

Syracuse University

From the Selected Works of Isaac Kfir

October 6, 2014

Refugee Law in Context: Natural Law, Legal Positivism and the Convention

Isaac Kfir, *Syracuse University*



Available at: https://works.bepress.com/isaac_kfir/9/

Refugee Law in Context: Natural Law, Legal Positivism and the Convention

Isaac Kfir*

The contemporary international refugee system was product of a desire to provide protection and assistance to those who have a well-founded fear of persecution, a somewhat sophistic term in the twenty-first century, which may explain why the system has become cumbersome, incoherent and divisive. One explanation for the tension within the refugee regime is that states—mainly western states—seek to reduce refugee applications while adhering and upholding their international obligations. Another explanation is that it is tensions between two legal traditions—natural law and legal positivism—that are shape the international refugee law that have led to the crisis, preventing a clear legal refugeeship taxonomy from emerging. In seeking to make this claim, the paper opens by looking at how natural law and positive law have shaped international refugee law. The second section reviews the evolution of refugeeship from the 1920s to the post-Cold War period. The section highlights how over time, and especially in the post-Cold War era, the regime became so fragmented, as refugeeship and the conditions that led to refugeeship changed as have the nature of conflicts. Simply, in the post-Cold War period, the conflicts are located in fragile regions, they are also internal, ethnocentric, religious or criminal in orientation, making their resolution more difficult. Additionally those seeking refuge are widely different from the Cold War refugees many of whom had skills that host countries were interested in. Thus, what becomes clear is that the refugee system is controlled by nation-states who interpret their obligations toward those seeking and claiming refuge in a manner consistent with their national interests. The third section reviews the Refugee Convention and the role of UNHCR in protecting those seeking refuge, aiming to underline how beholden the Convention and UNHCR are to states, which is why the agency had changed so drastically from what its framers had envisioned becoming a humanitarian actor as opposed to a protection agency for refugees. The paper concludes by calling on refugee law scholars to engage in a phenomenological and epistemological discussion of the refugee regime as a way to challenge the way states' increasingly narrow their obligations to refugees and asylum seekers.

Table of Contents

INTRODUCTION.....	2
I. SEARCHING FOR A LEGAL METHODOLOGY FOR INTERNATIONAL REFUGEE LAW	13
<i>Natural Law, Natural Rights and Refugee Law</i>	15
<i>Legal Positivism and International Refugee Law</i>	21
II. THE 1951 CONVENTION ON THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: DEFINING	
A REFUGEE?	25
1. SETTING THE FOUNDATION FOR A REFUGEE REGIME: THE NATIONALITY ISSUE	26
2. LOOKING AT STATES AND THE ROOTS OF REFUGEEESHIP AS A SOCIAL GROUP	30
3. THE INDIVIDUAL AND THE REFUGEEESHIP REGIME: PUTTING THE REFUGEE	
CONVENTION IN CONTEXT, HUMANITARIANISM AND NATIONAL INTEREST.....	34
4. THE REFUGEE SYSTEM AND THE POST-COLD WAR: SEARCHING FOR A NEW	
APPROACH TO ADDRESS REFUGEEESHIP	40
III. THE REFUGEE CONVENTION & THE UNHCR: WHERE TO NEXT	46
IV. CONCLUSION	53

* Isaac Kfir, Visiting Assistant Professor, College of Law, Syracuse University. I wish to thank Professors Lauryn Gouldin, Cora True-Frost, Nathan A. Sales, and Carrie E. Garrow, Syracuse College of Law; Professor Corri Zoli, Director of Research, Institute for National Security and Counterterrorism (INSCT) for helpful comments and conversations.

INTRODUCTION

The laws governing refugeeship¹ occupies a distinct place in society and, therefore, in law, not only because it emerged as a reaction to the need to protect people from the state, but also because as society changed, so did the law, leading to new legislation, policies and measures. Moreover, refugee law is also heavily judge driven, with judges increasingly shaping the refugee regime,² which transcends the Refugee Convention.³ That is, it seems that with the increase in refugeeship⁴ and refugee applications⁵ and political equivocations, courts have to address the latest wave of refugees through novel interpretations of domestic and international norms.⁶ Such an approach leads to discrepancies as the way state's approach the process of

¹ The term refugeeship is used in a dialogical sense, pertaining to an individual wanting to acquire refugee status: a refugee process.

² One way to define a regime is as a set of implicit and explicit norms that shape and govern the interactions and behaviors of states, organizations and individuals. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982); Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986). Stephan Haggard and Beth Simmons view regimes as examples of cooperative behavior that seek to facilitate cooperation, though they recognize that cooperation is not a prerequisite to having a regime. Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491, 495 (1987).

³ Hathaway and Neve for example distinguishes between Convention-based refugee law, which centers on the Refugee Convention and a broader conception of a refugee system that employs regional refugee solutions. James C. Hathaway, & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997); Martin Jones, *The Governance Question: UNHCR, the Refugee Convention and the International Refugee Regime*, IN THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW 91-92 (JAMES C. SIMEON, ED. 2013).

⁴ UNHCR notes that the number of displaced people (refugees, asylum seekers and internally displaced) in 2014 stands at around 50 million, which is unprecedented, half of whom are children. Moreover, many of those seeking refuge fall victims to trafficking rings. Harriet Sherwood, *Global refugee figure passes 50m for first time since Second World War*, GUARDIAN, Jun. 19, 2014, <http://www.theguardian.com/world/2014/jun/20/global-refugee-figure-passes-50-million-unhcr-report>; Sonia Nazario, *The children of the drug wars: a refugee crisis, not an immigration crisis*, N.Y. TIMES, Jul. 11, 2014, http://www.nytimes.com/2014/07/13/opinion/sunday/a-refugee-crisis-not-an-immigration-crisis.html?_r=0.

⁵ In 2013, almost 1.1 million people have submitted application for asylum or refugee status. UN High Commissioner for Refugees (UNHCR), *UNHCR Global Trends 2013: War's Human Cost*, 20 June 2014; UN High Commissioner for Refugees (UNHCR), *UNHCR Asylum Trends 2013: Levels and Trends in Industrialized Countries*, 21 March 2014.

⁶ The idea of claiming asylum because of one's sexual orientation or even gender was a rarity in the early years of the refugee convention, whereas in the post-Cold War period, such applications are on the rise. See e.g., Lauren Michelle A. Ramos, *New Standard for Evaluating Claims of Economic Persecution under the 1951 Convention relating to the Status of Refugees*, 44 VAND. J. TRANSNAT'L L. 499, 499 (2011) (Ramos writes, "Asylum claims based on non-physical forms of persecution, specifically social and economic deprivation, have received increased attention in recent years ... neither the international community nor domestic U.S. courts have come to a consensus in developing an approach, leading to confusion and inconsistent results."). The two *Pushpanathan* cases are also interesting in that, in the first the Canadian Supreme Court rejected the claim that conspiring to traffic drugs is not a violation of Art. 1(F)(c), but in 2002, the Court reached the conclusion that trafficking in drugs to support the Tamil Tigers amounted to crimes against humanity under both Article 1F(a) and Article 1F(c). *Pushpanathan v. Canada* (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; *Pushpanathan v. Canada* (Minister of Citizenship and Immigration), [2002] F.C.J. No. 1207; 2002 FCT 867.

determination refugee status is increasingly ad hoc⁷ with limited clarity as to why one case succeeds and another fails⁸ indicating that decisions are made on political expediency grounds, as opposed to legal reasoning.⁹

Professor Guy Goodwin-Gil, one of the leading scholars on international refugee law, emphasized that the term “refugee” is a term of art, and it is important to distinguish between the way the legal and the non-legal worlds treat it. In ordinary usage, the term has a broad, loose meaning that denotes a person who is fleeing because of personal circumstances that have made it impossible for the person to remain in their country of origin.¹⁰ The quandary therefore that surrounds the refugee regime is that “Implicit in the ordinary meaning of the word ‘refugee’ lies an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight.”¹¹

⁷ See e.g., Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109 (2007) (underlining the inconsistent application and definition of persecution within the United States); Anthony Pastore, *Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention*, 13 CHI. J. INT'L L. 615(2012) (emphasizing the need for a political as opposed to judicial response to the increase in refugee application). Audrey Macklin for example recalls two Canadian cases, decided six months apart, concerning two Jamaican women claiming refugee status. The first case deal with a woman married to a member of the civilian militia whereas the second was married to a police officer. Both were suffering from domestic abuse. The first claimant received refugee status with the Panel finding that Jamaica was not able nor willing to protect the claimant whereas the second found that the states was able and willing. Audrey Macklin, *Truth and Consequences: Credibility Determination in the Refugee Context*, INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES, 134, 135 1998.

⁸ This is seen very clearly in domestic abuse cases in the U.S. especially as the Board of Immigration Appeals (BIA) has yet to formally adopt the Department of Homeland Security's definition of a “particular social group” that would greatly aid victims of domestic abuse seeking asylum. See, Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225 (2011) (pointing out that the U.S. Board of Immigration Appeals has yet to accept domestic violence as a basis for a successful asylum claim). One can attribute the inconsistencies to the nexus requirement as laid out in the Convention, which means that refugee status is only available to those who have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. See also, Eva Nilsson, *The 'Refugee' and the 'Nexus' Requirement The Relation Between Subject and Persecution in the United Nations Refugee Convention*, 46, WOMEN STUD. INT'L FORUM, 123 (2014) (arguing for abolishing the nexus requirement).

⁹ Audrey Macklin, *Truth and Consequences: Credibility Determination in the Refugee Context*, INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES, 134, 135 1998 (arguing that a Panel that that rejected an application for refugee status by a Jamaican woman should have done so on the grounds of credibility and not claimed that Jamaica was able to provide protection).

¹⁰ GUY GOODWIN-GIL THE REFUGEE IN INTERNATIONAL LAW 3 (1996).

¹¹ GUY GOODWIN-GIL THE REFUGEE IN INTERNATIONAL LAW 1 (1996). See also, Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861 (2004) (arguing for the broadening of asylum standards to ensure that unaccompanied minors so as to identify them as a social group and thus ensure that they are protected); Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates: Refugee Law and Its Application to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135 (2012-2013) (on the rising number of Mexican fleeing drug violence in Mexico who are seeking asylum in the U.S.).

The need for an international refugee system stems from the fact that as individuals established communities that became nation-states,¹² they engaged in acts of violence either because of a need to protect their nation-state or out of a desire to expand territory; or simply because they wanted to control their own people.¹³ The conflicts that emerged naturally led to population movement and the prospects of other states having to deal with the influx of people seeking security.¹⁴ Thus, the international refugee regime¹⁵ is a product of a number of elements: the rise of the nation-state; the weakening or loosening of sovereign rights,¹⁶ often at the expense individual rights;¹⁷ and expansive interpretations of the sources of international law.¹⁸

¹² The literature on what is the nation-state, and how it is formed is expansive. See e.g., CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES AD 990-1992* (1992) (arguing that war and capital have been central in the formation of the nation-state). ERNEST GELLNER, *NATIONS AND NATIONALISM* (1993) (arguing that nationalism is a sociological product of the modern world). Mick Moore, *Revenues, State Formation, and the Quality of Governance in Developing Countries*, 25 INT'L POL. SCI. REV. 297 (2004) (offering a political economy explanation as state formation).

¹³ Marfleet for example writes as political authorities in the fifteenth-century were seeking to define and shape a national identity, "Their concern with physical frontiers was complemented by interest in socio-cultural borders: who was placed within the new nations and who outside them. National identities were ascribed and allocated as part of a process in which outsiders—Strangers and Others—played a key role, so that people *rejected* by the new nations were in fact integral to them." Philip Marfleet, *Refugees and History: Why We Must Address the Past*, 26 REFUGEE SURVEY Q. 136, 140 (2007) (italics in text). See also, James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379 (1995) (arguing that rational states take a rational decision to go to war).

¹⁴ See e.g., James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT'L & COMP. L.Q. 348 (1984) (reviewing the way the concept of refugee emerged between 1920 and 1950).

¹⁵ Notably, Martin Jones asserts that the international refugee regime consists of legal norms and supporting institutions aimed at providing protection from persecution for refugees necessitating a definition of who is a refugee and what are the obligations of the international community to such individuals. Martin Jones, *The Governance Question: UNHCR, the Refugee Convention and the International Refugee Regime*, IN *THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW* 85 (JAMES C. SIMEON, ED. 2013).

¹⁶ Roslyn Higgins, *International Law in a Changing International System*, 58 CAMBRIDGE L.J. 78 (1999) (noting how globalization is weakening sovereignty). For a rebuttal of this position, see John Yoo and Julian Ku *Globalization and Sovereignty* 31 BERKELEY J. INT'L L. 210 (2013); JOHN AGNEW, *GLOBALIZATION AND SOVEREIGNTY* (2009).

¹⁷ The concept of human security, as first advocated by the United Nations Development Program, refers to "freedom from want" and "freedom from fear." It epitomizes the existence of basic fundamental rights, and a state's duties to uphold them. The adoption of Responsibility to Protect, which upholds the right of the international community to intervene in domestic affairs of a states that fails to protect its citizens, has help alleviate the importance of human security in international relations. UNITED NATIONS DEVELOPMENT PROGRAM, *HUMAN DEVELOPMENT REPORT 1994*, 26-33 (1994); REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001). The concept of human security appeared in the 2005 World Summit and in a number of General Assembly resolutions. 2005 World Summit Outcome, ¶ 143, U.N. Doc. A/60/LI (20 September 2005); G.A. Res. 64/291, U.N. Doc. A/RES/64/291 (27 July 2010); G.A. Res. 66/290, U.N. Doc. A/RES/66/290 (25 October 2010).

¹⁸ There has been, especially since the end of the Cold War, a greater willingness to apply customary international law when interpreting treaties. Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT'L & COMP. L. 31 (1995-1996) (arguing that since 1945 the international human rights movement has played a key role in reshaping sovereignty to ensure greater compliance with international law).

Refugee law, as it initially emerged,¹⁹ encapsulated a desire to provide protection for those with a well-founded fear of persecution,²⁰ as long as it was based on race, religion, nationality, membership of a particular social group, or political opinion. At no point in the 1950s, as the regime was being established, was there an expectation that the refugee system will remain indefinitely or that the reasons for a refugee application expand so drastically,²¹ which may explain why the framers focused on the aforementioned groups and on the need for a nexus between the protected groups and the well-founded fear of persecution. In other words, under international law, the concept of a refugee is restrictive, focusing on key elements that must be met for one to obtain refugee status. These are having a “[w]ell-founded [sic] fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”²² Nevertheless, over time, the refugee system has grown to encapsulate many elements—the Refugee Convention, the United Nations High Commissioner for Refugee (UNHCR) Statute, regional agreements and domestic legislation.²³ The challenge that the international refugee system therefore faces is not only the increase in the number of those making asylum applications, but that the system is has many stakeholders—states, state’s agencies, nongovernmental organizations, and inter-governmental organizations—all of whom understand, interpret and view the refugee regime differently.²⁴

¹⁹ See section for the history of the Refugee Convention.

²⁰ In the 1920s and 1930s the idea of protection in respect to refugees was in reference to one not having state-based protection and therefore needed diplomatic protection—protection that one may obtained from embassies and consulates—whereas the Convention places the focus on the country of origin and whether it caused or was responsible for the person’s sense of being persecuted. Guy S. Goodwin-Gill, *Confronting Complexity: Interpretation or over-Interpretation*, 106 AM. SOC’Y INT’L L. PROC. 439, 441 (2012).

²¹ Goodwin-Gill for example points out that UNHCR’s Refworld database holds over 10,000 decisions, allowing him to emphasis how difficult it is to develop a consistent definition of a refugee. Guy S. Goodwin-Gill, *Confronting Complexity: Interpretation or over-Interpretation*, 106 AM. SOC’Y INT’L L. PROC. 439, 439 (2012).

²² “owing to well-founded [sic] 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.” UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art. 1A(2).

²³ Many UN agencies are also involved in caring and aiding refugees. See, e.g., World Food Program, *Syrian Refugees and Food Insecurity in Lebanon*, March 2013, <http://documents.wfp.org/stellent/groups/public/documents/ena/wfp257003.pdf>.

²⁴ Contrast for example the way the UNHCR and states interpret their duties and obligations, with the former focusing on refugees whereas the latter is more interested with its national interest, which may lead it to challenge or reject UNHCR’s designations. GUY GOODWIN-GIL THE REFUGEE IN INTERNATIONAL LAW 30-31 (1996).

At the core of refugee law are questions of sovereignty, the consolidation of the nation-state, human rights, responsibilities whether of states or the international community,²⁵ and definitions, ensuring that refugee law is an emotive issue and a political tool designed to generate reactions from lay and expert constituencies,²⁶ with the refugees often bearing the brunt.²⁷ Accordingly, refugee law has two elements: domestic and international.²⁸ With regard to the former, the assumption is that each country has the right to decide who shall or shall not enter it,²⁹ and yet, the international aspect of refugee law demands that states allow those escaping persecution the right to refuge and asylum entry.³⁰ Moreover, reference to the duty of states and the international community is found in many key international treaties and norms.³¹ Consequently, refugee law often requires a careful balancing: what sovereign states

²⁵ One explanation for the development of a refugee and asylum system is to see it as a product of a belief that one—states and individuals—have a duty to help strangers in times of great hardship. On “saving strangers” see, Nicholas J. Wheeler, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2002). Biray Kolluoglu links refugeeship to the consolidation of the nation-state system in Europe, which “marked the beginning of minorities as an international problem.” Biray Kolluoglu, *Excess of Nationalism: Greco-Turkish Population Exchange*, 19 *NATION & NATIONALISM* 532, 534 (2013).

²⁶ The debate in the United States over immigration is a good example of this as captured by Representative Charles Dent (R-PA) who declared “You have people on our side of the aisle who go through all sorts of contortions to get to ‘no,’ ... On the Democratic side, they’ll vote for the money but not for the policy changes. In my party, we’ll vote for the policy changes but not the money to implement the policy. This is extraordinarily frustrating and infuriating for people like me. We have a crisis on our hands.” Ashley Parker & Jonathan Weisman, *Rebellion inside the G.O.P. scuttles vote on border bill*, N.Y. TIMES, Jul. 31, 2014 http://www.nytimes.com/2014/08/01/us/politics/blow-to-house-gop-leadership-as-border-bill-falters-.html?_r=0

²⁷ In 2008, at the Cleveland squatter camp in Johannesburg five individuals were brutally killed with another 50 injured due to mob-inspired violence against Zimbabwean seeking refuge in South Africa. At a different squatters’ camp known as Primrose, mob violence led to the death of four people, including two school children. Chris McGreal, *Thousands seek sanctuary as South Africans turn on refugees*, GUARDIAN, May 19, 2008, <http://www.theguardian.com/world/2008/may/20/zimbabwe.southafrica>.

²⁸ Paul Weiss, *The Development of Refugee Law*, 3 *MICH. YBI LEGAL STUD.* 27 (1982) (Weiss, the former Director of the Legal Division of the Office of the United Nations High Commissioner for Refugees, reviews and points to the influence of the Refugee Convention on domestic legislation).

²⁹ James Hathaway writes for example that in practice refugee law has become more about how states can deny individuals their right to seek and obtain asylum. James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 *HARV. INT’L L. J.* 129, 131 (1990).

³⁰ Under the principle of *non-refoulement* states are obligated not to send individuals to territories where they may face persecution, which places limitation on the ability of states to act as they may wish with refugees. See e.g., Sir Elihu Lauterpacht, and Daniel Bethlehem. *The Scope and Content of the Principle of Nonrefoulement: Opinion*, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (2003).

³¹ See e.g., General Assembly, *Universal Declaration of Human Rights*, Art. 14, UNGA Res. 217(III), 10 December 1948; Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 44, 75 UNTS 287.

need and want (an integral aspect of this is the right of states to control their borders) and at the other end, the obligation of states to abide by the international agreements that they sign.³²

Over the last few years the discourse over refugees has become more poisonous, triggering erroneous and inflammatory claims,³³ including by government officials,³⁴ of refugees as bringing disease and polluting the host country.³⁵ Simply, the crisis that the international refugee regime is in, stems from the fact that refugees who make up a vulnerable community are easy targets for those wishing to make political capital,³⁶ which may also explain the propensity to denigrate them as seen with their portrayal as “illegal immigrant.”³⁷ Put differently, the way public discourse has evolved is linked to the fact that “conceptual developments have not kept pace with social and political realities.”³⁸ Thus, the regime that was designed in the 1950s, was meant to address the crises faced by the world in the post-World War II, making it somewhat ineffective in dealing with the plight that many refugees faced today.³⁹ The clearest indication is the fact that five protected grounds listed in the

³² The need for a balancing became abundantly clear by the fact that the UN upholds sovereign rights (Art. 2, Art. 51 UN Charter) whereas the Universal Declaration of Human Rights, adopted three years later recognizes “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” (Art. 14(1)), United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

³³ The British newspaper *Guardian* captured this when it admitted that it made an error by using the term ‘bogus asylum seekers’ emphasizing there is no such thing as an ‘illegal asylum seeker’ as everyone has a right to seek asylum while the term ‘bogus’ suggests pre-judgment. The paper took the decision to correct itself not only for integrity reasons but because the term ‘asylum seeker’ has become a term of abuse, with some using it as a euphemism for race. Ian Mayes, *Seeking asylum without prejudice*, GUARDIAN, Apr. 23 2004. <http://www.theguardian.com/uk/2004/apr/24/immigration.immigrationandpublicservices>.

³⁴ James Hathaway writes, governments have not only increasingly stigmatized those claiming refuge, they have “...sought to justify their harsh—and often illegal—treatment of refugees arriving at their territory on the grounds that such harshness is the necessary means to a more rational protection end, namely the reallocation of resources towards meeting the needs of the overwhelming majority of refugees located in the less developed world, with resettlement opportunities to be made available only to those said to be most acutely in need.” James C. Hathaway, *Why Refugee Law Still Matters*, 8 MELBOURNE J. INT’L L. 89, 90 (2007).

³⁵ Laura Murphy, *The Mexican ‘germ invasion’ is just the right’s latest anti-immigration myth*, GUARDIAN, Jul. 2, 2014 http://www.theguardian.com/commentisfree/2014/jul/02/border-patrol-diseases-anti-immigration-myth?CMP=fb_us.

³⁶ John Palmer, *The rise of the far right: a European problem requiring European solutions*, GUARDIAN, Nov. 15, 2013 <http://www.theguardian.com/commentisfree/2013/nov/15/far-right-rise-european-marine-le-pen-geert-wilders>; Marko Valenta, and Nihad Bunar, *State assisted integration: refugee integration policies in Scandinavian welfare states: the Swedish and Norwegian experience*, 23 J. REFUGEE STUD. 463 (2010) (analyzing refugee integration policies in Sweden and Norway); Anna Triandafyllidou, *Greek Migration Policy in the 2010s: Europeanization Tensions at a Time of Crisis*, 36 J. EUR. INTEGRATION 409 (2014) (noting the different impact of Europeanization on Greece).

³⁷ Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV 365, 366 (2005) (noting the pejorative aspect of the term illegal migrant, leading to the perception that the persons are not legitimate asylum seekers).

³⁸ Arthur C. Helton, *UNHCR and Protection in the 90’s*, 6 INT’L J. REFUGEE L. 1, 1 (1994).

³⁹ Jennifer Bond, *Principled Exclusions: A Revised Approach to Article 1 (F)(A) of the Refugee Convention*, 35 MICH. J. INT’L L. 15 (2013) (underlining that the exclusion clause has increased in both use and profile in recent years and suggesting that it stems from the ability of states to interpret Art. 1(F)(A) in line with domestic interests).

convention have not evolved to address contemporary issues ranging from the environment to gender to terrorism to child soldiers.⁴⁰ A second explanation as to the crisis faced by the refugee system stems from the widespread misconceptions as to why individuals flee—the idea exists that those seeking refuge are not really refugees but economic migrants or queue jumpers. Interfused with this is the idea that the system that provides for asylum seekers and refugees is too generous, leading to claims of abuse⁴¹ and calls for radical reform, with some wanting to limit the welfare aspect of the refugee system.⁴² Others however argue that the definition of a refugee is anachronistic, failing to take into consideration new political realities, such as natural disasters⁴³ and new social realities.⁴⁴ Thus, the refugee regime is affected by, first, a perception that those seeking refugee status are not really deserving and, second, that their destination is the Western states where they can have higher living standards or benefits.⁴⁵

⁴⁰ Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 381-382 (2014) (notes that in the U.S. there is a tendency to reject gender-based application on the grounds that persecution that the individual is seeking to flee stems from non-Convention grounds, placing an emphasis on the character of the abuser—“despicable person”—as opposed to focusing on the victim). See also, David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees*, 16 GEO. INT'L ENVTL. L. REV. 209 (2003); Bonnie Docherty & Tyler Giannini, *Confronting A Rising Tide: A Proposal for A Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009); Evelien Brouwer, *Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09*, 4 EUR. J. MIG. & L. 1 (2002); Bryan Lonagan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum after Negusie v. Holder*, 31 B.C. THIRD WORLD L.J. 71 (2011) (arguing that the barring child soldiers from claiming asylum contradicts the U.S.'s adherence to international law, which sees child soldiers as victims and not perpetrators).

⁴¹ Bruno Waterfield, *Britain 'too generous' with welfare payments to EU immigrants*, THE TELEGRAPH, Dec. 5, 2013, <http://www.telegraph.co.uk/news/worldnews/europe/eu/10496871/Britain-too-generous-with-welfare-payments-to-EU-immigrants.html>; Misha Hussain, *'Ghost' Malian refugees show abuse of U.N. registration system*, REUTERS, Mar. 21, 2014 <http://www.reuters.com/article/2014/03/21/us-burkina-refugees-idUSBREA2K13Y20140321>.

⁴² Daniel Hurst, *Scott Morrison calls for reinterpretation of refugee convention*, GUARDIAN, Aug. 4 2014 <http://www.theguardian.com/world/2014/aug/04/scott-morrison-calls-for-reinterpretation-of-refugee-convention>.

⁴³ L.W. Marshall, *Towards a New Definition of 'Refugee': Is the 1951 Convention out of Date?* 37 EUR. J. TRAUMA EMERG. SURG. 61 (2011) (arguing that the definition of a refugee needs to evolve and cover those escaping natural disasters). See also, Andrew E. Shacknove, *Who Is a Refugee?* 95 ETHICS, 274 (1985) (arguing for an expansive definition of a refugee).

⁴⁴ See e.g., Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367 (2010) (noting that to meet the refugee standard, applicant need to show that their sexual orientation meets the particular social group membership standard—characteristics as so fundamental so as to make them distinct—as opposed to being able to base the claim on their sexual orientation).

⁴⁵ When looking at the top 20 refugee-hosting countries, Pakistan hosts 1.6 million; Iran, 857,000; Lebanon, 856,000; Jordan 641,000; Kenya 534,000. Of the western countries, Turkey hosts 609,000, the U.S. hosts, 263,000, France, 232,000 and Germany 187,600. Harriet Sherwood, *Global refugee figure passes 50m for first time since Second World War*, GUARDIAN, Jun. 19, 2014. <http://www.theguardian.com/world/2014/jun/20/global-refugee-figure-passes-50-million-unhcr-report>. See also, Tehran Bureau Correspondent, *The price of an education for Afghan refugees in Iran*, GUARDIAN, Sept. 4, 2014, <http://www.theguardian.com/world/iran-blog/2014/sep/05/iran-the-afghanistan-refugees>.

It is important to emphasize the nature of the investigation undertaken in this paper, which is to review the influence of natural law and legal positivism on the development of international refugee law. Interspersed within this investigation is the recognition that conceptually refugee law has not kept pace with political developments, especially as the United Nations High Commissioner for Refugees is having to take a more humanitarian agenda, as opposed to strictly protective one.⁴⁶ Concomitantly, the hope here is to encourage the legal academy not only to focus on the practical issues relating to refugee and asylum law, but develop an effective and clear legal theory of refugeeship.⁴⁷ International refugee law seems to lack a clear legal doctrine and taxonomy, which means that issues relating to security, migration, obligations, human rights, criminal law and many more impact it, ensuring that the system becomes more convoluted with the passage of time.⁴⁸ What possibly undermines the ability of the field to develop a clear taxonomy is the tendency by scholars to refer to decisions from around the world, without an understanding of what has led the court to reach its decision.⁴⁹ In other words, there is a tendency to engage in comparative legal studies without appreciating its deep methodology.⁵⁰ Furthermore, the need for a legal taxonomy has become

⁴⁶ Writing in the mid-1990s, Arthur Helton noted “Conceptual developments have not kept pace with social and political realities.”, leading him to state “A philosophical basis and set of principles to inform UNHCR’s work in this new era must be developed.” Arthur C. Helton, *UNHCR and Protection in the 90’s*, 6 INT’L J. REFUGEE L. 1, 1 (1994).

⁴⁷ There is a sense when reading about refugee law that it draws from a host of legal sources, without appreciating that courts will reach decisions based on domestic and regional outlooks, which means that simply referring to German, British Brazilian and other jurisdictions without appreciating social and societal influences only tells half the story. The international refugee system is highly complex, at its epicenter lies the Refugee Convention, but there is also a plethora of regional agreements, treaties and norms, such as the Organization of African Unity Convention on Refugees; the Asian-African Legal Consultative Organization Bangkok Principles; the Cartagena Declaration and many more. Moreover, regional courts such as the European Court of Human Rights, the Inter-American Court of Human Rights have all weighed in when it comes to refugee and asylum, but each court draws on its own legal tradition. William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT’L L. 94 (2012) (noting the role of interest, whether state or human rights proponents, in influencing the definition of a refugee, with the former seeking a narrow one, and the latter a wide one).

⁴⁸ See e.g., GIL LOESCHER, *REFUGEE MOVEMENTS AND INTERNATIONAL SECURITY* (1992); Arthur C. Helton, *The Mandate of US Courts to Protect Aliens and Refugees under International Human Rights Law*, 100 YALE L. J. 2335 (1990); GUY GOODWIN-GIL *THE REFUGEE IN INTERNATIONAL LAW* 3 (1996); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005).

⁴⁹ Professor Emily Sherwin is undoubtedly correct when she declares that a formal taxonomy facilitates legal analysis and communication, helping those who make and apply the law by providing purposive overview of the field of law. Emily Sherwin, *Legal Taxonomy*, 15 LEGAL THEORY 25 (2009). On conflicting interpretation of refugee and asylum law in relation to the United States see Michael English who uses the *Li v. Gonzales* 420 F.3d 500 (5th Cir. 2005) to analyze the difficulty courts regularly face in deciding whether a prosecuted alien is entitled to asylum and in doing so emphasizing the inconsistencies, as courts apply different standards. Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109 (2007).

⁵⁰ Max Rheinstein, *Comparative Law - Its Functions, Methods and Usages*, 22 ARK. L. REV. 415 (1968-1969) (reviewing the functions, methods and use of comparative law); Pierre Legrand, *How to Compare Now*, 16 LEGAL

pertinent because at a time of economic austerity and heightened insecurity, the refugee regime—domestic and international—faces mounting pressures, with governments seeking to curtail and reduce it by often the law.⁵¹ However, by embracing a clear understanding as to the legal, philosophical roots of international refugee law and the where natural law intersects with legal positivism, those advocating for the regime, may find more effective tools that in turn would encourage a clearer taxonomy. In other words, positivist interpretation seem to dominate the regime, which is why natural law, and by extension human rights law, must take a more assertive stand to challenge the narrowing of refugee protection.⁵² The second aim is to underline how difficult it is to teach and study international refugee and asylum law.⁵³ The field has become so diverse not only because of the legal issues surrounding who is a refugee and what rights refugees are entitled to, but also because it is highly political, with refugees increasingly being used as a way to shore up populist support or to explain problems caused by poor political decisions,⁵⁴ leading to a number of myths about refugees.⁵⁵ It is hoped that by underlining the legal traditions at the heart of international refugee law—the need to help strangers—and in tracing the roots of the Refugee Convention, further attention is placed on

STUD. 232 (1996) (underlining the poor quality of comparative legal research within the European Union, because the focus is on contrasting); David S. Clark, *Comparative Law Methods in the United States*, 16 ROGER WILLIAMS U. L. REV. 134 (2011) (describing what comparative methods are used within the U.S. legal academy).

⁵¹ There are many examples of government seeking to limit the services accorded to refugees and migrants. Rowena Mason, *EU migrants to Britain face further restrictions on welfare payments*, GUARDIAN, Jul. 28, 2014 <http://www.theguardian.com/uk-news/2014/jul/29/eu-migrants-britain-further-restrictions-welfare-payments>. Arguably the controversial Malaysian Solution as adopted by the Australian government is an example of a cost-cutting initiative. Anthony Pastore, *Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention*, 13 CHI. J. INT'L L. 615 (2012-2013).

⁵² Concern over the rights of asylum seekers was a principal reason as to why the Australian high court invalidated what was known as the Malaysian Solution, in doing so the Court not only emphasized the importance of Australia abiding by its international obligations but also that states have a duty to those that seek refuge. *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Another, Plaintiff M106 (by bislitigation guardian, Plaintiff M70/2011) v Minister for Immigration and Citizenship and Another* (2011) 122 ALD 237; (2011) 280 ALR 18; [2011] HCA 32 (*Plaintiff M70*)

⁵³ Asylum is not addressed in this study mainly because asylum-seekers are those individuals claiming that they are refugees, but their claim is yet to be determined.

⁵⁴ See e.g., Helena Smith, *Fears over disappearance of 150 Syrian refugees from Greek village*, GUARDIAN, Dec. 13, 2013, <http://www.theguardian.com/world/2013/dec/24/greeks-protest-refugees-disappear-praggi>; *Greece: Frontier of Hope and Fear, Migrants and Refugees Pushed back at Europe's Border*, AMNESTY INTERNATIONAL, EUR 25/004/2014. <http://www.amnesty.org/en/library/asset/EUR25/004/2014/en/705659ab-637b-4940-b8d9-b448052f2764/eur250042014en.pdf>; Ian Buruma, *Europe's turn to the Right*, THE NATION, Aug. 29-Sept. 5, 2011, <http://www.thenation.com/article/162698/europes-turn-right#>.

⁵⁵ A recent study recognized five myths about refugees: refugee economies are not linked to the global economy; refugees are a burden on host countries; refugees are economically homogenous; refugees are technologically illiterate; and, refugees are dependent on humanitarian aid. Alexander Betts, Louise Bloom, Josiah Kaplan, & Naohiko Omata, *Refugee Economies: Rethinking Popular Assumption*, Refugee Studies Centre, The University of Oxford, (2014), <http://www.rsc.ox.ac.uk/files/publications/other/refugee-economies-2014.pdf>.

the plight of those claiming refugee status as they increasingly fall victim to capricious interpretations of the Refugee Convention.⁵⁶ Simply, it seems that natural law and legal positivism are causing major problems for the regime, with states, the principal proponents of legal positivism, pushing in one direction, while proponents of refugee rights drawing on natural law. By reviewing the Refugee Convention, an additional aim of the article is to contribute to our understanding of how refugee norms develop by looking at influences, primarily from a desire to flee persecution to a journey for human security,⁵⁷ which entails more engagement, assistance and support,⁵⁸ especially when the conferment of refugee status invites violence, discrimination and persecution, instead of providing protection.⁵⁹

The paper begins by examining the legal and philosophical roots that, in turn, affect the methodology of international refugee law. In doing so, the aim is to question whether international refugee law has a methodology, taxonomy or boundary, as it appears to lack a scientific, independent methodology, making it mostly reactive and descriptive as opposed to proactive and proscriptive. Part I, therefore, situates the research in a larger intellectual tradition—natural law and positivism—each of which has a strong legal, methodological foundation.⁶⁰ Nevertheless, as will be shown it is the influence from these two traditions that

⁵⁶ News stories on how policymakers are seeking to find ways to exclude individuals are found throughout as is the rise of political parties and movements determined to prevent immigrations and refugees from entering states. See e.g., Alastair Nicholson, *Asylum seekers: my country, my shame*, SYDNEY MORNING HERALD, Jul. 4, 2014, <http://www.smh.com.au/comment/asylum-seekers-my-country-my-shame-20140704-zswgi.html>. See also, Anthony Pastore, *Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention*, 13 CHI. J. INT'L L. 615 (2012-2013) (pointing to the tensions within the Australian Supreme Court where some judges hold that Australia's compliance with the Refugee Convention is imperative whereas others seek to uphold domestic supremacy, leading to some confusion).

⁵⁷ Speaking in 1999, Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, recognized that the term human security is not defined in international law but it does complement “the legally based concept of refugee protection.” The Commissioner argued that the value of human security for refugees stems from the fact that “Refugees and internally displaced people are a significant symptom of human insecurity crises. Because homes, personal belongings and family ties are such an important part of everybody's security, it takes considerable pressure to force people to abandon them, and become refugees. Refugees are doubly insecure: they flee because they are afraid; and in fleeing they start a precarious existence.” *Human Security: A Refugee Perspective* – Keynote Speech by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the Ministerial Meeting on Human Security Issues of the “Lysoen Process” Group of Governments, Bergen, Norway, 19 May 1999. <http://www.unhcr.org/3ae68fc00.html>.

⁵⁸ James C. Hathaway, *Why Refugee Law Still Matters*, 8 MELBOURNE J. INT'L L. 89 (2007) (arguing in favor of revision of the Refugee Convention and Protocols so as to end the misunderstandings that surround refugee law, but also because there is a need to protect those claiming asylum).

⁵⁹ Susan Kneebone & Dallal Stevens, *Conflicting Identities, Protection & The Role of Law*, IN REFUGEE PROTECTION AND THE ROLE OF LAW: CONFLICTING IDENTITIES 18 (Susan Kneebone, Dallal Stevens & Loretta Baldassar, 2014).

⁶⁰ One is clearly mindful of the dangers of identifying schools of thought especially within the legal tradition, as it often means glossing over individuals and focusing on thematic aspects of an approach. Nevertheless, this is necessary as the fields of natural law, legal positivism and international human rights law are vast. Thus,

undermines the field to the detriment of refugee applicants. To untangle the concept of refugeeship, Parts II and III shifts to the 1951 Convention, reviewing its history, so as to understand why the international community, at a time dominated by the Euro-Atlantic zone, formulated and adopted such an international mechanism. In doing so, the sections clearly demonstrates that any suggestions that international refugee law is ahistorical are problematic, as in fact the system seems trapped in the Second World and Cold Wars period. In other words, the section aimed to underline what the objectives were in the late 1940s and early 1950s for the Convention, which initially was limited to one place (Europe), one time (pre-1951) and a specific set of rights (civil and political) to the exclusion of social, economic and cultural rights.⁶¹ In undertaking this, the sections raises the question of whether the incoherence and disharmony in terms of interpreting key provisions of the Convention stem from a sense that the language is anachronistic.⁶² In doing so, the sections implicitly draws on comparative legal methods, without seeking to be a comparativist study.⁶³ The paper concludes by holding that it is the tensions between natural law, and legal positivism, that cause fissures within the international refugee regime. This observation is not a surprise, as similar issues can be encountered in respect to the application of international criminal law or international humanitarian law and many other areas where the international meet national state interest. Nonetheless, the international refugee regime is designed to protect the rights of millions of people who struggle daily with persecution, which is why there has to be a solution to the limitation of the current system, whether it is by revising the Refugee Convention, the UNHCR or simply by challenging those that wish to make political capital of those claiming refuge.

following Brian Bix, each section deal with a legal method will focus on a specific individual. Brian Bix, *On the Dividing Line between Natural Law Theory and Legal Positivism*, 75 NOTRE DAME L. REV. 1613 (1999).

⁶¹ MARK GIBNEY & GIL LOESCHER, *GLOBAL REFUGEE CRISIS: A REFERENCE HANDBOOK* 9 (2010).

⁶² The section recognizes the importance of such initiative as the International Association of Refugee Law Judges, which emerged because of the need to pay attention to how different courts and systems have come to address the evolving challenge of refugeeship. James Hathaway points to the importance of the International Association of Refugee Law Judges established in 1995 with the aim of “promoted ongoing awareness of the legal rules that govern the protection of refugees.” James C. Hathaway, *A Forum for the Transnational Development of Refugee Law: The LARLJ's Advanced Refugee Law Workshop*, 15 INT'L J. REFUGEE L. 418, 418 (2003).

⁶³ The section embraces Annelise Riles' warning as to the danger of information overload while also noting that comparative legal studies promotes a set of methods, research questions, passion, an empathy for differences and similarities, faith in the self-transformative value that comes with knowledge and form in the knowledge itself. Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L. L.J. 221, 229 (1999).

I. SEARCHING FOR A LEGAL METHODOLOGY FOR INTERNATIONAL REFUGEE LAW

There are different ways to approach the studying of international refugee law, as this is a “dynamic institution” reflecting the cyclical nature of international politics.⁶⁴ The section, therefore, emphasizes the dichotomy within the field of refugee studies that in many ways is distinctly anti-doctrinal, demanding interdisciplinary or multi-disciplinary approaches.⁶⁵ Ultimately, international refugee law is the sum of natural law and legal positivism. It embraces a sense of morality that needs to interact with political realities, which may explain why the discipline and the practice of refugee law are facing such a serious onslaught.

International refugee law as shown below is a product of natural law and positive law, though it also draws from international human rights law, international criminal law, customary law, not to mention legal doctrines developed largely by judges, who make new doctrines all the time⁶⁶ and often in response to public pressure.⁶⁷ Another element that adds to the complexity of international refugee law is the role of the United Nations High Commissioner for Refugees (UNHCR), which is mandated to provide international protection to refugees and supervise states compliance.⁶⁸ The mandate however, especially in the post-Cold War period often pits the states and UNHCR against each other: states tend to challenge if not reject the UNHCR’s interpretations of their Convention duties with respect to refugees and their rights.⁶⁹ For its part, UNHCR remains committed to protecting refugees by often

⁶⁴ In the first volume of *International Journal of Refugee Law*, its editors noted, “As the law of human rights has developed over the last forty years, so too has the law on refugees. As refugee migrations have ebbed and flowed, as policies or complacency have caused or contributed to the conditions that produce flight, so States and international organizations have attempted, with varying success and varying degrees of political will, to find solutions while upholding human dignity and integrity.” The Editor-in-Chief and the Editorial Board, *Refugee Law and the Protection of Refugees*, 1 INT’L J. OF REFUGEE L. 1, 2 (1989).

⁶⁵ Richard Posner argues that the legal American academy in the 1960s became focused on logic, analogy, judicial decisions, common sense and *stare decisis*, as tools for legal analysis, ensuring that the discipline was largely anti-doctrinal or un-theorized. Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316 (2001).

⁶⁶ Rubin and Feeley conclude, “Judges create new doctrine all the time. They do so not as a result of some brain seizure, or lust for power, or act of self-denying heroism, but as a regular part of their job.” Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CA. L. REV. 1989, 2037 (1995-1996).

⁶⁷ In a recent statement, Lady Hale, the deputy president of the English Supreme Court speculated whether the return to English constitutionalism as oppose to remaining committed to European instruments stems from “the rising tide of anti-European sentiment among parliamentarians, the press and the public,” which underlines that judges are not immune from public discourse. *UK Constitutionalism on the March?* Lady Hale gives keynote address to the Constitutional and Administrative Law Bar Association Conference 2014, <http://supremecourt.uk/docs/speech-140712.pdf>.

⁶⁸ *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428 (V), U.N. GAOR, 5th Sess., Supp. No. 20, ¶ 1, at 46, U.N. Doc. A/1775 14 December 1950. UN General Assembly, *Convention Relating to the Status of Refugees*, Art. 35, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

⁶⁹ See e.g., Kurt Sansone, *Minister lambasts UNHCR*, TIMES OF MALTA, May 16, 2009, <http://www.timesofmalta.com/articles/view/20090516/local/minister-lambasts-unhcr.257034>; *Bangladesh rejects*

demanding expansive interpretation of the Convention and of UNHCR's Statute.⁷⁰ Thus, the lack of a clear international refugee law methodology stems from the nature and roots of the field: a desire to help strangers originating in a reaction to the horrors of the 20th century during which humanity engaged in the extreme forms of violence. This violence was often instigated by or done in the name of the state against minorities.⁷¹ In the post-Cold War period, states, predominately western states, have come to see refugees as a security threat (to them) and as an economic burden, leading Reinhard Marx among others, to argue that refugee law has become less about human rights and more about public international law to the detriment of those fleeing.⁷²

International refugee law is interdisciplinary,⁷³ existing somewhere in the fields of public law, public international law and international human rights law.⁷⁴ The link between international refugee law and public law⁷⁵ stems from the fact that refugee law refers to a claim by an individual that the state, whether directly or through its organs, has abrogated its contractual responsibilities—social contract⁷⁶—toward the person. Interfused with the identification of a set of rights is the notion of responsibility by states towards the promotion

UNHCR call to allow Myanmar refugees, THE DAILY STAR, Jun. 13, 2012, <http://www.asiaone.com/print/News/AsiaOne%2BNews/Asia/Story/A1Story20120613-352422.html>.

⁷⁰ See e.g., Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT'L MIGRATION REV. 33 (2001) (noting that UNHCR's policy and practice has been driven by its statute and its interaction with states, leading to disagreements).

⁷¹ Rene Ristelhueber, *The International Refugee Organization*, 29 INT'L CONCILIATION 167 (1951-1952) (emphasizing that the creation of the International Refugee Organization was spurred humane concerns).

⁷² Marx writes, "[r]efugee law today is linked less firmly to human rights law than to general principles of public international law, and this enables States—or at least those States which are dominant in the international system—to continue to pursue their own interests within a global context." Reinhard Marx, *Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue*, 7 INT'L J REFUGEE L. 383, 384 (1995).

⁷³ At its most basic, interdisciplinary refers to the integration or synthesis of two approaches. Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 J. L. & SOCIETY, 163, 164-165 (2004).

⁷⁴ Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, IN HUMAN RIGHTS AND IMMIGRATION, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 19-72 (R. RUBIO MARIN, ED., 2012) (arguing that not only is the Refugee Convention not a conventional human rights treaty, human rights law has radically altered the Convention). See also, David James Cantor & Stefania Eugenia Barichello, *The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?*, 17 INT'L J. OF HUM. RTS. 689 (2013) (showing how the Inter-American human rights regime shores up refugee rights, leading to the development of a standard as to how to deal with refugees); Reinhard Marx, *Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue*, 7 INT'L J REFUGEE L. 383, 383 (1995) (declaring "refugee law in an inherent part of human rights...").

⁷⁵ Public law refers to the part of the law that deals with the relationship between individuals and the state, relationships between individuals that are of direct concern to the state; and, functions and constitutions of the organs of the state. JONATHAN LAW & ELIZABETH A. MARTIN, A DICTIONARY OF LAW (7TH ED., 2009).

⁷⁶ JEAN-JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT (1791) (positing that a social contract refers to the idea that each person relinquishes some individual sovereignty in return for receiving certain basic services.)

of normative world order⁷⁷ adding public international law influence to refugee law.⁷⁸ In the context of public international law, international refugee law, requires states to take responsibility for non-nationals whose rights have been or are being violated. This in itself is an odd concept, as historically whatever occurred within the state was for the state and not for the international community; but over time, the premise of absolutist sovereignty not only dissipated, it was replaced with a normative system that not only calls for but also demands intervention to prevent gross human rights violations.⁷⁹ By drawing on international human rights law, which seems to be omnipresent in international refugee law, one recognizes the existence of inalienable fundamental rights,⁸⁰ which are key to any successful claim for refuge, as ultimately the applicant claims that their basic rights are threatened.

In sum, the focus on the need to protect those escaping persecution may explain why scholarship as to the philosophical roots of international refugee law and what influenced it is scant. The two sections below aim to provide a review as to the influence of natural law and legal positivism on international refugee law.

Natural Law, Natural Rights and Refugee Law

The aim of this section is to explain what natural law is, as understood under the rubric of human rights, before shifting attention to how natural law impacts refugee law. Admittedly, natural law and natural right theories have diverse and extensive scholarship, which challenges those seeking to provide an overview of a rich legal, philosophical and ethical scholarship.⁸¹ Nonetheless, natural law theories are “reflective critical accounts of the constitutive aspects of

⁷⁷ HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977).

⁷⁸ Public international law governs interstate relations. D.G. CRACKNELL, *PUBLIC INTERNATIONAL LAW* (2002).

⁷⁹ See e.g., Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007); Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703 (2006); Jutta Brunnée & Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT'L L. & INT'L REL. J. 121 (2005); Mehrdad Payandeh, *With Great Power Comes Great Responsibility-The Concept of the Responsibility to Protect within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469 (2010).

⁸⁰ DAVID S. WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* (2007).

⁸¹ Brian Bix makes it clear that there are many different approaches to natural law, though he separates it into two main ones: traditional natural law theory that sets out a theory of how to think about and act on legal matters; and, a modern natural law theory that calls for moral evaluation when looking at the law. Brian Bix, *Natural law theory*, IN *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 223-227 (1996). For natural law advocates see, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100-133 (1980); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW* (1997); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGINS AND DEVELOPMENT* (1979).

the well-being and fulfillment of human persons and the communities they form”⁸² and when taken literally, human rights are rights one has by virtue of one’s existence.⁸³ Professor Jack Donnelly writes:

A natural right is one that is, by definition, possessed simply by virtue of being a human being. Since it is grounded in human nature, it is held universally and equally by all people, in that human nature is possessed equally by universally and equally by all people, in that human nature is possessed equally by a life worthy of a human being – that is, they are essential to the protection and realization of human nature and dignity- they hold against the whole world, not just some special group.⁸⁴

The origins of modern natural law lie with the Catholic Church’s eschatological legal system that in its early years faced myriad internal and external challenges.⁸⁵ The Gregorian reforms of the 11th century enabled the Church to establish itself as an autonomous, powerful, sacred entity whose purpose was to ensure that people abide by God’s will, seen as divine or natural law.⁸⁶ Integral to the understanding of the development of natural law was the need of the Church to delineate a set of principles and rules. These were designed to protect rights that the Church, as a proponent of natural law, claimed that each person had by virtue of his or her existence, a view that meant that no worldly force could deny or interfere with these

⁸² Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y., 171, 172 (2008).

⁸³ The connection therefore between natural law, when understood as human rights, and refugee is that when human rights are violated one is arguably able to claim refugee status. Brian Gorlick, *Legal Regime for Refugee Care*, IN PEACE STUDIES: AN INTRODUCTION TO THE CONCEPT, SCOPE, AND THEMES 92 (Ranabir Samaddar ED. 2004).

⁸⁴ Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391, 397(1982).

⁸⁵ Chris Thornhill, *Natural Law, State Formation and the Foundations of Social Theory*, 13 J. CLASSICAL SOCIOLOGY, 197, 202 (2013); Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J. L. & RELIGION 163 (1987) (tracing the development of an autonomous church, which ensured that the power of the state was never absolute and in doing so recognizing that certain rights are universal).

⁸⁶ Thornhill writes, “[a]t a time when, in all spheres of society, the exercise of public power was restricted by the private force of local actors, natural law enabled the church to distinguish itself from, and elevate itself above, the worldly institutions of feudalism by claiming general authority and jurisdiction, transmissible through law, over clearly extensible and inclusive legal communities.” Chris Thornhill, *Natural Law, State Formation and the Foundations of Social Theory*, 13 J. CLASSICAL SOCIOLOGY, 197, 202 (2013). On the presence of natural law in Martin Luther see, John T. McNeill, *Natural Law in the Thought of Luther*, 10 CHURCH HIST. 211 (1941).

rights.⁸⁷ Admittedly, the Church had an altruistic reason to support such an agenda,⁸⁸ but it also meant that the medieval Church was instrumental in promoting natural law.⁸⁹ Professor Chris Thornhill, has argued that the development of natural law during the medieval period meant that European societies could “explain their legal rulings in uniform fashion, to project and justify their legal rulings into a controllable societal future, and to stabilize their legal exchanges, positively and replicably, across increasingly complex differences of place and time.”⁹⁰ The rights identified—natural rights—are found in human nature and in moral behavior that distinguishes between right and wrong, not because it is stated but because of “higher law,”⁹¹ meaning that these rights are universal and inalienable.⁹² Natural law, therefore, has two principal assumptions: first, that the presence of an objective moral order places normative limits on social practices;⁹³ and, second, that human beings are endowed with practical reasonableness,⁹⁴ allowing them to identify a set of basic goods, or human goods. These goods include life (and health), knowledge, friendship, practical reasonableness and religion⁹⁵ that any person would want because these are moral principles that all human have and want.⁹⁶ The question, however, is: What are those rights?

⁸⁷ The relationship between the law, religion and human rights is controversial. John Witte Jr. for example argues, “Law, by its nature, is rooted in the ritual, tradition, and authority of religion, and draws in part on religious ideas, institutions, and methods for its spirit and substance.” John Witte, Jr. *Law, Religion, and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 30 (1996-1997).

⁸⁸ One could argue that the need for a natural law tradition came about because the Church rejected the notion of theocratic kingship, as it wanted its own domain, as secular monarchs such as Constantine increasingly sought to usurp the Church’s authority as a way to enhance theirs. Thus, when the Gelasian Doctrine—an attempt during the fifth century to ensure that the secular and the religious had supremacy within their respective realm—failed, the Church needed to find an alternative theory to provide it with authority, which led to the emergence of natural law. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY*, 19-27 (2004).

⁸⁹ There is an element of irony in this situation because the intention of Church was a desire to protect itself from monarchs that sought to more power by combine the secular with the religion, but the unintended consequence was that it helped develop the natural law tradition. Leslie Green, *The Functions of Law*, 12 COGITO, 117 (1998) (discussing intended and unintended consequences).

⁹⁰ Chris Thornhill, *Natural Law, State Formation and the Foundations of Social Theory*, 13 J. CLASSICAL SOCIOLOGY, 197, 204 (2013).

⁹¹ Brian Bix, *Natural Law Theory*, IN A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 223, 223-234 (Dennis Patterson ed., 1996).

⁹² John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 1 (1990).

⁹³ Jean Porter, *From Natural Law to Human Rights: Or Why Rights Talk Matter*, 14 J. OF L. & RELIGION 77, 81 (1999-2000).

⁹⁴ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100-133 (1980); Philip Soper, *Legal Theory and the Problem of Definition (book review)*, 50 U. CHI. L. REV. U., 1170 (1983) (discussing Finnis’s position).

⁹⁵ John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 1-2 (1990).

⁹⁶ Randy E. Barnett, *A Law Professor’s Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL’Y. 655, 666-667 (1997) (discussing the natural law method of analysis that recognizes that due to the nature of human beings and the world that they inhabit, humans must recognize that if they want to achieve something they have to engage in actions).

The impact of natural law on refugee law is substantial because it promotes three key elements. First, natural law underlines that all individuals are endowed with basic rights, referred to as natural, because they stem from one's existence as a person as they refer to "the rights that one has simply because one is human. As such, they propagate equal rights, because we either are or are not human beings, equally."⁹⁷ In the classical natural law tradition, one could argue that there was no need to enumerate or delineate these rights as they were often found or defined by the Church or religious texts. By contrast, in the contemporary period, these fundamental rights are often understood or interpreted through human rights legal mechanisms: treaties, conventions and declarations⁹⁸ as opposed to ecclesiastical texts or canonical law.⁹⁹ Thus, a key premise behind international refugee law and natural law is the recognition that international society¹⁰⁰ has to take action when egregious human rights violations due to the acceptance that the peoples of the world have fundamental human rights, dignity and equal rights¹⁰¹ that allow sovereignty to be challenged.¹⁰² When applied to refugee law, first one has to recognize that basic rights exists and that the applicant's rights are threatened by the state. The clearest indication therefore of natural law within the refugee regime is in relation to the principle of *non-refoulement*,¹⁰³ as it rests on human rights norms.¹⁰⁴

⁹⁷ Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 282 (2007)

⁹⁸ Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391(1982) (rejecting Charles Beitz theory of social justice as the source of human rights and not that human rights mechanisms are influenced by natural law).

⁹⁹ Michael Freeman, *The Problem of Secularism in Human Rights Theory*, 26 HUM. RTS. Q. 375 (2004) (noting that Jacques Maritain argued that it was not possible to develop a universal human rights paradigm on philosophical grounds because there are too many differences within the tradition). Alice Edwards point to at least six ways in which human rights law can help fill gaps in refugee protection. Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders*, 30 MICH. J. INT'L L. 763, 791-795 (2008-2009).

¹⁰⁰ This is where Hedley Bull's definition of a society of states becomes useful, as Bull argued that such a society—international society—"exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another and share in the working of common institutions." HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 13 (1977).

¹⁰¹ Louis Henkin argues that Article 56 of the UN Charter demands that states take joint action to promote and encourage human rights. Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT'L & COMP. L. 31, 34 (1995-1996). United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Preamble.

¹⁰² Christian Reus-Smit however argues that there is no tension between sovereignty and human rights finding instead, "the protection of basic human rights is integral to the moral purpose of the modern state, to the dominant rationale that licenses the organization of power and authority into territorially defined sovereign units." Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REV. INT'L STUD. 519 520 (2001).

¹⁰³ "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." UN General Assembly, *Convention Relating to the Status of Refugees*, July 28, 1951, entered into force Apr. 22, 1954, 189 U.N.T.S. 150.

¹⁰⁴ Notably, UNHCR has determined that the principle of *non-refoulement* applies "not only to recognized refugees, but also to those who have not had their status formally declared." UN High Commissioner for

the rights of the individual not to face persecution or threats, such as loss of life, torture, degrading and cruel treatment,¹⁰⁵ which international society accepts, as it agrees not to refoule the person claiming asylum.

Second, natural law recognizes that people have a desire for basic security understood as “freedom from fear” and “freedom from want.”¹⁰⁶ The former refers to civil and political rights, whereas the latter to social and economic rights. Basic security received a boost with once the United Nations Development Program (UNDP) formulated and promoted the concept of human security,¹⁰⁷ holding that security is more than security of the state from territorial aggression or the protection of national interests in relation to foreign and defense policy or security from nuclear war.¹⁰⁸ UNDP further argued that security means safety from hunger, disease, repression and protection from “sudden and hurtful disruptions in the patterns of daily life.”¹⁰⁹ Notably when viewing refugeeship as the quest for basic security, it becomes very difficult to deter a person from seeking basic security, as it is something that each person is entitled, needs and wants, as the alternative is inconceivable.¹¹⁰ Thus, the desire for basic security, as a human security, helps explain why people fleeing persecution and hardship will do what they can to achieve security for themselves and their families, which is

Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, Para. 6, pp. 1-2; UN High Commissioner for Refugees (UNHCR), *Non-Refoulement*, 12 October 1977, No. 6 (XXVIII) – 1977.

¹⁰⁵ UNHCR has further determined that the exceptions built into the *non-refoulement* principle (Art. 33(2)) do not apply when international human rights issues are affected as there are certain rights that states cannot derogate from. UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, Para. 11, Para. 17 p. 4, pp. 8-9.

¹⁰⁶ These terms are generally associated with human security. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994 26–33 (1994) (providing the first definition of human security). Astri Suhrke, *A Stalled Initiative*, 35 SECURITY DIALOGUE 365, 365 (2004).

¹⁰⁷ Alice Edwards writes that the need to use human security, understood through human rights, in respect to refugee stems from the fact that it offers “[a] specifically tailored protection system for refugees, ...”. Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders*, 30 MICH. J. INT’L L. 763, 801 (2008-2009).

¹⁰⁸ UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994 22 (1994).

¹⁰⁹ UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994 25 (1994). Alice Edwards writes “Human security treats security, rights, and development as mutually reinforcing goals and is oriented as much toward the protection of individuals as toward their empowerment. It also reinforces the view that no matter how vigorously a State defends its national borders, today’s global threats, such as environmental degradation, international terrorism, poverty, and infectious diseases do not respect them.” Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders*, 30 MICH. J. INT’L L. 763, 765 (2008-2009).

¹¹⁰ This need for basic security may even explain why millions of people accept the harsh conditions of living in refugee camps, as no matter how difficult it is, it remains better than the alternative of remaining in one’s country of origin.

why the focus when it comes to refugees is with protection and empowerment. This is what took place in the early years of the refugee regime—1920s to the 1960s, if not later—states appeared committed to support this right to basic security as they were either willing to support voluntary repatriation, by demanding changes at the country of origins or by accepting and resettling refugees.¹¹¹ In effect, what the refugee regime was seeking to do is ensure that people have basic security whether in their country of origin or their host country.

Third, morality exists within the law. The natural law tradition views legislation, directives and legal rules as not merely mechanisms to oversee the way society exists and operates, but also as guides for conduct in a particular way,¹¹² leading to a common good.¹¹³ Simply, if we are to exist as moral beings, we have a duty to preserve, protect and promote basic rights, especially towards individuals that flee their homes, as the state or other powerful actors seek to curtail the rights of the person fleeing. Such an approach holds that society benefits when it is governed by a set of morals, as such a standards challenges discriminatory practices. To that end, if the law is to be moral and therefore just, states have a positive obligation to adopt legislation to promote and protect these basic rights, because all benefits from a moral society.¹¹⁴ The issue is that laws that undermine, reject and challenge basic rights are immoral and, therefore, one is obligated to oppose and reject them.¹¹⁵ It is this view of the law and the fact that it places morality at its heart that make natural law so important to refugee studies, as that view emphasizes one's duties and obligations toward those that are vulnerable. Interspersed within this is accepting that many of those fleeing do so not because they want

¹¹¹ Judy Cheng-Hopkins, Assistant High Commissioner, United Nations High Commissioner for Refugees noted that in the aftermath of the Hungarian crisis 180,000 Hungarian refugees were resettled in 37 different countries, the first 100,000 in ten weeks. Cheng-Hopkins adds that the refugees “ranged from a garage mechanic in Bogota to the founder of Intel in San Francisco. All have done relatively well thanks to the legal protection and resettlement that they were able to avail themselves of and, of course, the receptivity of the West to their plight.” Judy Cheng-Hopkins, *Operational Challenges for UNHCR*, 26 REFUGEE SURVEY Q. 52, 53 (2007).

¹¹² Philip Soper, *Some Natural Confusion about Natural Law*, 90 MICH. L. REV. 2393, 2401 (1992).

¹¹³ John Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L. ETHICS & PUB. POLY 115 (1984-1985) (arguing that legal authority stems from an acceptance of a common good). See also, George Duke, *Finnis on the Authority of Law and the Common Good*, 19 LEGAL THEORY 44 (2013).

¹¹⁴ John M. Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1075 (1993) (arguing that a political community benefits from providing “coercive protection to all individuals and lawful associations within its domain.”) Fuller’s critique of Hart is useful here as Fuller argues that Nazi laws were so repugnant that they were not laws. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

¹¹⁵ The English jurist, Sir Sherston Baker famously declared that customs that are unjust and in violation of natural and Divine law, “have no binding force.” SHERSTON BAKER, *FIRST STEPS IN INTERNATIONAL LAW* §.8, 16 (1899).

to, but because they have to,¹¹⁶ which also means that by not providing protection society as a whole loses its moral identity, as it allows the strong to trample over the weak. At the same time, it is the commitment to morality and the recognition that man-made laws are not all there is that place the natural law tradition in direct opposition to the legal positivists, whose views are summarized in the succeeding section.

Legal Positivism and International Refugee Law

Legal positivism is one of the great legal traditions in legal theory. It has a checkered relationship with domestic law and international law, in that: “Starting in the nineteenth century the new doctrine of legal positivism first resolutely expelled international law from the realm of positivist jurisprudence. Then, as if repenting of its initial indiscretion, it effected a series of moves in order to reclaim international law on terms acceptable to positivist dogma.”¹¹⁷ Positivist scholarship is diverse, but it seems that its adherents, whether soft or hard ones,¹¹⁸ hold two key assumptions: first, that what counts as law is a social fact or convention (social thesis); and, second, that there need not be a connection between law and morality (the separability thesis).¹¹⁹

A key question that occupies legal positivists is as to the functions of the law,¹²⁰ often translate to: a focus on the law as it stands;¹²¹ the sovereign as the entity that makes the law;¹²²

¹¹⁶ Patricia Shannon et. al. study on screening for war trauma, torture, and mental health symptoms among newly arrived refugees highlights the rise in the number of refugees that claim torture, pointing that historically the percentages of refugees who endure the horror of torture ranged between 5% to 35 percent, but more recent studies point to torture prevalence rates as being over 60% in some cases. Patricia Shannon et. al. *Screening for War Trauma, Torture, and Mental Health Symptoms Among Newly Arrived Refugees: A National Survey of U.S. Refugee Health Coordinators*, 10 J. IMMIGR. & REFUGEE STUD. 380, 382 (2012).

¹¹⁷ Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUROPEAN J. OF INT’L L. 269, 271 (2001).

¹¹⁸ Soft or Inclusive positivists recognize that morality may influence a legal system. Hard positivism or exclusive positivism denoting an approach that reject the idea that a legal system incorporate moral limits on legal validity. Hard positivists when looking at the sources of law rely on circumstances and interpretative materials. For the hard positivists, see for example, John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS., 199 (2001).

¹¹⁹ Finnis for example writes that legal positivism holds that “[s]tate law is, or should systematically be studied as if it were, a set of standards originated exclusively by conventions, commands, or other such social facts.” John Finnis, *On the Incoherence of legal Positivism*, 75 NOTRE DAME L. REV., 1597, 1598 (1999); Veronica Rodriguez-Blanco, *Is Finnis Wrong*, 13 LEGAL THEORY, 257 (2007) (critiquing Finnis’ methodology, while accepting his idea that all the different conceptions of the law could be unified for the sake of theoretical research).

¹²⁰ Leslie Green, *The Functions of Law*, 12 COGITO, 117 (1998).

¹²¹ W. J. Waluchow declaring that legal positivism “[a]sserts that human law is, in its essence, the expression of human will?” W. J. Waluchow, *What Legal Positivism Isn’t*, 12 COGITO 109, 109 (1998) (italics in text).

¹²² Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law*, INT’L L.Q. 153, 171 (1947) (Kelsen writes in relation to Nuremberg setting a legal precedent “If the principles applied in the Nuremberg trial were to become a precedent—a legislative rather than a judicial precedent then, after the next war, the governments of the victorious States would try the members of the governments of the vanquished States

and, a rejection of a connection between reasonableness or justice and the law.¹²³ By raising the idea of the functions of law positivists question the purpose of the law and how the law promotes social order¹²⁴ and therefore raising the prospects of a legal regime that is quintessentially immoral.¹²⁵ Accordingly, positivists also emphasize the ability to impose a legal order, which means that for the positivists the law is “the conduct of at least, two individuals: the organ authorized to execute a sanction and the subject against whom on behalf his illegal conduct, the sanction is directed.”¹²⁶ Within this framework, positivists such as Professor Hans Kelsen maintained that norms regulate how an individual behaves but more importantly that they are valid as long as they are “existing,” as understood through the ability to enforce them.¹²⁷ Admittedly, such an outlook raises challenges in adopting and interpreting legislation, as these may (and do) change as society changes,¹²⁸ leading to the question of where one should situate politics in the legal positivist analysis.¹²⁹ To that end, Professor Hart’s recognition of the “open texture” is significant when analyzing refugee law as it emphasizes different interpretations of commonly used phrases, such as torture or cruelty.¹³⁰ In other words, even though there is a general consensus that torture is abhorrent and a violation of human rights, states can through distinctive interpretation of what amounts to torture engage in such activities.¹³¹ Thus, it is important to recognize that legality, at least in a positivist framework,

for having committed crimes determined unilaterally and with retroactive force by the former. Let us hope that there is no such precedent.”)

¹²³ Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUROPEAN J. OF INT’L L., 269, 272 (2001); Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, HARV. L. REV. 44 (1941) (arguing that the law needs to be distinguished philosophy of justice and sociology).

¹²⁴ Leslie Green, *The Functions of Law*, 12 COGITO, 117, 119-120 (1998).

¹²⁵ W. J. Waluchow, *What Legal Positivism Isn’t*, 12 COGITO 109, 109 (1998).

¹²⁶ Hans Kelsen, *The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, 1945 JUDGE ADVOC. J., 8, 8 (1945).

¹²⁷ Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, HARV. L. REV. 44, 49-51, 57-59 (1941).

¹²⁸ Gustav Radbruch famously wrote, ‘A law is a law’, interpreted to mean that the jurist unlike the soldier must abide by the law, especially if it can be enforced. Gustav Radbruch, *Five Minutes Of Legal Philosophy (1945)*, 26 OXFORD J. OF LEGAL STUD. 13, 13 (2006).

¹²⁹ This is Dworkin’s key critique of positivism, as he denied the presence of any general theory when it comes to the law, opting to focus on fairness when it comes to the adjudication. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1978).

¹³⁰ Jari Pirjola, *Shadows in Paradise—Exploring Non-Refoulement as an Open Concept*, 19 INT’L J. REFUGEE L. 639 (2008) (noting that the principle of non-refoulement lacks a definition, allowing states to interpret such concepts as torture, cruelty and inhuman treatment as they see fit).

¹³¹ Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2006-2007) (offering a review of how U.S. courts have treated torture, specifically water-based torture); Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS Jul. 15, 2004, at 4-9; Sonni Efron, *Torture Becomes a Matter of Definition*, L.A. TIMES, Jan. 23, 2005, at A1; Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-40A (Aug. 1, 2002), available at http://www.texscience.org/reform/torture/bybee-olc-torture-1_aug02.pdf.

is far from a “static mechanistic concept” but rather “a dynamic relationship between norms and participants and is always about contestation and argumentation.”¹³²

The implication of legal positivism on international refugee law is seen in two ways.¹³³ First, as the refugee system evolves, the reasons why one fled one’s country of origin become less important than the development and application of law.¹³⁴ That is, increasingly states appear less interested in what has led the individual to flee, but more with whether they are required to admit the person and what services they need—obligated—to provide asylum seekers and refugees with within the Refugee Convention.¹³⁵ Such a system recognizes the limitations of international law, as law is in the purview of state, while international law’s purpose is to promote the interests of the state.¹³⁶ The hard positivist therefore asserts that the Convention is a product of legal niceties that states adhere to or reject on the grounds of their national interests.¹³⁷ Such an approach suggests that states need to accept the utility of a refugee system, not only because millions of people flee their homes, but because they never know if their people may, one day, have to flee.¹³⁸ The soft positivists, accepting the dominance of states and their commitment to national interest, also accept the need for a refugee regime not for *realpolitik* but because it shapes international society and the principle of fair play.¹³⁹

¹³² C.J. Harvey, *Talking about Refugee Law*, 12 J. REFUGEE L. 101, 132 (1999).

¹³³ There are some subtle differences between hard and soft positivists that are discussed below.

¹³⁴ This is the key argument of B. S. Chimni and his critique of the refugee system as he asserts that Grahl-Madsen’s *The Status of Refugees in International Law* (1966) and Goodwin-Gill’s *The Refugee in International Law* (1983) make virtually no references to political situation in which refugee law evolved. Commenting on Goodwin-Gill’s book, Chimni writes, “reading his book one would not even be aware of the Cold War origins of the 1951 Convention or the Office of the UNHCR.” B. S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 352 (1998).

¹³⁵ This may for example explain why there has been an increase in exclusions under Article 1F. Asha Kashul & Catherine Dauvergne, *The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions*, 23 INT’L J. REFUGEE L. 54, 56 (2011) (taking a quantitative approach so as to show how state security concerns play out in refugee exclusions in Canada and finding “the concept of terrorism has expanded considerably over the eleven year period.”).

¹³⁶ HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 13 (1977).

¹³⁷ Peter Schuck sums up this position as by writing, “The refugee protection system, however, has less to do with the legal niceties of the Refugee Convention than with the political prerogative of sovereign states. Each state judges for itself whether a particular migrant or group of migrants who reach its territory or seeks resettlement there will be receive that, or any, relief. Each state, moreover, possesses powerful disincentives to provide relief, especially on its own territory.” Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243, 252 (1997).

¹³⁸ When thinking of this one is reminded of Martin Niemöller famous poem, “First they came for the Socialists, and I did not speak out—Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out—Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out—Because I was not a Jew. Then they came for me—and there was no one left to speak for me.”

¹³⁹ H.L.A Hart argued that fair play refers to a system that recognizes that when people engage in any joint enterprise according to rules, which means a restriction of their liberty, those that submitted to these restrictions

A second implication that legal positivism raises is that the refugee system depends on the member states—mainly but not only the Contracting States to the Refugee Convention—and the way these states construe and interpret the Refugee Convention and various protection agreements.¹⁴⁰ Member states may decide not to respect or follow the Convention, with the UNHCR having no real ability to counter noncompliance.¹⁴¹ This means that states may and often do, adopt new domestic legislation, limiting the ability of courts to review their compliance with international commitments.¹⁴²

In sum, natural law underlines the existence of a set of fundamental rights that one has by virtue of one's existence as a person and despite if not because of the state. These rights emphasize a moral order that is central to the maintenance of social order and social justice. As natural law evolved, it came to call on states to ensure that these rights were not only respected, but that they were also protected and promoted. Legal positivism emphasizes the challenge of codifying basic rights because society changes, which means that society is entitled to adopt laws suited for its needs and wants, which therefore mean that one cannot have absolute rights. When applied to international refugee law, the natural law tradition therefore helps one identify a set of fundamental rights, whereas legal positivism emphasizes the centrality of laws and of states. That is, the positivistic mode emphasizes that a state would adopt laws suited to its contemporary "need".¹⁴³

"when required have a right to a similar submission from those who have benefited by their submission." H.L.A. Hart, *Are There Any Natural Rights?* 64 *PHILOSOPHICAL REV.* 175, 185 (1955).

¹⁴⁰ Hathaway correctly notes that international alien law, which lies at the heart of refugee law, "was conceived very much within the traditional contours of international law: the rights created are the rights of national states, enforced at their discretion under the rules of diplomatic protection and international arbitration." JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 78 (2005).

¹⁴¹ UNHCR was only entrusted with the power of supervision. Art. 8(a) UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December, 1950, A/RES/428(V).

¹⁴² See for example the decision by the Australian government to suspend asylum applications from Sri Lanka and Afghanistan due to "changing circumstances" in those countries. *Australia suspends Afghan, Sri Lankan asylum-seeker claims*, *THE AUSTRALIAN*, Apr. 9, 2010. <http://www.theaustralian.com.au/archive/politics/australia-suspends-afghan-sri-lankan-asylum-seeker-claims/story-e6frczfd-1225851763188?nk=80e583116f86f870c0af1ef66d0e4828>. When states adopt such measures, it falls on domestic legal actors to review the state's reasons for noncompliance, which arguably weakens the international refugee system because it reinforces the fact that it exists to serve states and not people. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 644-656, 991 (2005).

¹⁴³ With respect to the international refugee regime, states recognize a need for a clear demarcation between nationals and non-nationals as a way to manage population movement. This is not a new phenomenon or consideration as shown in Gilad Ben-Nun's important study as to what transpired at the Conference of Plenipotentiaries to the Convention underlines that the text of article 3, non-discrimination, was a product of a balancing between "the humanistic desire for universal non-discrimination and an understanding that the application of this universal principle would ultimately be interpreted and applied by the individual UN member states." Gilad Ben-Nun, *The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention*, 27 *J. REFUGEE STUD.* 101, 113 (2014).

II. THE 1951 CONVENTION ON THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: DEFINING A REFUGEE?

The section reviews the development of the 1951 Refugee Convention. In doing so, the section draws on natural law and legal positivist assumptions as it traces the development of the international refugee system. This section also underlines the changes in international law and sovereign rights, with states largely abandoning the principle of “exclusive control over the individuals on its territory.”¹⁴⁴ This section also begins by noting the historical roots of the Convention, pointing out how assumptions about the roles and duties of states toward people, whether nationals or aliens, have changed over time,¹⁴⁵ especially about states, people and citizenship. Early on in the 20th century, the international system focused on states and how to ensure peaceful relations.¹⁴⁶ This approach meant imposing special provisions as a way to protect individuals, often minorities, whose states either ceased to exist, did not want them or refused to recognize them.¹⁴⁷ Over time, attention shifted to the individual, their circumstances (why are they not wanted by the state) and one’s rights. Thus, when reviewing the Convention, it is clear that its central element is the role of citizenship and the privileges it confers.¹⁴⁸ The focus on citizenship is why by the 1950s, an axiomatic situation has emerged when it comes to refugee as on the one hand the Convention rejected discrimination on the grounds of citizenship, but it also recognized the centrality of citizenship and the rights it entailed. In other words, there was a desire to make citizenship the end goal of refugee applications but at the same time, the best form of protection that one can offer a refugee is

¹⁴⁴ Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT’L L. 327, 327 (1949).

¹⁴⁵ James C. Hathaway, *The Evolution of Refugee Status in International Law*, 33 INT’L & COMP. L.Q. 348 (1984) (Hathaway identifies three distinct trends in the definition of refugee – juridical, social and individual – that underline the way a state’s relationship with its citizens).

¹⁴⁶ See for example Article 1 of the, *Convention concerning the Exchange of Greek and Turkish Populations and Protocol*, January 30, 1923, which declares “As from the 1st May 1923, there shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem [sic.] religion established in Greek Territory. These persons shall not return to live in Turkey or Greece respectively without the authorisation of the Turkish or of the Greek Government respectively.”

¹⁴⁷ Biray Kolluoglu, *Excess of Nationalism: Greco-Turkish Population Exchange*, 19 NATION & NATIONALISM 532, 534 (2013).

¹⁴⁸ Since the mid-nineteenth century, states increasingly assumed social responsibilities, which they would only provide to their own nationals. Thus, Milbrand for example by looking at the concept of stateless, notes that in Thailand for example those that do not have identity cards, let alone Thai passports do not receive any social services, such as health and education. Jay Milbrand, *Stateless*, 20 CARDOZO J. INT’L & COMP. L. 75 (2011-2012).

to grant them citizenship as it means that first they are no longer refugees but citizens of a state that will protect their rights; and, second it meant less responsibility for UNHCR.

1. SETTING THE FOUNDATION FOR A REFUGEE REGIME: THE NATIONALITY ISSUE¹⁴⁹

The need to establish a system to address the mass movement of people became apparent during and soon after the First World War, as around 2 million Russians, Armenians and others left their homes, and their nations, in lieu of fighting and to avoid general hardship.¹⁵⁰ That is, in developing the refugee regime, states in many ways were expanding the age-old principle of a right to asylum.¹⁵¹ This principle was based on the premise that each state had the right to govern who enters its territory.¹⁵² Simply, the conventions, agreements and norms that shaped the early refugee system emphasized that refugees had only rudimentary rights as shaped by their country of domicile or country of residence.¹⁵³ This therefore meant that states could revoke one's nationality¹⁵⁴ and when it did so, the person not only became de facto stateless, they lost the protection that came with being a member of a nation-state.¹⁵⁵

¹⁴⁹ This section is inspired by the work of Hannah Arendt who noted that the First World War “exploded the European comity beyond repair.” Writing about the people, especially the “stateless,” Arendt points out “Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth.” HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 267 (1966).

¹⁵⁰ The Russian Civil War led to a massive population movement, with over one million Russians seeking refuge outside of Russia. An important group within this large population was General Wrangel's Army of around 90,000 soldiers who were evacuated to Constantinople in 1920 once international aid cease and the Red Army had won the war. The French initially provided funds for these troops but as the burden became heavier, France threatened to cut off the aid, which led the International Committee of the Red Cross to request that the League of Nations coordinate the relief, leading to the establishment in 1921 of the post of the High Commissioner for Russian Refugees, responsible for either the reparation of the refugees or emigration. Katy Long, *Early Repatriation Policy: Russian Refugee Return, 1922-1924*, 22 J. OF REFUGEE STUD., 133, 136 (2009).

¹⁵¹ Asylum refers to the shelter that one has from persecution, which mean that an asylum seeker is someone that is seeking shelter, safety from persecution, but who have not been granted refugee status.

¹⁵² Accordingly, the system that emerged was state-centric as exhibited by the willingness or refusal of states to grant asylum and by the fact that “the burden of proving the right to remain in the United States is placed by the law upon the alien.” *Ex Parte Kurth et. al*, 28 F.Supp. 258 (1939).

¹⁵³ League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, Art. 4, League of Nations, Treaty Series Vol. CLIX No. 3663. R. Yewdall Jennings, *Some International Law Aspects of the Refugee Question*, 20 BRIT. Y.B. INT'L L. 98, 106-107 (1939).

¹⁵⁴ The Permanent Court of International Justice recognized that when it comes to the granting or revoking of nationality, the issue lies within the purview of states, although the court also added that this is the current state of international law, suggesting that in time, such a right may change. *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice, 7 February 1923. See also *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, International Court of Justice (ICJ), 6 April 1955. The Court declared, “It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation.” at p. 20.

¹⁵⁵ Alexander Orakhelashvili captures the importance of being a member of a state by noting that under general international law, the individual does not have any legal capacity and adding “The claim against the

The large movement of people that emerged in the post-World War I period, which Professor James Hathaway described as forming the first generation of refugees,¹⁵⁶ placed states in a unique situation. First, states did not want to take responsibility for stateless¹⁵⁷ people, who needed immediate relief and status,¹⁵⁸ as it was expensive and it also meant adding people that the state may not want. At the same time states also recognized that they could not stop the movement of people fleeing hardship.¹⁵⁹ In understanding the development of the refugee system, it is important to recognize that by the early 20th century, states began to assume social and economic duties. These duties were to provide citizens—individuals identified as nationals of the state—with public goods, making them exceptionally zealous about whom the states granted citizenship rights.¹⁶⁰ Simply, nationality “is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”¹⁶¹ Key to having nationality is obtaining official documents from one’s state¹⁶² which conferred on the individual rights, and the recognition that the state that one ‘belonged’ to would protect its national.¹⁶³ In developing this notion juridical nationality a clear division emerged between those who were entitled and those who were not. The division between those that had juridical

violating state must be made, not on behalf of an injured individual, but on behalf of the State of his nationality. The damage suffered in this case is considered damage to the State, rather than damage to the individual.” Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L.J. 241, 252 (2000-2001).

¹⁵⁶ James C. Hathaway, *The Evolution of Refugee Status in International Law*, 33 INT’L & COMP. L.Q. 348, 350-361 (1984).

¹⁵⁷ The term stateless is problematic one as prima facie the millions of Russians and Armenians were not stateless, as they either had a state that opted to deprive them of their passports (case of Soviet Russia) or they lost their state (Chaldeans and Assyrians) but they still needed documents to travel and assert their status. For a more recent discussion about statelessness see, Jay Milbrand, *Stateless*, 20 CARDOZO J. INT’L & COMP. L. 75 (2011-2012) (arguing that statelessness is often overlooked and that there is a need to develop a better system to address such a status as the current system is letting millions down).

¹⁵⁸ Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT’L L. 680, 681-682 (1938).

¹⁵⁹ James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT’L & COMP. L.Q. 348, 350-361 (1984).

¹⁶⁰ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 267-290 (1967).

¹⁶¹ *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, International Court of Justice (ICJ), 6 April 1955.

¹⁶² “Up to the nineteenth century, movement between states was virtually unrestricted, because passports, visas, and rigid frontier controls were largely unknown.” M.G. Kaladharan Nayar, *The Right of Asylum in International Law: Its Status and Prospects*, 17 ST. LOUIS U. L.J. 17, 18 (1972-1973). John Simpson writing about the aftermath of the First World War noted, “Before the war refugee problems were avoided because the frontiers were open. There was none of the political, economic and racial nationalism that we have seen today. From Eastern Europe alone in the twenty years before the War millions of people who might otherwise have been refugees got away to the new lands across the ocean, new lands that wanted a new labour supply, that wanted people to develop them.” John Hope Simpson, *The Refugee Problem*, 17 INT’L AFF. 607, 607 (1938).

¹⁶³ *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, International Court of Justice (ICJ), 6 April 1955.

nationality and those that did not may explain why when the issue of refugeeship emerged some states granted naturalization, whereas others granted a right of passage to a third country.

When the Soviet government declared in 1921 that it would not take back Russians that had resided, without first acquiring government's permission, outside of the Soviet Union for more than five years,¹⁶⁴ the international system, needed to adapt to the decree of All Russian Central Executive Committee and the Council of People's Commissars. The League of Nations became involved in supporting, inspiring or initiating the formation of several institutions and mechanisms to provide those fleeing with some protection and relief.¹⁶⁵ The League acted in response to the Russian refugee crisis and to build on previous experiences, such as the Greco-Turkish population exchange, to promote congruity states,¹⁶⁶ which, by the mid-1920s, were no longer available because the Soviet government did not want the refugees. What the League did was to appoint Fridtjof Nansen as the High Commissioner for Refugees, empowering him to regulate the legal status of those deemed stateless by virtue of their host state refusing to recognize them; and to assist these people in finding permanent homes and work.¹⁶⁷ The key to the process that emerged with Nansen was an acceptance that individuals needed documentation and some sort of affiliation with a state or an organization,¹⁶⁸ as a way

¹⁶⁴ Katy Long's historical study point out that initially the Soviet government was interested in accepting Russians who had fled, as was Fridtjof Nansen, but by 1923 Soviet interest in repatriation waned, placed the international community in an awkward situation as because of the desire to respect national sovereignty, it was felt that one could not compel the Soviet government to accept those Russian that fled. Katy Long, *Early Repatriation Policy: Russian Refugee Return, 1922-1924*, 22 J. REFUGEE STUD. 147-149 (2009).

¹⁶⁵ See for example, the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946), and the International Committee on Refugees (1938-1947). Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT'L REV. OF THE RED CROSS, 727, 729 (2001). The closest the League came to provide refugees with protection is in Art. 23(a) which underlines the League's commitment to "secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;" League of Nations, *Covenant of the League of Nations*, 28 April 1919.

¹⁶⁶ Biray Kolluoglu, *Excess of Nationalism: Greco-Turkish Population Exchange*, 19 NATION & NATIONALISM 532, 537 (2013) (reviewing the population exchanges between Greece and the Ottoman Empire noting that the July 1914 negotiation between the two led to forced removal of 200,000 to 300,000 Greeks from their homes in Western Anatolia. In 1919, the Greeks who came to occupy the province encouraged those Greeks that were expelled to return leading to 80,000 Muslims to become refugees).

¹⁶⁷ Norman Bentwich, *The League of Nations and Refugees*, 16 BRIT. Y.B. INT'L L. 114, 115-116 (1935).

¹⁶⁸ The 1926 Arrangement relating to the issue of identity certificates to Russian and Armenian Refuge was incredible important because it declared that refugeeship was limited to "Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality." It also covered Armenians stating "Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality." *Arrangement relating to*

to facilitate reparation and resettlements.¹⁶⁹ Nansen organized an international conference that culminated in an agreement for the issuance of an identity certificate, valid for one year that allowed individuals—Russians, Armenians and a few other minorities—to move from one country, where they sought refuge to another that could become a temporary or permanent home.¹⁷⁰ The certificates (Nansen Passports, as they came to be known) were a reaction to “denaturalisation or the withholding of diplomatic facilities such as travel documents and consular representation, results in a malfunction in the international legal system.”¹⁷¹ What emerged in the post-First World War period therefore was an ad hoc juridical approach to refugeeship that was a product of necessity: the need to cater to millions of individuals abandoned, rejected by their nations, while being mindful of state sovereignty.¹⁷² Thus, during the period, when possible, states engaged in “population transfer,”¹⁷³ often through a legal regime,¹⁷⁴ although what determined it were where the individuals were located (great or small states), their national identity and religion, which underlined the fact that when states wanted to engage in something as questionable as population transfer, they would do so.

In sum, when reviewing the post-First World War period and its implications for the refugee regime that emerged, what becomes abundantly clear is, first, the abandonment of the age-old concept of asylum, which had been sacrosanct,¹⁷⁵ in favor of a legal system aimed at providing protection to a select group of people who had lost their national identity

the issue of identity certificates to Russian and Armenian refugees, 12 May 1926, Treaty Series, No. 2004, LXXXIX, available at, <http://www.refworld.org/pdfid/3dd8b5802.pdf>.

¹⁶⁹ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT’L J. REFUGEE L. 238, 242 (2002).

¹⁷⁰ The Nansen Passport which came to be recognized by 52 governments had a picture of Nansen and cost five gold francs, which was used to support relief and assistance for refugees. William F. Fuller, *Peace Profile: Fridtjof Nansen*, 20 PEACE REV.: J. OF SOCIAL JUST. 239, 240 (2008).

¹⁷¹ James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT’L & COMP. L.Q. 348, 358 (1984).

¹⁷² Hathaway writes, “The period 1920-1935 may therefore be characterised as a time of international resolve to assist the victims of the legal phenomenon of the withdrawal of the *de jure* protection with limited attention to afforded to the social causes underlying the refugees’ legal predicament.” James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT’L & COMP. L.Q. 348, 361 (1984).

¹⁷³ Christa Meindersma, a consultant to UNHCR and legal researcher for the International Commission of Jurists, defines population transfer as, “a policy and/or practice of governments or non-State actors having the purpose or effect of compelling people to leave their territory or accept the settlement of others into that territory, without the free and informed consent of the transferred population and/or any receiving population.” Christa Meindersma, *Population Exchanges: International Law and State Practice—Part I*, 9 INT’L J. REFUGEE L. 335, 336 (1997).

¹⁷⁴ In the case of the Greco-Turkish population exchange it was the establishment of the Territorial and Military Commission, chaired by Lord Curzon and the 1923 Exchange Commission.

¹⁷⁵ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 280 (1967).

(citizenship) because of new political realities that made it impossible for them to remain true to their country of origin. Second, the period emphasized the centrality of the nation-state in international relations, as the nation-state focused on its own nationals and interests, often at the cost of human rights and its own morality. To that end, in order to ensure peace following political upheavals, states had no qualms to engage in population exchange or even revoke one's legal national identity, leaving the matter to international society. Thus, the section emphasized that at this stage of the evolution of the refugee system, what determined refugeeship was nationality and one's link to the nation-state, and the acceptance of that person or group by the nation-state.¹⁷⁶

2. LOOKING AT STATES AND THE ROOTS OF REFUGEEHIP AS A SOCIAL GROUP

The rise of Nazism and Fascism played an important role in furthering the need for an international refugee system. Notably, the European states of this era were no strangers to discriminatory practices or engaging in mass acts of violence against groups whom they considered inferior,¹⁷⁷ and yet it was these states that recognized an emerging duty to help, especially those facing Nazi persecution. The Nazi and Fascist governments began to systemically strip specific social groups—ethnic, cultural, religious, national identities—of their rights.¹⁷⁸ They introduced laws that compelled the members of the identified groups to leave their country of origin not only because they were being persecuted because of their membership in the group but also because their ability to work was revoked by the new measures.¹⁷⁹

¹⁷⁶ The issue of acceptance of an individual by a nation-state is key as otherwise one is stateless raising a host of other challenges when it comes to protection, with statelessness being defined as “a person who is not considered as a national by any State under the operation of its law.” Art. 1 (1) *Convention Relating to the Status of Stateless Persons*, Sept. 28, 1954, United Nations, Treaty Series, vol. 360, p. 117.

¹⁷⁷ A good example of such attitude was the behavior of King Leopold of Belgium towards the people of the Congo that caused such an outrage that Belgium was stripped of its ownership.

¹⁷⁸ Karl Loewenstein, *Law in the Third Reich*, 45 YALE L. REV. 779 (1936) (reviewing the laws adopted by the Hitler regime and the implications on the legal system). Between 1933 and 1937, Germany adopted 135 laws that expelled Jews from civil service, education institutions, economic system and finally their German citizenship. Solomon Adler-Rudel, *The Evian Conference on the Refugee Question*, 13 LEO BAECK INSTITUTE YEARBOOK, 235, 235 (1968); MICHAEL BURLEIGHM, *THE RACIAL STATE: GERMANY 1933-1945* (1991).

¹⁷⁹ The Nuremberg Laws for example prohibited German Jews from marrying German nationals; it prohibited Jews from employing German nationals as domestic servants James Wilford Garner, *Recent German Nationality Legislation*, AM. J. INT'L L. 96, 98 (1936).

In reviewing this stage in the evolution of refugee regime, it becomes clear that the process of refugeeship was dependent on two elements: first, the social identity of the individual,¹⁸⁰ and, second, the deprivation of the individual's political and civil rights by a system of laws.¹⁸¹ The issue of social identity also meant that some states when considering whether to admit refugees, explored whether the individuals would "fit" or specifically how they would be integrated within the host country, leading to the rejection of certain groups.¹⁸² The presence of these elements may explain why the refugee process that emerged in the late 1930s and during the Second World War was unique, leading to an international approach to resolve the movement of people fleeing Nazi and fascist laws. These circumstances led to the establishment of the High Commission for the Refugees from Germany and the Intergovernmental Committee on Refugees,¹⁸³ whose duties ranged from negotiating with governments on such issues as passports, identification papers and work permits, as well as the admission of groups of refugees to countries that would absorb them.¹⁸⁴

¹⁸⁰ Social identity generally refers to a subjective process based on a person and a group having certain social characteristics that could range from cultural norms, religious practices, dress, and so on that help the individual, the group and the community-at-large identify the person. A key aspect of social identity is social comparison—one either belongs to the group or not—that lead to certain benefits or losses. Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 *SOCIAL PSYCHOLOGY Q.* 224, 225 (2000); BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS* (1983); Asef Bayat, *Islamism and Social Movement Theory*, 26 *THIRD WORLD Q.* 891 (2005); Renate Ysseldyk, Kimberly Matheson & Hymie Anisman, *Religiosity as Identity: Toward an Understanding of Religion From a Social Identity Perspective*, 14 *PERSONALITY AND SOCIAL PSYCHOLOGY REV.* 60 (2010).

¹⁸¹ The 1935 Nuremberg Laws created different categories of Germans: those that belong to the German State (*Staatsangehörigen*), those that belong to the German empire (*Reichsbürger*) and the rest. The classification of one was dependent on racial identification and the receipt of a letter patent issued by the German State. James Wilford Garner, *Recent German Nationality Legislation*, *AM. J. INT'L L.* 96, 96-98 (1936).

¹⁸² This was very much the case in relation to Ireland and how it approached Jews fleeing persecution or refugees from Spain's civil war. Eilis Ward for example refers to a 1945 Irish Department of Justice Memo that claimed that because Jews do not assimilate they have the potential of becoming a social problem. Eilis Ward, *'A Big Show-Off to Show What We Could Do': Ireland and the Hungarian Refugee Crisis of 1956*, 7 *IRISH STUD. INT'L AFF.* 131, 133 (1996).

¹⁸³ The Inter-governmental Committee on Refugees (IGCR) came out of the Evian Conference that President Roosevelt had called for, whereas the League also had its own High Commission for the Refugees. In 1939, Sir Herbert Emerson, who was also serving as League's High Commissioner was appointed as director of IGCR. The IGCR had an operation budget of \$5 million, which the UK and the USA provided, ensuring the need of their approval for any new projects. *Intergovernmental Committee on Refugees*, 1 *INT'L ORG.*, 144, 144-145 (1947); Herbert Emerson, *Postwar Problems of Refugees*, *FOREIGN AFF.* 211, (1943).

¹⁸⁴ Intergovernmental Committee on Refugees, *Final Act of the Intergovernmental Conference on the adoption of a travel document for Refugees and Agreement relating to the issue of a travel document to refugees who are the concern of the Intergovernmental Committee on Refugees*, 15 October 1946, *UNTS Vol. XI, No. 150*. R. Yewdall Jennings, *Some International Law Aspects of the Refugee Question*, 20 *BRIT. Y.B. INT'L L.* 98, 107-108 (1939).

The international community's desire to address the imploding refugee crisis¹⁸⁵ following Hitler's rise was largely influenced by an acceptance or recognition of the weaknesses of the Versailles Treaty, whom many believe was the cause of anger and aggravation.¹⁸⁶ Versailles was an important event in facilitating the rise of Nazism and fascism, which quintessentially amounted to the institutionalization of "pervasive hatred of everybody and everything."¹⁸⁷ It is clear that many found the presence of these philosophies of hate abhorrent and viewed them as a rejection of what was humane. Nevertheless, as states recognized that Europe was having a second refugee problem,¹⁸⁸ the League of Nations, which played an important role in the process in the 1920s, had become marginalized. It was unable to address intransigencies and malversations,¹⁸⁹ necessitating a consultative, negotiated approach that balanced the rights of states with the need to help. Accordingly, the response was paradoxical; it recognized that what was taking place in Germany and Europe was wrong, but at the same time, it was accepted that the laws adopted by the Third Reich were a domestic affair, beyond the remit of the international system.¹⁹⁰

The refugee system that emerged in the 1930s was based on two conventions: the Convention relating to the Status of International Refugees (1933)¹⁹¹ and the Convention

¹⁸⁵ Holborn writes that reportedly around 150,000 Germans left Germany as a result of measures adopted by the Nazi government. Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT'L L. 680, 691 (1938).

¹⁸⁶ Hathaway for example argues that the League of Nations became engaged with the fate of the 3300 Saarlanders who left the Saar Territory following a plebiscite in which the majority opted to join Germany and the documents that these individuals had were not being honored. James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT'L & COMP. L.Q. 348, 361-362 (1984). Holborn adds that the French regarded the Saar issue as a League's responsibility, as the Saarlanders were subjects of the League, at least until the plebiscite took place. Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT'L L. 680, 693-694 (1938).

¹⁸⁷ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 268 (1967).

¹⁸⁸ As Hitler's Germany was expanding in the 1930s, it was ensuring that the states that it annexed were adopting its anti-Jewish legislations. Thus when Austria was annexed in 1938, meant that 190,000 Jews had lost their rights. Solomon Adler-Rudel, *The Evian Conference on the Refugee Question*, 13 LEO BAECK INSTITUTE Y.B. 235, 236 (1968).

¹⁸⁹ The 1930s saw the Japanese manufacturing the Manchurian Incident, which allowed them to conquer Manchuria and set up a puppet government; Italy's invasion of Ethiopia in 1935; German occupation of the Rhineland and many more incidents.

¹⁹⁰ Louise Holborn writes that when the Dutch brought the issue of Third Reich's legislative reforms before the League's Assembly, it was raised as a technical matter. When Germany objected, the matter was transferred to the newly formed High Commission for the Refugees from Germany, which was autonomous. Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT'L L. 680, 690-691 (1938).

¹⁹¹ The Convention expanded the Nansen system specifically in term of the period of validity of the passport; restricted expulsion; provided guarantees for the civil rights of refugees; the right of return to the country that had delivered the refugee and other social measures to aid the refugee system. League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663.

Concerning the Status of Refugees coming from Germany (1938),¹⁹² and a desire for collaboration as a way to solve the imploding of the mainly Jewish and other minorities refugee question.¹⁹³ What led to these conventions was a desire, in part, to enable the movement of people away from Germany, as these individuals were no longer wanted by their country of origins. It was accepted that once Germany revoked one's nationality, one became stateless, leading Hannah Arendt to argue that Nazi Germany, by depriving Jews of their nationalities, made them stateless, easing the extermination process, as Jews could not claim the protection of a nation-state.¹⁹⁴ In other words, the international community on the one hand accepted that Germany had a right to introduce legislation and measures that de-nationalized a person, and that the international community needed to help those 'former' German nationals.

The process of dealing with the refugees was further complicated by the fact that beyond the need to respect sovereignty, the economic and social realities of the 1930s¹⁹⁵ meant that not many countries were willing to accept refugees, especially if the aim was to naturalize them.¹⁹⁶ That is, on the one hand there was a desire to build on the Nansen system, by maintaining a commitment to resettle refugees; if such an option was not possible, a commitment existed to repatriate those who were no longer in their country of origin. Thus,

¹⁹² The Convention defined a refugee as "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." Art. 1(1)(a) and "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." Art. 1(1)(b). It emphasized that individuals that left Germany for "reasons of purely personal convenience" (Art. 1(2)) were not covered. League of Nations, *Convention concerning the Status of Refugees coming from Germany*, Geneva, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461.

¹⁹³ In 1938, following a communiqué from President Roosevelt, a conference was held in the Swiss town of Evian (Evian Conference) with the aim of: 1. Find a way to address the refugee problem that was developing because of Germany's racial policies; 2. Examine how existing immigration laws can help receive the refugees; 3. Consider a system of documentation for those refugees that cannot have documents; 4. Consider the establishment of an international body to oversee the process. Eric Estorick, *The Evian Conference and the Intergovernmental Committee*, 203 ANNALS OF THE AM. ACADEMY OF POL. & SOCIAL SCIENCE, 136, 136 (1939). Mark Wischnitzer, *Jewish Emigration from Germany 1933-1938*, 2 JEWISH SOCIAL STUD. 23 (1940) (reviewing Jewish migration to the U.S. as a reaction to Nazi policies).

¹⁹⁴ HANNAH ARENDT, EICHMANN IN JERUSALEM 167 (1963); David Weissbrodt & Clay Collins, *The Human Rights of a Stateless Person*, 28 HUM. RTS. Q. 245, 265 (2006).

¹⁹⁵ In earlier periods, there was an assumption that refugees could bring economic prosperity as many were skilled laborers, artisans or wealthy individuals. Raoul Blanchard writing in the mid-1920s declared that Greece benefited from the population exchange with Turkey because it many agricultural peasants, which Greece lacked but with the new it could populate areas that needed agriculturalists. Raoul Blanchard, *The Exchange of Populations between Greece and Turkey*, 16 GEOGRAPHICAL REV. 449, 454-455 (1925).

¹⁹⁶ Eric Estorick for example noted, "The South American countries, on the other hand, who would ordinarily welcome immigrants to develop their resources, are at the present time grappling with low wages and unemployment." Eric Estorick, *The Evian Conference and the Intergovernmental Committee*, 203 ANNALS OF THE AM. ACADEMY OF POL. & SOCIAL SCIENCE 136, 137 (1939).

the need for and, in some respect, hopes for the High Commission for the Refugees from Germany stemmed from the fact that the refugees of this period differed from those who were eligible for the Nansen passport, because the League, by the late 1930s, was impotent.¹⁹⁷ The implications to the development of the refugee regime were substantial. It began with an acceptance that a state can introduce measures that would severely harm individuals simply because of their social identity and ended with an international obligation to assume responsibility, understood as a duty to help strangers, mainly in the shape of resettlement and absorption for those targeted by one's country of origin.

3. THE INDIVIDUAL AND THE REFUGEEHIP REGIME: PUTTING THE REFUGEE CONVENTION IN CONTEXT, HUMANITARIANISM AND NATIONAL INTEREST

The legacy of the Second World War on human evolution is incalculable. Because the horror that accompanied the war was unimaginable, many changes have taken place in reaction to the conflict, including the desire to ensure that succeeding generations would be saved from "the scourge of war."¹⁹⁸ The brutality of the war compelled millions to flee from their homes as they searched for safety and security,¹⁹⁹ placing a tremendous burden on the international community to provide short-term (relief) and long-term solutions.²⁰⁰

To understand the development of the refugee system in the post-Second World War period, one must recognize the magnitude of the problem (by 1945, around 30 million or more had been uprooted),²⁰¹ as well as the fact that for the first time in modern history, international society faced the idea that a state would not only disenfranchise and abuse its own citizens, but engage in a systematic killings of their own citizens. There was also a desire for an idealized

¹⁹⁷ Writing in the late 1930s, Louis Holborn noted, "The League today is too weak to take a strong stand against Italy and Germany." Louise W. Holborn, *The League of Nations and the Refugee Problem*, 203 ANNALS OF THE AM. ACADEMY OF POL. AND SOCIAL SCIENCE, 124, 134 (1939).

¹⁹⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Preamble.

¹⁹⁹ Sir Herbert Emerson, the High Commissioner for All Refugees the League of Nations Protection pointed out that by 1943, there were fifty million refugees in China, and an equal amount of Russians, two million Indians and countless number of Poles. Emerson adds "the number of refugees has been limited only by the means of escape." Herbert Emerson, *Postwar Problems of Refugees*, FOREIGN AFF. 211, 211 (1943).

²⁰⁰ Herbert Emerson called on the United Nations to "In imposing terms of peace they must at once annul all discriminatory legislation and end all administrative measures of discrimination. They must restore to the affected classes the rights of citizens and guarantee them safety and protection of life and property." Emerson asserted that only the removal of discriminatory and hatred legislation will ensure lasting peace and that none others will adopt the "evil methods." Herbert Emerson, *Postwar Problems of Refugees*, FOREIGN AFF. 211, 220 (1943).

²⁰¹ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT'L J. REFUGEE L. 238, 243 (2002); Patrick Murphy Malin, *The Refugee: A Problem for International Organization*, 1 INT'L ORG. 443 (1947).

world, free from war and violence, not to mention an acceptance of the existence of a fundamental human rights²⁰² that had to come to terms with political realities of such things as state power, sovereignty and national jealousies.²⁰³ Initially, there was an assumption that many of those who were displaced could and would return to their country of origin when the fighting ended, especially as the Allies and the Preparatory Commission for the International Refugee Organization were quite effective in facilitating resettlement.²⁰⁴ However, with the political realities of the emerging Cold War and the inability or disinclination of many, especially Jews who constituted a large portion of the refugees, to return to their country of origin,²⁰⁵ the international community recognized that it had to take a new approach to the refugee problem. Thus, the immediate post-war period had two sets of refugees: those that could but would not return because of new political realities in their country of origin (political refugees) and those so traumatized by their war experience that they needed a fresh start, whom one could describe as social refugees, as their persecution was based on their social identities.

The international community initially attempted to address the refugee and displaced person challenge of the post-war period through ad hoc arrangements that were often a response to a crisis. This approach may explain why, initially, the United Kingdom and the United States rejected the term “refugee,” opting for “displaced persons,” which underlined the desire to ensure that individuals who had left their country of origins would return.²⁰⁶ Nonetheless, the General Assembly on February 12, 1946, recognized that “the problem of

²⁰² The post-World II period saw a plethora of international treaties aimed to protect and promote the rights of individuals. Many of these treaties and more specifically the articles that they included such as absolute prohibition on torture were clearly a reaction to the violence committed by the Nazis. See e.g., art. 5 of the Universal Declaration of Human Rights, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” General Assembly, *Universal Declaration of Human Rights*, Art. 14, UNGA Res. 217(III), 10 December 1948.

²⁰³ EDWARD HALLETT CARR *THE TWENTY YEARS' CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1974); HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1967).

²⁰⁴ Abba P. Schwartz, *International Refugee Organization*, 50 AM. JEWISH YEARBOOK, 473, 475-476 (1948-1949).

²⁰⁵ Abba Schwartz writes, “it was universally agreed that the small percentage of Jews who survived in Europe required special consideration. They could not return to the countries which are the graveyards of their families, nor could they remain in Germany, Austria or Italy, where the hostility of the local population grew noticeably and where they were regarded as a hindrance to economic recovery. Their problem could be solved only by emigration. With respect to the immigration.” Abba P. Schwartz, *International Refugee Organization*, 50 AM. JEWISH YEARBOOK 473, 476 (1948-1949).

²⁰⁶ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT'L J. REFUGEE L. 238, 244 (2002). See also, *Agreement for United Nations Relief and Rehabilitation Administration*, 9 November 1943, available at, <http://www.ibiblio.org/pha/policy/1943/431109a.html>. There is no reference to the term refugee in the agreement.

refugees and displaced persons of all categories is one of immediate urgency and recognizing the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and the war criminals quislings and traitors ...”²⁰⁷ Within a few months, the General Assembly approved the creation of the International Refugee Organization (IRO),²⁰⁸ which replaced the United Nations Relief and Rehabilitation Agency (UNRRA), empowering it to deal with the refugee problem that emerged in Europe in the aftermath of the war.²⁰⁹ At this stage, the aim of states and, therefore, of the organizations they created was to encourage and assist refugees and displaced persons return to their country of origin.²¹⁰ Or, if such a thing were not possible, the aim was to help these individuals “find new homes”²¹¹ to end the need for national and international bodies dealing with refugees,²¹² but also to define the term “refugee.”²¹³ In seeking to fulfill its agenda, IRO found it critical to establish a “guaranteed core of refugee rights ... as a residual answer to the refugee protection needs.”²¹⁴ The need for this guarantee stemmed from the fact that many of those whom UNRRA repatriated or

²⁰⁷ *Question of Refugees*, General Assembly Res. A/Res/8(1) 12 February, 1946.

²⁰⁸ GA Res. A/RES/62(I)[I-II], Dec. 15 1946; Arthur Rucker, *The Work of the International Refugee Organization*, 25 INT’L AFF. 66 (1949).

²⁰⁹ UNRRA largely provided administrative (repatriation), medical and welfare (food rations) assistance to displaced people located mainly in Europe, though it also did work in the Middle East and China, which may explain its broad mandate. Patrick Murphy Malin, *The Refugee: A Problem for International Organization*, 1 INT’L ORG. 443, 449 (1947).

²¹⁰ The Yalta and Potsdam conferences for example included provisions for the repatriation of Soviet citizens to the Soviet Union. *Agreement Relating to Prisoners of War and Civilians Liberated by Forces Operating Under Soviet Command and Forces Operating Under United States of America Command*, 11 February, 1945. See also, Cathal J. Nolan, *Americans in the Gulag: Detention of US Citizens by Russia and the Onset of the Cold War, 1944-49*, 25 J. CONTEMP. HIST. 523 (1990).

²¹¹ *Arrangements and measures to be taken by Members of the United Nations in connection with displaced persons, refugees, prisoners of war and persons of similar status, pending the Establishment of the International Refugee Organization*, GA Res. A/RES/62(I)-II, 15 December 1946.

²¹² Patrick Murphy Malin, *The Refugee: A Problem for International Organization*, 1 INT’L ORG. 443, 455 (1947).

²¹³ In Annex I, a refugee is defined as “a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories,” (a) Victims of the Nazi or Fascist regime or their allies; (b) Spanish Republicans and other victims of the Falangist regime in Spain; (c) persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion. Section B defined a displaced person as who because of the Axis powers has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons. *Arrangements and measures to be taken by Members of the United Nations in connection with displaced persons, refugees, prisoners of war and persons of similar status, pending the Establishment of the International Refugee Organization*, Annex I, General Assembly Resolution A/RES/62(I)-II, 15 December 1946.

²¹⁴ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 93 (2005). This may also explain why the IRO’s functions and powers were design to limit repatriation as the Organization whose functions centered on the repatriation of persons within its jurisdiction could only do so in accordance with the purposes and the principles of the Charter of the United Nations. United Nations, *Constitution of the International Refugee Organization*, 15 December 1946, Art. 2. United Nations, Treaty Series, Vol. 18, p. 3.

wanted to repatriate had no interest in the process. By 1950, it became abundantly clear that refugeeship was not a temporary phenomenon, necessitating a long-term, permanent solution, as Europe had to deal with more than a million refugees,²¹⁵ leading to the adoption of the Refugee Convention and the creation of the United Nations High Commissioner for Refugees.

The onset of the Cold War made refugeeship intensely political, with the West, particularly the United States, using those claims of refugee status from the Soviet bloc to emphasize the limitations of the communist system.²¹⁶ For much of the Cold War period, when refugeeship emerged, it was mainly a reaction to a turbulent event, such as the Soviet invasion of Hungary in 1956 that led to around 180,000 Hungarians to flee to, mainly, Austria, and some to Yugoslavia.²¹⁷ The Hungarian Crisis emphasized the danger that a large population movement could cause to a state—Austria’s stability was severely shaken by the influx of countless Hungarians fleeing their country of origins—which led other states to step in and accept (resettle) many of those fleeing.²¹⁸ Within a year of the Hungarian Revolution, the UNHCR and the refugee system needed to address another crisis, albeit one in East Asia, as the tiny British colony of Hong Kong was dealing with more than 2.5 million refugees,²¹⁹ which made

²¹⁵ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT’L J. REFUGEE L. 238, 245 (2002).

²¹⁶ Krever writes the “Western States sought to give priority in granting asylum to those whose flight was motivated by Western liberal political values.” Tor Krever, *“Mopping-up”: UNHCR, Neutrality and Non-Refoulement since the Cold War*, 10 CHINESE J. INT’L L. 587, 595 (2011). Gil Loescher adds, “U.S. policymakers considered refugee issues within the same policy framework as national security and even formally defined refugees as only those fleeing communism. U.S. generosity of asylum towards refugees from Eastern Europe was in part motivated by a desire to “roll back” or at least contain Communism by encouraging East European citizens to escape their homelands.” Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33, 35 (2001).

²¹⁷ Johanna Granville, *In the Line Of Fire: The Soviet Crackdown on Hungary, 1956–57*, 13 J. COMMUNIST STUD. & TRANSITION POL. 67 (1997) (using new Soviet sources to review the Soviet decision to invade Hungary). UNHCR became the lead agency, and with the Red Cross, it promoted a dual policy of reparation and resettlement, with many Hungarians actually opting to return, with many others being accepted by Western countries. By the middle of 1958, the U.S. had resettled around 38,000 Hungarian refugees, Canada resettled 35,000, the UK took 16,000, West Germany 15,000, Australia 13,000, Switzerland 11,500 and France 10,000. UNHCR, *THE STATE OF THE WORLD’S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION* 31-32 (2000).

²¹⁸ Marjoleine Zieck, *The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement*, 5 AMSTERDAM L.F. 45 (2013) (recounting the first large-scale resettlement under the Refugee Convention).

²¹⁹ The Hong Kong crisis was unique because those that fled to the colony were Chinese seeking to initially escape the civil war that broke out on the mainland with the end of the Second World War. The situation was then exacerbated once the Chinese communists defeated the Nationalists. This created what general assembly Alexander Grantham, Hong Kong’s governor described as “problem of people” with Hong Kong being unable to provide basic services to the people. Chi-Kwan Mark, *The ‘Problem of People’: British Colonials, Cold War Powers, and the Chinese Refugees in Hong Kong, 1949-62*, 41 MODERN ASIAN STUD. 1145 (2007). Notably in the midst of the crisis, the General Assembly appealed to “[S]tates Members of the United States and members of the specialized agencies and to non-governmental organizations to give all possible assistance with the view of alleviating the

it difficult to determine who was a genuine refugee.²²⁰ The crisis led the General Assembly to authorize the UNHCR to take a more active role in not only assisting the refugees, but also playing a role in encouraging arrangements and contributions from the member states.²²¹ This type of action dominated much of the Cold War period, with UNHCR, the Red Cross and other humanitarian organizations seeking to help individuals forced to flee from their country of origin because of conflicts.²²² In other words, when looking at the Hong Kong crisis or the Algerian crisis²²³ one can identify clear humanitarian principles as the engines for the involvement, first of the UNHCR, and second of the General Assembly. The situation in Hong Kong and the rising tide of decolonization led to the adoption of the 1967 Protocol, removing the temporal and geographical elements that were presented in the 1951 Refugee Convention.²²⁴ The western states were prepared to accept these reforms because natural

distress of the Chinese refugees in Hong Kong.” General Assembly Resolution 1167 (XII), ‘Chinese Refugees in Hong Kong’, 26 Nov. 1957, Para 1.

²²⁰ Edvard Hambro, the chair of the Hambro Committee, which was commissioned to study the refugee problem in Hong Kong underlined the difficulty of determining who is a refugee. The report determined that there were approximately 385,000 refugees in Hong Kong, of whom roughly 100,000 were refugees *sur place*. There were also around 280,000 individuals who were dependents of the refugees—individuals born in Hong Kong to the refugees, making them British subjects, but not legal refugees. Ultimately, Hambro argued that as it was impossible to engage in individual assessment, it would be prudent to find the 385,000 people to be refugees from the People’s Republic of China. Glen Peterson, *To Be or Not to Be a Refugee: The International Politics of the Hong Kong Refugee Crisis, 1949–55*, 36 J. IMPERIAL & COMMONWEALTH HIST. 171, 174 (2008).

²²¹ UN General Assembly, *Chinese Refugees in Hong Kong*, 26 November 1957, A/RES/1167. Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33 (2001) (reviewing UNHCR’s need to adapt to the oppugnancy of some states when it came to fulfilling its mandate).

²²² Other notable cases were the Algerian War of Independence which led to the displacement of more than a million people and countless refugees in Tunisia and Morocco, with those two countries being unable to cope with the large numbers. Rwanda’s independence in 1959 and the ensuing elections (1961) led to over 120,000 Tutsi to flee to neighboring countries. The Nigeria civil war (1967-1970) led to a large refugee problem as thousands of mainly Ibos fled to Equatorial Guinea. UN General Assembly, *Refugees in Morocco and Tunisia*, 5 December 1958, A/RES/1286; UNHCR, *THE STATE OF THE WORLD’S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION* 38, 48, 47 (2000).

²²³ In 1957, as the process for Algerian independence was gathering momentum, Tunisia faced a large influx of people fleeing the violence in Algeria, leading the Tunisian government request for material support from UNHCR. This was the first time a Third World country asked for support “thus it marked an important step in the development both of the political conditions under which the UNHCR had to act and of the functions it was permitted to perform.” Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33 37 (2001)

²²⁴ James Hathaway accepts Paul Weis claim that with the 1967 Protocol created a new refugee convention. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 111 (2005).

barriers kept the numbers of those seeking refuge in the developed countries low.²²⁵ At the same time they remain protective of their sovereign rights.²²⁶

The Cold War period was difficult for the UNHCR as it had to balance neutrality and its commitment to help those fleeing persecution, while operating in a highly politicized international environment brought about by the Cold War. Thus, as Gil Loescher shows the conflicts of the 1970s and 1980s “perpetuated endemic violence which, in turn, generated large outpourings of refugees.”, which the UNHCR had to deal with,²²⁷ which at times challenged its ability to fulfil its mandate of providing protection to refugees. Nevertheless, what added to the complexity of the refugee system was that by the 1970s the transportation revolution was gathering momentum, which meant that those seeking refuge were no longer doing it within their regions but rather in or from western states. This change heightened the debate over who is a refugee.²²⁸ Second, diplomatic relations between the Communist and non-Communist world were strained in the 1970s and 1980s, making repatriation challenging, as on the one hand the need to keep border open was seen as a totem of liberalism, but at the same time, states became weary of large population movements.²²⁹ Third, domestic and regional human rights legislation increasingly prevented the repatriation of individuals.²³⁰

In sum, the Cold War period on the one hand helped cement the refugee system within international relations, by signing up to the Convention and Protocol states formally accepted the need for a refugee regime. Notably, the process was driven by the recognition that population movement could create international insecurity and therefore there was a need for

²²⁵ Martin adds, “the idea that haven might be possible in a distant but wealthy Western nation simply had not worked its way through, except to a tiny and usually westernized or elite minority.” David A. Martin, *Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction*, 26 CORNELL INT’L L.J. 753, 757 (1993).

²²⁶ In writing about the United Nations Declaration on Territorial Asylum, Paul Weis, the Special Adviser, Office of the United Nations High Commissioner for Refugees, notes that although the Declaration expands on Article 14 of the Universal Declaration of Human Rights it “[r]ecognizes the right to seek and to enjoy asylum, but not the right to be granted asylum. It is based on the concept of asylum as a right of the state to grant it, rather than as a right of the individual to be granted asylum.” Paul Weis, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT’L L. 92, 117 (1969).

²²⁷ Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33 40, 41 (2001) (quote p. 40).

²²⁸ See e.g., Arthur C. Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243 (1983-1984) (declaring that the Refugee Act of 1980 ensures that decision as to refugee status remain political, as opposed to humanitarian); Andrew E. Shacknove, *Who Is a Refugee?* 95 ETHICS, 274 (1985).

²²⁹ Katy Long, *In Search of Sanctuary: Border Closures, ‘Safe’ Zones and Refugee Protection*, 26 J. REFUGEE STUD. 458 (2012) (examining the closer of borders by refugee-hosting countries, who often construct “safety” zones, which the international community increasingly choose not to condemn).

²³⁰ Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33 41-42 (2001).

an international legal regime to address such movement. Additionally, states also saw the Convention and Protocol as political tools to help them in the Cold War. Nonetheless, the period also sowed an element of humanitarianism within the refugee system as states and people appreciated that there is a need, and an obligation, to help strangers. However, as numbers rose and conflicts became more intractable, states became more reluctant to admit refugees, seeing them as a burden, which pitted them against the regime that they had help create. These tensions are explored in the next section will show, which once the Cold War ended, the refugee system had to deal with these conflicting legacies.

4. THE REFUGEE SYSTEM AND THE POST-COLD WAR: SEARCHING FOR A NEW APPROACH TO ADDRESS REFUGEE SHIP

The end of the Cold War has led to a radical change in international relations with the demise of the Soviet Union and political ideology as the root of conflict.²³¹ The new political reality had a tremendous impact on international law by judicializing international relations.²³² On the issue of refugee law, the new political and legal realities led to greater calls for reform of the refugee system,²³³ which has included revising the Convention and the UNHCR, whose mandate has expanded and changed,²³⁴ as well as recognizing that one's understanding of the term persecution has to adapt to the new realities.²³⁵ Concomitantly, there have also been changes on the domestic front, with states seeking to assert more power and authority over

²³¹ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2006).

²³² See, generally, Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, (1998); Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 333 (1997); Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335 (1999); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1990-1991); Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 L. & CONTEMP. PROBS. 127 (1996).

²³³ C.J. Harvey, *Talking about Refugee Law*, 12 J. REFUGEE STUD. 101 (1999) (emphasizing the need for refugee law to adapt to the new political reality of a post-Cold War period); see also, James C. Hathaway, *Toward the Reformulation of International Refugee Law*, 15 REFUGEE 1 (1996).

²³⁴ Judy Cheng-Hopkins, *Operational Challenges for UNHCR*, 26 REFUGEE SURVEY Q. 52 (2007); Augusta Conchiglia, *The UNHCR's evolving mandate*, LE MONDE DIPLOMATIQUE, Jun. 15, 2012 <http://mondediplo.com/2012/06/15unhcr>; GIL LOESCHER, ALEXANDER BETTS & JAMES MILNER, *THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES* (2008); Arthur C. Helton, *UNHCR and Protection in the 90's*, 6 INT'L J. REFUGEE L. 1, (1994).

²³⁵ GUY GOODWIN-GIL, *THE REFUGEE IN INTERNATIONAL LAW* 66-79 (1996). Martin Jones for example goes as far as to claim "UNHCR is now behaving like a state" so as to emphasize how detached the agency has become from its convention obligations and duties. Martin Jones, *The Governance Question: UNHCR, the Refugee Convention and the International Refugee Regime*, IN *THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW* 96 (JAMES C. SIMEON, ED. 2013).

the process of refugee application.²³⁶ One impact of the change in international relations was the revitalization of the Security Council, which increasingly assumed a more active role in managing the maintenance of international peace and security, including recognizing the role of refugees in creating instability.²³⁷ Concern over population movements effects the Responsibility to Protect Doctrine, which advises, if not calls on, states that unless they take responsibility for ending international violations within their territory, the international community may intervene.²³⁸

The end of the Cold War saw the UNHCR facing three main crises: northern Iraq (1991), a traditional-style conflict caused by one state invading another sovereign state; the Balkans (1992–1995), an ethno-historical-territorial conflict; and, Rwanda (1994–1996), an ethnic-genocidal conflict. These crises saw demands that UNHCR serve as “lead agency” which also required that the agency shift its agenda from one of protection to a more humanitarian orientation that was not solely focused on refugees, but also on internally displaced person.²³⁹ At the same time, in Europe for example structural changes made states more reticent about accepting refugees.²⁴⁰ The conflicts, however, as one scholar noted, transformed the UNHCR

²³⁶ The *Delgado* decision is an example of this shift, as the Ninth Circuit not only overruled *Matsuk* but held that “purposes of withholding of removal, an offense need not be an aggravated felony to be a particularly serious crime.” It also determined “that, for asylum purposes, the Attorney General has the authority to designate offenses as particularly serious crimes through case-by-case adjudication as well as regulation.” *Delgado v. Holder*, 648 F.3d 1095, 11062, 11063 (9th Cir. 2011) (en banc). There is an interesting debate developing in Australia as to the means that those seeking refuge are employing. Reportedly, the Immigration Department approved 94 per cent of all refugee status claims from people arriving illegally by boat, compared to only 39 per cent of protection visas to those not using boats to arrive in Australia. These figures led Scott Morrison, where he was the opposition immigration spokesman to assert that there is a bias towards those coming by boats, which encourages others to use this method to claim asylum. Verity Edwards, *Boat arrivals almost all get visas*, THE AUSTRALIAN, Feb. 25, 2011, www.theaustralian.com.au/news/nation/boat-arrivals-almost-all-get-visas/story-fn7dlx76-1226011619093.

²³⁷ Anne Hammerstad notes that in the 1990s the High Commissioner reported directly to the Security Council, with the Commissioner’s speeches heavily focusing on the connection between the security of people and the security of states. Anne Hammerstad *Whose Security?: UNHCR, Refugee Protection and State Security After the Cold War*, 31 SECURITY DIALOGUE 391, 401 (2000).

²³⁸ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT (2001); UN General Assembly, *Implementing The Responsibility To Protect: Report Of The Secretary-General*, 12 January 2009, A/63/677; Francis M. Deng, *Dealing with the Displaced: A Challenge to the International Community*, 1 GLOBAL GOVERNANCE 45 (1995) (arguing that the international community has a duty towards displaced people); Carsten Stahn, *Responsibility to protect: Political rhetoric or emerging legal norm?* 101 AM. J. INT’L L. 99 (2007) (arguing that the phrase Responsibility to Protect is a political catchword encompassing a wide range of different norms).

²³⁹ B. S. Chimni writes that between 1991 and 1997, the Security Council had made over 30 specific references to UNHCR in contrast to four prior to 1991. B. S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243, 256 (2000).

²⁴⁰ Astri Suhrke and Kathleen Newland, “In Europe, the increase of asylum seekers coincided with structural unemployment and financial difficulties of the welfare state (especially intense in Germany, where they were associated with reunification). The mix tapped into racial animosities and deep-seated insecurities about how to

from a “protection agency to an institution providing material assistance” that many came to see by the end of the decade as the United Nation’s key coordinating humanitarian agency.²⁴¹ The emergence of “new wars”—a reference to conflicts in which globalization, identity and nonconventional military tactics that inflict intentional harm on civilian in spite of international humanitarian law²⁴²—led to either a new influx of refugees or accentuated the problem of displacement.²⁴³ The individuals who escaped across borders and sought refugee status raised new challenges for the refugee system because of the nature of the conflicts: new wars are not quintessentially ideologically-driven, as they focus on ethnicity, religion, and other non-political factors.²⁴⁴ Also, the conflicts were all embracing, with the warring factions not only seeking territory but wealth, population destruction and the intentional infliction of harm.²⁴⁵ This situation had two important consequences: the systematic destruction of infrastructure, which meant that individual insecurity was pervasive; and people join one of the factions as a way to get protection.²⁴⁶ The consequence of this for those seeking refugee status was enormous. First, the destruction inflicted is systematic and widespread, often entailing extensive insecurity, in terms of security to the person and their ability to work. Second and more specific, the conflicts often mean that when one’s faction loses power, those who are members of the faction become targets, leading them to request asylum. However, the Convention allows states to reject applications if one has committed a crime, especially an

handle minorities within while relating to a poor but populous world outside.” Astri Suhrke and Kathleen Newland, *UNHCR: Uphill into the Future*, 35 INT’L MIGRATION REFUGEE 284, 290 (2001).

²⁴¹ Tor Krever, “Mopping-up”: UNHCR, *Neutrality and Non-Refoulement since the Cold War*, 10 CHINESE J. INT’L L. 587, 592 (2011). Loescher writes that in the post-Cold War period, the agency’s ability to operate changed drastically. “During the Cold War, in-country cross-border assistance and protection was taboo for UN agencies because this involved violation of sovereignty. In the post-Cold War period, by contrast, the UNHCR tackled refugee-producing situations at or near their source.” Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33, 43 (2001).

²⁴² MARY KALDOR, *NEW AND OLD WARS: ORGANISED VIOLENCE IN A GLOBAL ERA* (2013); MARTIN VAN CREVELD, *TRANSFORMATION OF WAR* (2009).

²⁴³ Jeff Crisp points that that between 1995 and 2002, the number of refugees declined from 15 million to 12 million, although what increased were the numbers of displaced persons. Jeff Crisp, *Refugee and the Global Politics of Asylum*, 74 POLITICAL Q. 75, 75-76 (2003).

²⁴⁴ MARY KALDOR, *NEW AND OLD WARS: ORGANISED VIOLENCE IN A GLOBAL ERA* (2013).

²⁴⁵ James D. Fearon & David D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 AM. POL. SCI. REV. 75 (2003).

²⁴⁶ Dara Kay Cohen, *Female Combatants and the Perpetration of Violence: Wartime Rape in the Sierra Leone Civil War*, 65 WORLD POL. 383 (2013) (arguing that female combatants may participate in war time rapes because of social pressures within the armed group and that public violence helps create cohesion within armed groups that lack natural bonds). See also, Benedetta Faedi, *From Violence against Women to Women's Violence in Haiti*, 19 COLUM. J. GENDER & L. 1028 (2010) (illustrating the role of violence against women as a social condition that leads some women to engage in violence against women).

international crime,²⁴⁷ although for example there is no standard mechanism to address situations whereby sending the applicant to their country of origin would mean a breach of a basic, human right, such as the right to life.²⁴⁸

A first challenge faced by the contemporary refugee regime is the sheer number of those seeking refuge—creating the idea that states are seeking protection from the flow of refugees to their shores²⁴⁹—as well as their direction: people moving from the south to the north. From the perspective of those fleeing, their principle aim was to escape conflicts, authoritarian regimes or humanitarian crises.²⁵⁰ Concomitantly, states increasingly changed the way of dealing with refugees and displacement, often to detriment of those seeking asylum, so as to narrow the definition and therefore minimize their Convention obligations, leading to the develop of an alternative, non-refugee regime.²⁵¹ Simply what is occurring is that states are engaging in formulating and cementing such measures as new travel regime²⁵² expanding the notion of temporary refugee status,²⁵³ processing individuals seeking asylum outside the host

²⁴⁷ Art. 1(F)(a)-(c) UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, entered into force 22 April, 1954, 189 U.N.T.S. 150. UNHCR has provided a guideline for exclusion: UN High Commissioner for Refugees (UNHCR), *The Exclusion Clauses: Guidelines on their Application*, 2 December 1996; UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003; UN High Commissioner for Refugees (UNHCR), *Addressing Security Concerns Without Undermining Refugee Protection—UNHCR's Perspective*, 29 November 2001, Rev.1.; Jennifer Bond, *Principled Exclusions: A Revised Approach To Article 1 (F)(A) Of The Refugee Convention*, 35 MICH. J. INT'L L. 15 (2013) (emphasizing the lack of harmony between states when it comes to the exclusionary principle); *R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant)*, [2010] UKSC 15, United Kingdom: Supreme Court, 17 March 2010; Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement*, 80 Fordham L. Rev. 73 (2011) (arguing that preventing states from expelling dangers aliens poses a threat to the human rights of those living in the host country).

²⁴⁸ See e.g., Joke Reijven & Joris van Wijk, *Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law*, 26 J OF INT'L REFUGEE L, 248 (2014) (emphasizing the difficulty that Holland faces in respect to thousands of applicants accused of international criminal law violations but who cannot be repatriated as it could mean threats to their lives).

²⁴⁹ Susan Kneebone & Dallah Stevens, *Conflicting Identities, Protection & The Role of Law*, REFUGEE PROTECTION AND THE ROLE OF LAW: CONFLICTING IDENTITIES 15 (Susan Kneebone, Dallah Stevens & Loretta Baldassar, 2014).

²⁵⁰ Mark Townsend *One man's hellish journey from Eritrea terror to UK sanctuary*, GUARDIAN, Sep. 6, 2014, <http://www.theguardian.com/global-development/2014/sep/06/eritrea-dangerous-trek-to-britain-slavery-trafficking> (recounting the story of Mehari Solomon, an Eritrean refugee, noting why he fled and his perilous journey to the UK). See also, Eli Saslow, *A 10-year-old immigrant faces risks, doubts on the journey to reunite with his mother*, WASH. POST, Sept. 7, 2014, http://www.washingtonpost.com/national/a-10-year-old-immigrant-faces-risks-doubts-on-the-journey-to-reunite-with-his-mother/2014/09/07/169f16d6-3213-11e4-9e92-0899b306bbea_story.html.

²⁵¹ Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURVEY Q. 12, 23-24 (2010); REY KOSLOWSKI, MIGRANTS AND CITIZENS: DEMOGRAPHIC CHANGE IN THE EUROPEAN STATE SYSTEM (2000).

²⁵² Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURVEY Q. 12, 29-30 (2010).

²⁵³ Temporary protection emerged in the 1990s as a reaction to large population displacement from the Balkans to Western Europe. The European states reacted by adopting temporary protection status, which mean

country (safe-third country principle²⁵⁴). What lies behind these measures is a desire to reduce or prevent the state from having to assess whether the individual is a refugee applicant.²⁵⁵ In other words, states seek to circumvent their treaty obligations.²⁵⁶

A second noticeable development is the emergence of what could be described as the rise of the “economic refugee,” a term of art referring to those seeking refuge are increasingly associated with the idea that such individuals are economic migrants and not genuine refugees. Historically, the system distinguished between those seeking to leave their country of origins for persecution (refugee) and those seeking economic betterment (migrants). Thus, the UNHCR Handbook emphasizes that a migrant is person that “voluntarily leaves his country in order to take up residence elsewhere.” adding “If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.”²⁵⁷ Nevertheless, UNHCR also accepts that the distinction between the two statuses can be “sometimes blurred” as a situation may arise whereby the measures are adopted to “destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.”²⁵⁸ The centrality of economics mean

that an individual could remain in host country until the situation in their country of origin changed. The temporary protection therefore prevented refoulement and granted very limited rights to the applicant. UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, 19 February 2001, EC/GC/01/4. Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of A Formalized Regime*, 94 AM. J. INT'L L. 279 (2000).

²⁵⁴ The principle emerged of protection elsewhere is arguably a product of a loose reading of Article 1E which declares that the Convention does not apply “to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.” UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. United Kingdom, *Sending Asylum Seekers to Safe Third Countries*, 7 INT'L J. REFUGEE L. 119 (1995) (defining a safe third party as a country that lies between the country from which the applicant is fleeing and the country that they seek asylum). Savitri Taylor, *Protection Elsewhere/Nowhere*, 18 INT'L J. REFUGEE L. 283 (2006) (examining the safe-third country principle as applied by Australia and arguing that the interpretation extends what the international community considers acceptable).

²⁵⁵ On the Malaysia solution, Anthony Pastore, *Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention*, 13 CHI. J. INT'L L. 615 (2012).

²⁵⁶ The reasons for this are numerous ranging from the cost of the process, resettlements, questions over security for the refugee and the community at-large, as well as claims that many refugee applications are in effect individuals seeking to migrate for economic reasons.

²⁵⁷ UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, Para. 62, HCR/IP/4/Eng/REV.1.

²⁵⁸ UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, Para. 63, HCR/IP/4/Eng/REV.1. Notably, Lauren Ramos writes that courts “tended to automatically dismiss asylum claims that were based exclusively on economic disadvantage, even when the asylum seeker suffered the disadvantage because of his race, religion, nationality, or social or political group.” Lauren Michelle A. Ramos,

that the issue of refugeeship has become fused with questions about international aid and development,²⁵⁹ not to mention crime.²⁶⁰ That is, an assumption exists that many of those seeking refuge are not bone fide refugee application but simply economic migrants. Combined in this issue is a racial aspect,²⁶¹ which explains why in its current form, the refugee regime has become so complex. Simply, whereas the early refugee regime centered on Europe and the movements of European, mainly from east to west; the contemporary refugee movement is south to north, with many of those fleeing having little or no professional skills. These elements all played in a role in leading to the institutionalization of what has become known as protracted refugeeship,²⁶² which stems from the fact that conflicts in the post-Cold War period take longer to resolve. Even when they are resolved, tremendous tensions, hatred and structural problems remain,²⁶³ which may explain the need for the refugee regime to change or at least engage in some meaningful epistemological and ontological reform that may include

New Standard for Evaluating Claims of Economic Persecution under the 1951 Convention relating to the Status of Refugees, 44 VAND. J. TRANSNAT'L L. 499, 512 (2011).

²⁵⁹ GUY GOODWIN-GIL, *THE REFUGEE IN INTERNATIONAL LAW* 1 (1996).

²⁶⁰ Human trafficking is a major concern as smugglers make enormous profits, as seen by the fact that one Libyan smuggler allegedly makes around \$1 million a week, as he is able to charge each person around \$1,000 to cross from Libya to Europe. Nancy Porsia, *Libya's most successful people smuggler: 'I provide a service'*, GUARDIAN, Aug. 1, 2014 <http://www.theguardian.com/world/2014/aug/01/libya-people-smuggle-provide-service>.

²⁶¹ James Hathaway captured this point by noting, "Most refugee who seek entry to developed states today are from the poorer countries of the South: their "different" racial and social profile is seen as a challenge to the cultural cohesion of many developed states. The economies of industrialized states no longer require substantial and indiscriminate infusions of labor. Nor is there ideological or strategic value in the admission of most refugees. To the contrary, governments more often view refugee protection as an irritant to political and economic relations with the state of origins." James C. Hathaway, *Can International Refugee Law Be Made Relevant Again?* 41 LAW QUAD. NOTES, 106, 106 (1998). Hathaway and Neve also point out that northern states have the logistical capacity to stop the arrival of those seeking to claim refuge before they enter their borders, which means that they can avoid taking on the legal duty of determining whether the application has any merit. James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 120 (1997). See also, Linda McDowell *Old and New European Economic Migrants: Whiteness and Managed Migration Policies*, 35 J. ETHNIC & MIGRATION STUD. 19 (2009).

²⁶² A situation characterized by a prolong period of exile with UNHCR defining the situation as "one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance." UNHCR, ExCom, *Economic and social impact of massive refugee populations on host developing countries, as well as other countries*, EC/54/SC/CRP.5, Para. 18 February 2004.

²⁶³ See e.g., Neil Narang, *Humanitarian Assistance and the Duration of Peace after Civil War*, 76 J. OF POL. 46 (2014) (arguing that high level of humanitarian assistance lead to shorter spells of peace); Elaine K. Denny & Barbara F. Walters, *Ethnicity and War*, 51 J. PEACE RES. 199 (2014) (pointing to the role of ethnicity in prolonging conflict and making peace); James D. Fearon, *Why Do Some Civil Wars Last so Much Longer than Others?*, 41 J. PEACE STUD. 275 (2004) (emphasizing the role of the ability of governments and rebels to earn money as a way to sustain the conflict).

redefining who is a refugee in addition to rejecting many erroneous assumptions about refugees.²⁶⁴

III. THE REFUGEE CONVENTION & THE UNHCR: WHERE TO NEXT

The 1951 Refugee Convention was a product of the world wars of the early 20th century. Therefore, it had a very specific aim: provide protection to those seeking refuge in Europe. The Convention had clear geographical and temporal restrictions,²⁶⁵ as states sought to limit what they should and could do for those who were either displaced, stateless or sought refuge from persecution. The section begins with the Convention's definition of a refugee, followed by a review of the Convention and what is intended. Then, its attention shifts to the UNHCR as the entity empowered to carry out the protections set forth by the Convention. The section aims to underline Professor James Hathaway's assessment that the system is a product of self-interest: make sure that those who did not have a state or whose state no longer wishes to protect them find one so that they do not become a destabilizing force.²⁶⁶ In the post-Cold War period, however, the regime became convoluted and confused, as interpretations about the Convention as well as about one's duties and responsibilities vary not only between states but also within states.²⁶⁷ There are multiple reasons for this, though the key ones are: geography of the movement of those seeking refuge, the age, gender and reasons, leading states to focus more on interdiction, barriers to granting refugee status and conflicting decisions that emphasized the importance of UNHCR as a protective agency, but also the difference between the UNHCR and the member states. That is, when the Cold War ended,

²⁶⁴ This is why the recent study by scholars from the Refugee Studies Centre at the University of Oxford was important as it challenges some key myths about refugees. Alexander Betts, Louise Bloom, Josiah Kaplan, and Naohiko Omata, *Refugee Economies: Rethinking Popular Assumption*, Refugee Studies Centre, The University of Oxford, (2014), <http://www.rsc.ox.ac.uk/files/publications/other/refugee-economies-2014.pdf>.

²⁶⁵ Article 1A(1) declares that the term refugee shall apply to any person who: "Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Organization;". Article 1A(2) states that a refugee is someone that has a well-founded fear of being persecuted because of their race, religion, membership of a particular social group or political opinion, and because they are unable to receive protection from their country of origin. See, UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art. 1A(1)-(2).

²⁶⁶ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 92 (2005).

²⁶⁷ See e.g., Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109 (2007); Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 381-382 (2014). One area where there is a fair amount of consistency is when it comes to expulsion. Joseph Rikhof, *War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453 (2009) (Rikhof points out that since 1992 there have been more than 350 decisions on exclusion, with enormous consistency when it comes to interpreting Art. 1(F)).

the agency faced many new definitional challenges including an existential one: what was its purpose,²⁶⁸ necessitating a change in the UNHCR's orientation but also in how states dealt with refugees.

The aim of the Convention is to set forth the rights of refugees,²⁶⁹ which it does, albeit in a language open to conflicting interpretations.²⁷⁰ In principle, the 1951 Refugee Convention and the 1967 Protocol provide a definition of who is a refugee and, by extension, the rights and duties of those seeking refuge. Simply, the convention seeks to provide protection to refugees even though it does not define the concept, merely referring to it in its preamble, by declaring that the High Contracting Parties consider it "desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement."²⁷¹ Additionally, the Convention also seeks to ensure that refugees receive equal and fair treatment in the host country in respect to religion (Art. 4) property (Art. 14), access to courts (Art. 16) education (Art. 22) social security (Art. 24) and more.²⁷²

A person is designated a refugee when they successfully undergo a Refugee Status Determination (RSD) proceeding in the country where they are seeking temporary or permanent asylum.²⁷³ When their status is confirmed, the individual has international protection, allowing them to remain where they had first claimed asylum or sought

²⁶⁸ See e.g., UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12 (noting how state practice has evolved in the post-Cold War period); UN High Commissioner for Refugees (UNHCR), *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, June 2005, PPLA/2005/02 (exploring the term and the need for complementary protection).

²⁶⁹ Notably, once the person is recognized as a refugee by the host country, they received certain basic rights in reference to security, dignity and stability. Nevertheless, the rights regime that refugees have is far from uniform, as the accrual of rights is dependent on domestic legislation. Maria O'Sullivan, *Identifying Asylum seekers as potential refugees*, IN REFUGEE PROTECTION AND THE ROLE OF LAW: CONFLICTING IDENTITIES 124-125 (Susan Kneebone, Dallah Stevens & Loretta Baldassar, 2014).

²⁷⁰ Jeannie Rose C. Field, *Bridging the Gap between Refugee Rights and Reality: A Proposal for Developing International Duties in the Refugee Context*, 22 INT'L J. REFUGEE L. 512, 525-27 (2010); Anthony Pastore, *Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention*, 13 CHI. J. INT'L L. 615, 621 (2012-2013).

²⁷¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Preamble.

²⁷² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. Luke T. Lee, *The Refugee Convention and Internally Displaced Persons*, 13 INT'L J. REFUGEE L. 363 (2001) (arguing for additional protocols to the Refugee Conventions to address the post-Cold War changing conditions).

²⁷³ Jill I. Goldenziel, *Regulating Human Rights: International Organizations, Flexible Standards, and International Refugee Law*, 14 CHI. J. INT'L L. 453, 462-463 (2014).

resettlement in a third country.²⁷⁴ The rights accorded to a refugee have roots in the 1933 Refugee Convention, the 1948 Universal Declaration of Human Rights and norms promoted by the League of Nations High Commissioner for Refugees,²⁷⁵ as well as natural law in that they articulate fundamental rights that each person is entitled to by virtue of being human. At their core, the rights underline a set of protections that those who claim refuge are entitled to and should expect, and a set of obligations on states that transcend protection. The Convention makes it clear that everyone has the right to refuge,²⁷⁶ which includes not being penalized when seeking protection in addition to receiving basic rights to allow such persons to survive in the host country.²⁷⁷

The need for an agency such as UNHCR became apparent by the late 1940s, as states recognized that refugeeship was no longer a temporary phenomenon,²⁷⁸ leading the General Assembly to establish the High Commissioner Office for Refugees, which was founded in 1951.²⁷⁹ The post-World War II refugee regime is composed of two elements: the 1951 Convention that lays out who is a refugee and the rights that they are entitled to when refugee status is conferred; and the UNHCR that has a responsibility to oversee the way states implement the Convention.²⁸⁰ The UNHCR's main responsibilities are: provide international protection to those individuals who "fall within the scope of the present Statute"; seek out

²⁷⁴ Protection is a complicated concept as is the question of who grants it, a state or UNHCR, as sometimes when the latter grants it, states refuse to recognize the protection. MARJOLEINE ZIECK, *UNHCR'S PARALLEL UNIVERSE: MARKING THE CONTOURS OF A PROBLEM* (2010) (noting that a Dutch court has rejected an asylum application of a Kurd even though UNHCR had recognized him as a refugee in Turkey, while at the same time accepted a UNHCR designation of a Congolese as a refugee in Kenya). See also, Arthur C. Helton, *UNHCR and Protection in the 90's*, 6 INT'L J. REFUGEE L. 1, 1 (1994) (writing about the various challenges of UNHCR especially of its protection officers who operate in very difficult, insecure conditions).

²⁷⁵ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 94 (2005).

²⁷⁶ Notably this right is not found in the Convention but rather in the Universal Declaration of Human Rights, "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Art. 14, General Assembly, *Universal Declaration of Human Rights*, UNGA Res. 217(III), 10 December 1948.

²⁷⁷ Under Chapter V, Administrative Measures, refugees are accorded freedom of movement (Art. 26), identity papers (Art. 27), travel documents (art. 28), transfer of assets (art. 30). UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

²⁷⁸ Initially, UNHCR's mandate was for three years, which until 2003 was renewed every five years, which was when the General Assembly decided to remove "...the temporal limitation on the continuation of the Office of the High Commissioner..." so as to, "continue the Office until the refugee problem is solved." UNGA Res. 58/153, Para. 9, 22 December 2003.

²⁷⁹ UNGA Res. 319(IV), Para. 1, 3 December 1949. What however is also important to emphasize that adopting the convention was not a forgone conclusion as some states opposed the process because the European states, especially France, felt that the refugee issue was not one for the UN, whereas another set of countries, dubbed universalists such as Australia and Canada, wanted to weaken the protective measures of the convention, as a way to sustain their selective refugee strategy and remove any international obligations. Gilad Ben-Nun, *The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention*, 27 J. REFUGEE STUD. 101, 110-111 (2014).

²⁸⁰ Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURVEY Q. 12, 12-13 (2010).

“permanent solutions for the problems of refugees by assisting governments”; and, with the permission of states, “facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”²⁸¹ The UNHCR was to undertake this task by being politically neutral,²⁸² although as noted by at least one commentator more than ninety percent of the agency’s funds come from voluntary contributions ensuring that “UNHCR is therefore by no means an autonomous agent ...”²⁸³

In the post-Cold War period, the UNHCR has seen its mandate expand, mainly because of a “new” understanding of refugeeship and what causes one to flee from one’s home,²⁸⁴ compared to the approach of states, which have become more committed to narrow the definition.²⁸⁵ In its *UNHCR Strategy Towards 2000*, the agency underlined the change that has taken place in international relations leading it to assert that its agenda has had to change in that it could no longer only focus on voluntary repatriation and reintegration but rather on mitigating the conditions that those fleeing face.²⁸⁶ Thus, as conflicts become more brutal and protracted, massive humanitarian crises occur, and yet states pursue a narrow the definition of refugeeship, design to stymie the flow of refugee applications, spending more on interdiction, instead of addressing the problem at its source,²⁸⁷ which meant that the security of refugees was largely ignored, with the UNHCR being unable to change state policy.²⁸⁸ What also

²⁸¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, Annex to UNGA Res. 428(V) Para. 1, 14 December, 1950, A/RES/428(V).

²⁸² “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.” UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428 (V), Annex to UNGA Res. 428(V) Para. 2, 14 December 1950).

²⁸³ Katy Long, *In Search of Sanctuary: Border Closures, ‘Safe’ Zones and Refugee Protection*, 26 J REFUGEE STUD. 458, 460 (2012) (Long adds that UNHCR is also not, “[p]articularly well placed to directly oppose (rather than to facilitate or modify) state strategies for responding to mass exodus.”).

²⁸⁴ In situation of mass influx, UNHCR advocates the recognition of refugee status on a *prima facie* basis, which means that an individual qualifies for refugee status by being a member of a group. UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees*, 7 February 2006, Para. 9.

²⁸⁵ Eleanor Drywood, *Who’s In and Who’s Out? The Court’s Emerging Case Law on the Definition of a Refugee*, 51 COMMON MARKET L. REV. 1093 (2014) (reviewing ECJ judgments addressing the definition of a refugee and arguing that the ECJ can help promote a uniform definition of refugee because of conflicting state determination). See also, Å. Wettergren, & H. Wikström. *Who Is a Refugee? Political Subjectivity and the Categorisation of Somali Asylum Seekers in Sweden*, 40 J. ETHNIC & MIGRATION STUD. 566 (2014) (reviewing how the Swedish system determine refugee status in the case of Somalis).

²⁸⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR Strategy Towards 2000*, 1998.

²⁸⁷ Jasmine Coppens, *Migrants in the Mediterranean: Do’s and Don’ts in Maritime Interdiction*, 43 OCEAN DEVELOPMENT & INTERNATIONAL LAW 342 (2012) (discussing whether the interdictions carried out by Frontex accord with international law of the sea and the *non-refoulement* principle).

²⁸⁸ For example the United States ignored UNHCR’s protests over the tightening of U.S. asylum determination process in the 1990s as a reaction to the Haitian crisis that included the use of Guantanamo to

exacerbated the situation was a lack of a shared burden and an appropriate resettlement and repatriation system.²⁸⁹ Therefore, the refugee regime, especially as administered by the UNHCR in the post-Cold War era, became immersed in a dual process of addressing the traditional needs of refugees (identify and support those fleeing their country of origin because of a well-founded fear of persecution) and, as a preventive, peace-building agency, promoting the successful integration of refugees as a way to consolidate a sustainable peace.²⁹⁰ Accordingly, a key element behind the UNHCR's approach to refugeeship in the post-Cold War period is:

[i]n post-conflict situations, refugees often go back to situations of fragile peace where tensions remain high where there is still chronic political instability and where the infrastructure is devastated. Such countries are often precariously perched between the prospect of continued peace and a return to war. In such situations, the prevention of renewed fighting and further refugee flight depends largely on efforts made by local, regional and international actors to ensure durable peace.²⁹¹

Thus, in the post-Cold War period, there is a greater focus as to the need to repatriate refugees and those claiming refuge, raising a host of new challenges for the refugee regime. An examination of the process indicates several key approaches, one largely promoted by states, and a second advanced by UNHCR. The first approach, which states engage in, seeks to portray repatriation as a "natural" solution: getting refugees to go "home."²⁹² In pursuing

process Haitian asylum seekers. Turkey ignored UNHCR's protests when it closed its border to stop Iraqi Kurds fleeing in 1991. Astri Suhrke and Kathleen Newland, *UNHCR: Uphill into the Future*, 35 INT'L MIGRATION REFUGEE 284, 292 (2001).

²⁸⁹ Rita Bettis, *The Iraqi Refugee Crisis: Whose Problem is It-Existing Obligations under International Law, Proposal to Create a New Protocol to the 1967 Refugee Convention, & US Foreign Policy Recommendations to the Obama Administration*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 261 (2010). See also, Ryan Bubb, Michael Kremer, and David I. Levine, *The Economics of International Refugee Law*, 40 J. LEGAL STUD. 367 (2011) (arguing in favor of a subsidy system in which the wealthy states pay poor states to resettle refugees from other poor states as a way to create positive externalities on third countries).

Call for a new international legal standards and procedures to deal with the latest wave of refugees, such as the Iraqi refugees.

²⁹⁰ UNHCR, *THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION* 133 (2000).

²⁹¹ UNHCR, *THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION* 152 (2000).

²⁹² KATY LONG, *REPARATION, REFUGEES, AND RETURNING HOME* 23-24 (2013).

this agenda states engage in a process of making it harder to claim asylum, either by making borders more secure or by making living conditions for refugees intolerable so that they change routes²⁹³ or by constructing “safety” zones.²⁹⁴ A second track is to devote more resources to development, aimed at improving conditions so as to forestall and discourage population movement.²⁹⁵ A third approach is to make it easier to repatriate individuals by declaring that security in countries of origin has improved. That is, states in pursuing this agenda strive to apply Article 1C(1)-(6) of the Refugee Convention, which underline the conditions under which an individual ceases to be a refugee²⁹⁶ or to employ the restrictions set out in Article 1(F).²⁹⁷ What is most notable, however, when it comes to these measures is that

²⁹³ This is seen most clearly in Europe where for example the Greece which received €12 million to care for migrants between 2011 and 2014, compared to €228 million given for border security; Hungary which some have argued has no functioning asylum system tends to house refugees in former military barracks converted into prisons. Frontex, the EU’s border agency has seen its budget increase from €6 million in 2005 to almost €90 million, as the agency is increasingly asked to patrol the EU’s borders. Maximilian Popp, *An inside look at EU’s shameful immigration policy*, SPIEGEL ONLINE Sept. 11, 2014, <http://www.spiegel.de/international/europe/europe-tightens-borders-and-fails-to-protect-people-a-989502-druck.html>.

²⁹⁴ Long argues that whereas initially safety zones were created for humanitarian purposes largely to cater for the wounded, the sick and civilians in conflict, states have come to use them in refugee situation where states provide humanitarian assistance but without having to assume all of the responsibilities that come with the convention as the individuals are not bona fide refugees. Katy Long, *In Search of Sanctuary: Border Closures, ‘Safe’ Zones and Refugee Protection*, 26 J. REFUGEE STUD. 458 (2012).

²⁹⁵ The EU’s Aeneas Programme had a budget of €40 million for the period 2004–2006, whereas its successor the Thematic Programme, has a budget of €54.4 million per year over the period 2007–2013. The Aeneas Programme’s general objective was “to provide specific and complementary financial and technical assistance to third countries in support of their efforts to ensure more effective management of all aspects of migration flows.” *AENEAS Programme Financial and technical assistance to third countries in the field of migration and asylum: Guidelines for grant applicants responding to the Call for Proposals for 2004*, European Commission, (2005), <http://www.guiafc.com/documentos/2005-AENEAS-01.pdf>. Florian Trauner & Stephanie Deimel, *The Impact of EU Migration Policies on African Countries: the Case of Mali*, 51 INT’L MIGRATION 20 (2013) (describing how the EU’s migration policies are impacting African states by using Mali as a case study).

²⁹⁶ A person may cease to be a “refugee” if they re-availed themselves to the protection of their nationality; re-acquired their nationality; acquired a new nationality; re-established themselves; no longer fear persecution; and, the circumstances that led to them being recognized as a refugee ceased to exist. UN General Assembly, *Convention Relating to the Status of Refugees*, Art. 1C(1)-(6), 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. See also, UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, 10 February 2003, HCR/GIP/03/03.

²⁹⁷ Article 1(F) provides: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.” UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art. 1(F). See also, Jennifer Bond, *Principled Exclusions: A Revised Approach to Article 1 (F)(A) of the Refugee Convention*, 35 MICH. J. INT’L L. 15 (2013) (arguing that there is a lack of harmonization and widespread failure to consistently apply international criminal law undermines the 1F exclusion provision).

they are accompanied by legislation, as a way to justify the actions.²⁹⁸ Nonetheless, UNHCR and many refugee law practitioners have sought to raise the bar when it comes to refugee protection, specifically in respect to repatriation, arguing that there is a need to not only ensure the cessation of violence, but rather that conditions for peaceful coexistence are established and cemented before individuals are repatriated.²⁹⁹ However, as some have argued and show, the ability of UNHCR to meet its obligations is dependent on the member states, who place political and national interests above humanitarianism.

In sum, in the post-Cold War, UNHCR has had to adjust its mandate to address humanitarian crises often caused by political realities such as the Iraq War, the Syrian civil war or natural disasters, which have placed the agency under enormous stress.³⁰⁰ Additionally, at a time of economic austerity, the agency has also had to find ways to address its heavy dependence on states' largess, which as some suggest has come at the expense of refugees.³⁰¹ These conflicts have demanded a more intricate response from states and the international community whose response has been ad hoc, emphasizing a need for reform of the refugee system.³⁰²

²⁹⁸ A good indication of this is the commitment of northern states to what they describe as voluntary repatriation. Thus, in the UK for example, the Voluntary Assisted Return and Reintegration Programme (VARRP) adopted in 1999 and funded by the government and the European Refugee Fund sees the International Organization for Migration and its UK partner (the charity Refugee Action) provide advice and help to current and former asylum seekers. Webber, a barrister, and vice-chair of the Institute of Race Relations asserts that voluntary returns is "[a] less painful alternative to continued destitution followed by (inevitable) compulsory return, and it is generally impossible for the returnee to make an informed choice about the country to which they are returning." Frances Webber, *How Voluntary are Voluntary Returns?* 52 RACE & CLASS 98, 100, 103 (2011).

²⁹⁹ James Hathaway makes it clear that one's refugee status does not cease when one returns to their country of origin, but rather that it ends when the person is able to re-establish themselves, which mean that their protection continues and is dependent on an assessment as to whether they have "re-establish" themselves. James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 OHIO ST. J. DISP. RESOL. 175, 176. (2005).

³⁰⁰ António Guterres & Paul Spiegel, *The State of the World's Refugees: Adapting Health Responses to Urban Environments*, 308 JAMA: THE J. AM. MEDICAL ASSOC. 673 (2012) (on the need to integrate refugees into existing health systems). Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVIRONMENTAL POL. 60 (2010) (exploring the need for a global response to climate refugees).

³⁰¹ Beth Whitaker in looking at Tanzania's refugee policy argues that funding levels can impact a poor state's ability and willingness to comply with the refugee convention and that voluntary contributions underline that the refugee regime exists within the purview of states, particularly northern ones. Beth Elise Whitaker, *Funding the International Refugee Regime: Implications for Protection*, 14 GLOBAL GOVERNANCE 241 (2008).

³⁰² Katy Long declares "In the post-Cold War period, all state actors have proven remarkably willing to accept the premise underlying border closures: namely, that universal protection is limited and refugee aid is better delivered as a pragmatic, conditional good." Katy Long, *In Search of Sanctuary: Border Closures, 'Safe' Zones and Refugee Protection*, 26 J. REFUGEE STUD. 458, 473 (2012).

IV. CONCLUSION

The aim of this paper was to highlight a need for some form of legal taxonomy and doctrine with respect to international refugee law, as states dominate the refugee system which means that the state practice that has emerged is highly convoluted, designed to protect the interest of the wealthy states at the expense of individuals.³⁰³ The refugee system seeks to balance the rights of individuals and the interests of states. However, as it evolved, what has emerged is a highly complex system, with “conflicting identities”³⁰⁴ and aims, which essentially weakens the refugee regime, as norms and values are subverted. This may also explain why judges have had to take the responsibility of addressing refugeeship in the post-Cold War, leading to novel interpretations, sometimes in response to public discourse³⁰⁵ and sometimes against or despite it.³⁰⁶ Accordingly, the variations have added to the enormous costs associated with the refugee system, which range from how much is spent on providing support and assistance to asylum seekers and refugees to interdiction to addressing the subsidiary issues, such as crime and inter-state tensions over lack of appropriate response to weak borders.

The refugee system is predicated on recognizing that individuals have fundamental rights, some of which come from the virtue of their being persons and others that are granted by the state.³⁰⁷ The system however has also come to curtail certain rights, often under the guise of national interests, security or by making applications difficult by placing tests to ensure limits on the domestic and international obligations of states toward those seeking refuge.³⁰⁸ The

³⁰³ Customary international law norms emerged because of states adopt international treaties designed to govern their behavior and interactions. United Nations, *Vienna Convention on the Law of Treaties*, Art. 34-37, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p. 331; Josef L. Kunz, *The Nature of Customary International Law*, 47 AM J. INT'L L. 662 (1953); Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. YB INT'L L. 275 (1965); Beth A. Simmons & Daniel J. Hopkins, *The Constraining Power of International Treaties: Theory and Methods*, 99 AM POL. SCI. REV. 623 (2005).

³⁰⁴ The term is borrowed from an edited volume aimed at highlighting that challenges that the protection system has raised leading to tensions between law, politics and social policy. REFUGEE PROTECTION AND THE ROLE OF LAW: CONFLICTING IDENTITIES (Susan Kneebone, Dallal Stevens & Loretta Baldassar, 2014).

³⁰⁵ See e.g., Daniel Wilsher, *Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability*, 15 INT'L J. REFUGEE L. 68 (2003) (noting different interpretation within English jurisprudence as to persecution and protection).

³⁰⁶ In acting contrary to public discourse judges are effectively applying the concept of *Boni iudicis est ampliare jurisdictionem*: it is the part of a good judge to extend the jurisdiction. Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT'L J. REFUGEE L. 285, 297 (1989).

³⁰⁷ Under the Universal Declaration of Human Rights, individuals have the right to nationality, and yet states may revoke one's nationality: “Everyone has the right to a nationality”. Art. 15(1) UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³⁰⁸ Reinhard Marx for example noted “Refugee law has evolved from a relatively open system strongly influenced by humanitarianism, to a system that now excludes the majority of the world's refugees.” Reinhard

dichotomic situation is caused by the fact legal concepts do not remain open, as each decision leads to content and meaning, which in itself leads to distinct interpretations, often based on what is right.³⁰⁹ Moreover, the system itself relies on the actions of its members as well as non-governmental organizations, the academic community and UNHCR.³¹⁰ Thus, whereas one could argue that there used to be a time when the different actors had a broad consensus and a shared understanding in respect to those seeking refuge, such sentiments and attitudes have largely dissipated.

Natural law and legal positivism help place the need for an international refugee regime in context, because the former cements the idea that individuals are endowed with fundamental rights, increasingly understood as human rights. Natural law is a mode of thinking that connects the celestial, the moral and the law.³¹¹ In relation to refugee law, natural law raises is whether there is a moral duty to help those who have a well-founded fear of persecution, and if so, what kind of help? The moral element that lies within natural law provides tools to studying international refugee law because where “scientific theories risk instant obsolescence as knowledge advances, ... moral theories, once established, seem immune to the fashions of ethics.”³¹² Interfused in this understanding is a theory of objective values that includes recognizing the costs and benefits of living in a community. Human beings chose to come

Marx, *Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue*, 7 INT’L J. REFUGEE L. 383, 384 (1995).

³⁰⁹ Jari Pirjola, Legal Adviser to the Office for the Parliamentary Ombudsman of Finland notes that when he sat for five years on the Finnish Asylum Appeals Board that at times decisions were reached because they felt “more correct than another”. Pirjola adds, “The result of votes taken on asylum could often be predicted from the persons and organisations involved in a case.” Jari Pirjola, *Shadows in Paradise—Exploring Non-Refoulement as an Open Concept*, 19 INT’L J. REFUGEE L. 639, 656 (2008). Audrey MacKlin notes that as a member of the Canadian Refugee Division of the Immigration and Refugee Board she was surprised how much time she spends on credibility determination, as opposed to the pontification that occupies scholars such as what is a particular social group. Audrey Macklin, *Truth and Consequences: Credibility Determination in the Refugee Context*, INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES, 1998. See also, David Delgado, *Running Afoul of the Non-Refoulement Principle: The [Mis] Interpretation and [Mis] Application of the Particularly Serious Crime Exception*, 86 S. CAL. L. REV. 1389 (2013) (suggesting that U.S. courts are not remembering the purpose of the convention: protecting the vulnerable, which means weakening the refugee protection regime).

³¹⁰ See e.g., Michiael Kingsley Nyinah, *Exclusion under Article 1F: Some Reflections on Context, Principles and Practice*, 12 INT’L J. REFUGEE L. 295, 295-296 (2000) (Nyinah, Senior Legal Advisor, Department of International Protection, writes “[c]ommon understandings appear to be elusive on key questions of principle and practice relating to Article 1F of the 1951 Convention.”)

³¹¹ Brian Bix, *Natural Law theory: The Modern Tradition*, IN OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 61 (Jules L. Coleman & Scott Shapiro, eds., 2002).

³¹² Philip Soper, *Some Natural Confusion about Natural Law*, 90 MICH. L. REV., 2393, 2393 (1992). The challenge however that comes with morality is that it pertains to a choice, as individuals may choose to live a moral existence where they respect rights or not. See e.g., Tibor R. Machan, *A Recommendation of Natural Rights Theory*, 19 AM. PHILOSOPHICAL Q. 61, 62 (1982).

together because they are social beings who need one another³¹³ and this is also why the current system which draws heavily on deterrence is problematic because those fleeing insecurity know that when they enter a country illegally all they could face is a return to their original country.³¹⁴

The morality of international refugee law is that as human beings, we share a duty to support and assist one another.³¹⁵ Yet, where it becomes challenging is the practicality of the system that may entail providing permanent settlement. Legal positivism had an auspicious entry into legal studies, as it expounds a philosophy of law dependent on societal wants: as society changes, so do its laws.³¹⁶ This idea plays a key role in international refugee law because states adopt legislation to address refugeeship. Positivism underlines that the refugee regime exists within the purview of the state that decides whether to adhere or not, or to amend the regime, often at the expense of the rights of those seeking refuge.³¹⁷

One way to address the dichotomy posed by the way the refugee system has evolved is not only to recognize the limitations of morality on state action, but to also emphasize that morality has to play a role in national interests. That is, a moral refugee system promote better inter-state relations, with states coming together to resolve problems, instead of simply seeing refugees as an economic or security burden, which often leads to inter-state accusations as to

³¹³ In primordial societies, one could argue, as for example Durkheim does, that the need is basic, stemming from survival, whereas in more developed societies, the need is more intricate being based on shared norms, ideas, and values. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1984); Warren S. Goldstein, *Sociological Theory of Religion*, 6 RELIGION COMPASS 347 (2012).

³¹⁴ In other words, for the person that enters a country without the correct documents, the issue is are they going to be caught and even so would they be able to successfully argue that their *refoulement* would amount to a breach of the *non-refoulement* principle or of international human rights agreements. Niraj Nathwani, *The Purpose of Refugee Law*, INT'L J. REFUGEE L. 354 (2000) (noting the limitation of deterrence when it comes to refugees). Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement*, 80 FORDHAM L. REV. 73 (2011) (emphasizing the clash between human rights, *non-refoulement* and the ability of a state to remove individuals considered dangerous).

³¹⁵ The U.S. delegate to the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons noted that when engaging in *refoulement* states should pause and possibly err on the side of caution because it could mean sending a person to face death or persecution. UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS* 234 (1990).

³¹⁶ It is interesting to note that Paul Weiss, the director of protection for the IRO and a key player in drafting the Refugee Convention, received his PhD. in International Law from Vienna University in 1930 where he was a student of Hans Kelsen. Gilad Ben-Nun, *The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention*, 27 J. REFUGEE STUD. 101, 107 (2014).

³¹⁷ Martin Jones for example argues that in seeking to develop a governance of the international refugee regime the danger becomes that it would permit state behavior that is antithetical to refugee protection. Martin Jones, *The Governance Question: UNHCR, the Refugee Convention and the International Refugee Regime*, IN *THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW* 94 (JAMES C. SIMEON, ED. 2013).

the failure of the other to patrol or police one's borders.³¹⁸ Additionally, states must recognize that until individuals are free from want and fear, the refugee system will continue, necessitating a policy that ends impunity, human insecurity and the vilification of refugees. History has shown that refugees have much to offer to host countries³¹⁹ and it is therefore incumbent on the international community to recognize that refugees are people whose situations are the result of events that are usually beyond their control and given the opportunity refugees will seek to remain within their country of origin, or return to it. For those forced to resettle, refugees bring value, as not only are they hardworking, but they seek repay the trust that the host country has given them.³²⁰ Therefore, by shedding prejudices and adopting measures that empower refugees, states benefit and with it international peace and security.

³¹⁸ This has become very clear in respect to Europe and its asylum system—Dublin II—which holds that the state where the individual seeking refugee status enters is the place where the application needs to be considered and that no other state need to examine the application. This therefore means that countries such as the UK or France if they can show that the asylum seeker had first entered through Greece for example, deem themselves obligated to send the person to Greece not to their country of origin. European Union, *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities* ("Dublin Convention"), 15 June 1990, Official Journal C 254 , 19/08/1997 p. 0001 – 0012; European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003). Silja A Klepp, *Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea*, 12 EUR. J. MIGRATION & L. 1 (2010) (underlining the dynamic power relations that operate between states that lie on the borders of the EU and the European Union).

³¹⁹ Graeme Hugo, *The Economic Contribution of Humanitarian Settlers in Australia*, 52 INT'L MIGRATION 31 (2014) (arguing that refugee-humanitarian settlers have a higher propensity to establish their own businesses); Patricia Leigh Brown, *When the uprooted put down roots*, N.Y. TIMES, Oct. 9, 2011 <http://www.nytimes.com/2011/10/10/us/refugees-in-united-states-take-up-farming.html?pagewanted=all>; Alexander Betts, Louise Bloom, Josiah Kaplan, and Naohiko Omata, *Refugee Economies: Rethinking Popular Assumption*, Refugee Studies Centre, The University of Oxford, (2014), <http://www.rsc.ox.ac.uk/files/publications/other/refugee-economies-2014.pdf>.

³²⁰ See e.g., Antigone Lyberaki *The Greek Immigration Experience Revisited*, 6 J. IMMIGR. & REFUGEE STUD. 5 (2008) (arguing that a close examination of immigrants in Greece has brought enormous value to the country as not only do immigrants fill gaps in the economy, they encourage economic activity and seek to integrate). Velta Clarke, *West Indians in New York*, J. IMMIGR. & REFUGEE STUD 49 (2002) (emphasizing how well West Indians integrate into U.S. society).