.'"[355] What is problematic with contemporary humanitarianism is that it seems to seek the protection of, or work towards, the realization of human rights, but it does so artificially and without attention to what we might call the "root causes" of human rights concerns. This is evidenced in the case of Rwanda, where Chossudovsky articulates this disconnect, which also links to the aforementioned issues associated with globalization and international financial institutions:

> The Rwandan crisis has been presented by the western media as a profuse narrative of human suffering, while carefully neglecting to explain the underlying social and economic causes. The brutality of the massacres have shocked the world community, but what the international press failed to mention is that the civil war was preceded by the flare-up of a deep-seated economic crisis. It was the restructuring of the agricultural system which precipitated the population into abject poverty and destitution.[356]

As Douzinas explains, "post-communist humanitarianism, scared by the atrocities of 20th century ideology, prefers a suffering humanity and replaces the grand narratives of history with the misfortune of the species."[357]   In the above example from Rwanda, we can see that the 'humanitarian' and 'human rights' discourses effectively placed blame in the structures of the state and region, not in the larger global dynamics.

International refugee law consists of a large body of legally binding norms and principles, which are aimed at promoting asylum in foreign countries, and while others such as IDPs may receive protection, it is often more about humanitarian intervention in struggling countries than legal protections.[358]   However, refugee protection is moving more towards humanitarianism, rather than focus on legal rights, as most forced displacement is contained in the global south.

The refugee label, in both the global north and south, implies humanitarianism and "creates and imposes an institutional dependency,"[359] relating humanitarianism to a sort of victimization. Humanitarianism, as an ideology used by the hegemonic north effectively creates a victimized and suffering Other, which manifests as those from the global south. The victim is

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[354] Michel Agier, "Humanity as an Identity and Its Political Effects: A Note on Camps and Humanitarian Government," Humanity: An International Journal of Human Rights, Humanitarianism, and Development 1, no. 1 (Fall 2010): 29.
[355] Ibid., 30.
[356] Chossudovsky, "Reforms and Social Unrest in Developing Countries," 1788; see also this source for an in depth discussion of how the interference of the international financial intuitions, and subsequent socio-political issues, led to the deterioration of Rwanda, as well as in Somalia and Yugoslavia.
[357] Douzinas, "The Many Faces of Humanitarianism," 20.
[358] Turton, "Refugees and 'Other Forced Migrants,'" 4.
[359] Haddad, *The Refugee in International Society*, 37.

someone without agency, "whose dignity and worth have been violated, … powerless, helpless and innocent, [the victim's] basic nature and needs have been denied" and that they are often conceptualized as "part of an indistinct mass or horde of disparaging, dispirited people,"[360] and as victims of some evil, or perhaps human rights violations, in a sense they lose their humanity,[361] what Giorgio Agamben refers to as "bare life."[362]

In our globalized world, everything has been put into terms of exporting and importing, and cost and benefit. The global north not only exports financial and economic ideas into the global south, as mentioned above, but it also exports democracy and human rights.[363] In this line of thought, humanitarianism lies in a paradigm of the victim/ perpetrator/moral savior- a paradigm in which the countries of the north have delegated themselves as the moral savior and teacher, and the 'Other' as the victim and perpetrator.[364] This stance effectively allows powerful (wealthy, democratic, and 'rights-bearing') societies to place the blame on other societies (in the global south) as the cause of human rights violations, without taking responsibility for their role in the creation of situations in which rights are not guaranteed or realized. According to Douzinas, "we [the global north] do not like these others [the suffering of the global south], but we love pitying them. They, the savages/victims, make us civilized."[365] In this humanitarianism, refugees are often cast as the hopeless victim, resulting in a power dynamic in which the global north provides humanitarian aid, "conceived of in terms of charity rather than as a means of enabling refugees to enjoy their rights."[366] This system, according to Chimni is part of the larger process of globalization, as it seeks "to legitimize and sustain an international system that tolerates an unbelievable divide not only between the north and the south but also inside them."[367]

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[360] Douzinas, "The Many Faces of Humanitarianism," 11-12.

[361] *Ibid.,* 12.

[362] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life,* trans. Daniel Heller-Roazen, (Stanford: Stanford University Press, 1998), 45-67.

[363] Costas Douzinas, "The Many Faces of Humanitarianism," 19.

[364]*Ibid.* For Douzinas, in this context the 'Other' has two sides: one is the victim and the reverse side is the cause of the suffering, the absolute evil which can have many names, such as "the African dictator, the Slav torturer, the Balkan rapist, the Muslim butcher, the corrupt bureaucrat… the warlord, the rougue, the bandit" (to name a few). This side of the 'Other' is the "single cause and inescapable companion of suffering."

[365] *Ibid.,* 13.

[366] Barbara Harrell-Bond, "Can Humanitarian Work with Refugees Be Humane," *Human Rights Quarterly* 24 (2002):53.

[367] Chimni, "Globalization, Humanitarianism and the Erosion of Refugee Protection," 245

However, perhaps it is necessary to maintain a victim-like definition in order for the concept of a 'refugee' to survive.[368] Would the north feel obligated to donate or assist if refugees or other victims of displacement had agency, if they were not portrayed as passive recipients of aid? Many refugees and forced migrants have been deeply affected by the process of globalization, one that creates a global divide that is increasingly more difficult to bridge.

An Irrational Construction

The previous analysis and information provided argues that international refuge law has lost its relevance as a protection mechanism in the contemporary realities of migration. Furthermore, the category of the 'refugee' has become an irrational distinction in international law. The continued use of the 1951 Convention has created and legitimated a normative understanding of the 'refugee,' including the causes of forced displacement worthy of this title and the associated international protection. This framework holds political persecution as the form of oppression that deserves protection and international response. The attention of the international community on the political refugee, or the Convention Refugee, has legitimated a system in which structural violence in the global south is largely tolerated.

The domestic refugee systems in the countries of the global north have created a system in which this irrational distinction is to their advantage, allowing them to legally restrict entry of persons who do meet the Convention criteria. Derrida's conception of 'hospitality'[369] takes an interesting view in re-conceptualizing the restrictive policies towards refugees in the global north. For Derrida, the way in which states and societies accept foreigners (or 'guests') into their territory is framed around the notion of hospitality. The idea of 'unconditional hospitality' is being "open to someone who is neither expected not invited, to whomever arrives as an absolutely foreign visitor, as a new arrival, nonidentifiable and unforeseeable, in short wholly other."[370] The north is not unconditionally hospitable. They practice what Derrida terms 'tolerance,' which is "scrutinized hospitality, always under surveillance… and protecting of its sovereignty."[371] Tolerance implies that one is allowing entrance under the host's terms.

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[368] Haddad, *The Refugee in International Society,* 35

[369] For the complete work on 'hospitality,' see Jacques Derrida, *Of Hospitality,* trans. Rachel Bowlby (Stanford: Stanford University Press, 2000),

[370] Jacques Derrida, *Philosophy in the Time of Territory: Dialogues with Jurgen Habermas and Jacques Derrida*, ed. Giovanna Borradori,(Chicago: The Chicago University Press, 2003): 17.

[371] *Ibid.,* 161.

When dealing with issues of displacement, this attitude of 'tolerance' is problematic as it is a conditional hospitality, or a hospitality without risk, in which he asks, can "a hospitality protected by an immune system against the wholly other, be true hospitality?"[372] One could argue that the right to asylum[373] is the legal equivalent of such tolerance,[374] a preventative measure to mitigate risk, and control and formalize the unexpected; the refugee or forced migrant represents the limits of hospitality.

If we first accept that refugees are "an inevitable if unintended consequence of the international states system,"[375] as citizens can no longer depend on their state for protection, one can see the irrationality of the refugee system, as it attempts to control what is in fact unexpected. However, as the causes of refugee production move away from clear individual persecution at the hands of the state, this framework for regulation becomes more problematic. Even this limited form of hospitality is waning as states in the north attempt to ensure that most asylum seekers do not reach this territory. Hospitality and tolerance become increasingly irrelevant as most forced migrants become contained under regional protection schemes in the global south.

The consistent flows of forced migration that occur in the global south means that many of the receiving countries do not have much choice in regulating their 'hospitality.' And as forced displacement is dominated by internal displacement, how can a country practice this discretionary power over its own citizens? Or in other words, how do we conceptualize this relationship of tolerance, as the displaced become 'guests' in their own home?[376] In the global south, tolerance has been replaced by humanitarianism. As discussed above, this humanitarian refugee regime as it stands today reinforces global discrimination. The answer to fighting this discrimination cannot be victimization.[377] By victimizing forced migrants we are removing their political agency, not empowering them, and have moved towards a new form of imperialism or totalitarianism. In the humanitarian world, it is the global north that has "the power of life [to [allow to] live or survive) and the power of death (to let die) over the individual it considers the

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[372] *Ibid.*, 129.
[373] UN General Assembly, *"Universal Declaration of Human Rights,"* Article 14.
[374] Derrida, *Philosophy in the Time of Terror*, 196.
[375] Haddad, The Refugee in International Society, 7.
[376] In Derrida, Of Hospitality, the terms 'guest' and 'home' are utilized by Derrida as a metaphor for the foreigner and the receiving state/society.
[377] Grappi, "Refugees and Partition in a Migrants' World," 69.

absolute victim."[378] To move away from the humanitarian approach would be a move towards relinquishing global control in all matters, including economic control and influence; a move that is not likely to happen.

Then do we change the law? And if the legal definition of a refugee is made broader and more persons are included under this legal category, what would this change? If the definition were to be opened to meet the needs of all persons who are forced to migrate, in theory, whole countries could cross borders and become refugees. Broadening the definition does not remedy the root causes of forced migration, but rather creates a larger legal space to deal with them. The current state of protracted refugee and IDP situations[379] is evidence that the expanded understanding of forced migration in the global south and the inclusion of more persons but has not changed the reality: people are fleeing and unable to return home.

For the millions of persons who are in these situations,[380] being a refugee, or a ward to the humanitarian global north, has become a way of life. Protracted refugee situations are not new, however they are becoming increasingly prevalent in part because of the prevalent situations of war and conflict which have made return difficult, but also the international community's failure to bring them to an end.[381]

So what can be done to better this protection in a rational, reasonable way? A purely legal (often restrictive) approach, as is taken in much of the global north (discussed in Part II), removes the issues of morals and ethics, and protection becomes a purely "legal transaction" as

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[378] Agier, "Humanity as an Identity and Its Political Effects," 33.

[379] There is no formal legal definition a protracted refugee situation, however it "refugees can be regarded as being in a protracted situation when they have lived in exile for more than five years, and when they still have no immediate prospect of finding a durable solution to their plight by means of voluntary repatriation, local integration, or resettlement." The vast majority of these situations are found in the Sub-Saharan Africa. Jeff Crisp, "No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa," *UNHCR New Issues in Refugee Research, Working Paper* no. 75 (January 2003): 1, www.unhcr.org/3e2d66c34.

[380] According to the World Development Report 2011, There are upwards of 5.7 million refugees in 29 situations constituting 54 % of the refugees under UNHCR protection and IDPs in 35 situations comprising most of the IDPs in protracted displacement situations at the time these numbers were taken, protracted situations existed when at least *25,000* persons of the same nationality were in exile; this numeric limit has since been removed, so the number of protracted situations is likely to be much larger. See Harild, Niels, and Asger Christensen. "The Development Challenge of Finding Durable Solutions For Refugees and Internally Displaced People." *World Development Report 2011* (July 30, 2011). http://wdronline.worldbank.org/ (accessed April 7, 2012).

[381] Crisp, "No Solutions in Sight," 2; During the refugee produced from Cold War, as well as in Iraq, Bosnia, Kosovo and East Timor elicited a "decisive response from the world's more prosperous states" which enabled a relatively quick process of repatriation or resettlement. However, most or the current situations of forced migration are not connected to a larger political goal or issue, so the pressure to 'solve' the problem and promote conditions enabling them to return home are simply not there.

states will do only what the law requires.[382] On the other hand, a human rights-based or humanitarian approach, which is the main approach to problems in the global south, tends to remove the agency and autonomy of the individual.[383] Finding a balance between the two is difficult. As stated before, human rights and state sovereignty tend to clash, as issues of *emigration* can be framed in terms of human rights, whereas the issue of *immigration* always remains a question of national sovereignty.[384] As the countries of emigration are predominantly located in the global south, a certain distinction is created: issues of human rights abuse lie in the south, while preserving sovereignty is the privilege of the north.

Since the end of Cold War, and the end of the era of the 'political refugee' (or ideologically significant refugee), there has been an increasing effort to expand the conceptualization of this phenomenon, moving from focus on the 'refugee' to forced migration more generally. Some, most notably Hathaway, believe that refugee law is worth saving. For him, the "challenge is not to rewrite refugee law, but rather to take advantage of the flexibility which the extant body of law affords to retool it at an operation level"[385] and that refugee law must remain its focus on refugees as it plays a "truly unique human rights role at a time when *no meaningful alternative is in sight.*"[386] To an extent this is true. At this point there are no alternatives in sight that acknowledge social realities, however, it is important that we realize that the law cannot be the sole mediator for this realization.[387] Even if the field of 'refugees' is expanded to forced migration, we are simply bringing more persons, into the sphere of humanitarian protection, and further the conditions that allow forced migration to feed into the larger context of northern dominance.[388]

At this point, there are no meaningful alternatives in sight, because we are not actively seeking them from outside the confines of the 1951 Convention. Most of the current critiques try to re-conceptualize laws and policies with an emphasis on human rights or an increased space of protection. Additionally, the current political climate and the immigration stance of many of the

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[382] Erin K. Wilson, "Protecting the Unprotected: Reconceptualizing Refugee Protection through the Notion of Hospitality," *Local-Global Journal* 8 (2010): 110.

[383] *Ibid.*

[384] Haddad, *The Refugee in International Society*, 83.

[385] Hathaway, "Why Refugee Law Still Matters," 97.

[386] Hathaway, "Why Refugee Law Still Matters," 89; see also Hathaway, "Forced Migration Studies," 349-69.

[387] Chimni, "The Birth of a 'Discipline,'" 24.

[388] *Ibid.,* 11-29.

countries in the global north, who also fund most of UNHCR's activities and programs, will not agree to a more inclusive legal framework.[389] What is needed is a not a re-conception of the law, but rather a reform in how this space of protection is approached. The most realistic and relevant approach to reform, is the 'Dialogic Model' proposed by Chimni, as discussed in Part II. This model creates space for communication and discussion is opened which involves not only the governments and intuitions in the global south, but the refugees themselves.[390] Similar to Chimni's manifesto on Third World Approaches to International Law, this model confronts global inequalities, including the colonial logic of the global north's humanitarian ideology.[391] Through challenging the current unilateral manner of decision making by UNHCR and the global north, and encouraging greater regional partnership among states of the global south, this model represents a step forward towards bridging the gap between the north and south and opens the potential for real progress to be made.

CONCLUSION

International refugee law, as it stands today, legitimates a norm that is not beneficial to those suffering displacement and is not in tune with reality. Under this system asylum in both the north and south is no longer a legal, surrogate state protection. Instead, the refugee label has been draped in humanitarianism and victimization, which exacerbates the divide between the north and south and reaffirms the current global power dynamic as demonstrated in the process of globalization. However, this is not an issue restricted to refugee law, as the larger body of international law "is playing a crucial role in helping legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide."[392]

As discussed earlier, the refugee holds an uncomfortable place in the international imaginary, as it does not fit into the normal framework of citizenship and states. This discomfort has led many to become specialists or experts in this field, as well as the emergence of refugee aid organizations, refugee lobby and advocacy groups, refugee lawyers, academic journals and

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[389] Edwards, "Human Rights, Refugees, and The Right 'To Enjoy' Asylum," 329.

[390] Chimni, "Reforming the International Refugee Regime."

[391] See the following Chimni articles: "The Birth of a 'Discipline,'" 24; Globalization, Humanitarianism and the Erosion of Refugee Protection," 244; and "Third World Approaches to International Law," 16.

[392] Chimni, "Third World Approaches to International Law," 3; see also Douzinas, *The End of Human Rights*; Rajagopal, *International Law from Below*.

university programs dedicated to refugee studies, further legitimizing and perpetuating this irrational distinction as an exceptional form of forced migration. The international refugee law regime's lack of remedial action has continued to propagate a strategy that holds "prevention is preferable to cure."[393] Through expanding humanitarian protection in the global south, the international community reaffirms the legitimacy of the law and ignores root cause of displacement that largely falls outside the 1951 Convention.

The figure of the refugee helps shed light on some of the limits of international law, human rights and humanitarianism. The problem does not lie in the narrow definition of the refugee, but rather in the geopolitical structure of today's world. If the inequalities and uneven development between the global north and south remain unchecked and continue grow, so will migration. In a recent news article titled ""Has the Refugee Convention Outlived Its Usefulness?" international refuge law expert Guy Goodwin-Gill stated: "The pure refugee does exist, but there are many others who face insecurity because of economic problems and persecution."[394] The political refugee defined in the 1951 Convention has indeed become largely extinct, and the uncritical acceptance of the current distinction of the 'refugee' as the exceptional forced migrant legitimates and perpetuates an unequal and irrational framework for protection.

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[393] Chimni, "The Geopolitics of Refugee Studies," 360.
[394] IRIN, "Has the Refugee Convention Outlived Its Usefulness?" *IRIN*, March 26, 2012. http://www.irinnews.org/Report/95144/Analysis-Has-the-Refugee-Convention-outlived-its-usefulness (accessed April 14, 2012).

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