

# THE CURSE OF THE NATION-STATE: Refugees, Migration, and Security in International Law

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## ABSTRACT

*How does international law protect migrants? For the most part, it does not. Of the millions of people who flee persecution, conflict, and poverty each year, international law protects only refugees: those who flee persecution on the basis of religion, race, nationality, political opinion, or membership in a particular social group. The 1951 Convention Relating to the Status of Refugees provides critical protections for minorities that must never be diluted. However, it is insufficient to protect the swarms of migrants landing on the shores of Europe and elsewhere, or to guide states on how to protect them while guarding their own security. This Article argues that states have always revised international law regarding displaced people to protect their own security interests and changing circumstances of displacement. The time is thus ripe for the creation of an additional instrument of international law to protect the thirty-five million displaced people who do not meet the definition of “refugee.” To support this argument, this Article presents a comprehensive history of refugees in international law, combining primary sources and original interview data to trace how states have used refugee law to protect minority rights, even as state security interests have changed refugee protection over time. In doing so, this Article makes two theoretical claims that contribute to growing scholarly interest in the history of human rights law. First, this Article argues that refugee law is paradigmatic human rights law, although it is often excluded from the human rights canon. Second, this Article claims that refugee law predates the modern human*

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*rights regime, challenges its foundations, and extends its claims to universality.*

#### INTRODUCTION

*“Since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state.”<sup>1</sup>*

– Hannah Arendt

The plight of refugees and displaced people is the biggest human rights issue of our time. We are bombarded with images of the horrors of displacement, from Syrians and Iraqis fleeing barbarism on foot, to emaciated, battered North Koreans escaped from modern-day concentration camps. As civil conflicts rage on, the problem of population displacement will only worsen. For many, forced displacement means deprivation of the basic legal protections and human rights that states ordinarily guarantee. For rich and poor nation-states alike, refugees remain an ever-worsening “curse” to their professed human rights commitments, their sovereign right to determine who can enter their borders, and even their national security.

But what is a refugee? This question remains highly contested. Doctrinally, international refugee law protects only individuals fleeing persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.<sup>2</sup> No international law is designed to protect the majority of displaced people, who do not meet this definition. As of mid-2014, thirteen million people qualified as refugees under international refugee law, while the Office of the United Nations High Commissioner for Refugees (UNHCR) identified 46.3 million people as “persons of concern.”<sup>3</sup> An average of 32,000 people per day fled their homes due to violence in 2013, and their harrowing circumstances may or may not

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1. HANNAH ARENDT, *IMPERIALISM: PART TWO OF THE ORIGINS OF TOTALITARIANISM* 170 (1968).

2. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

3. U.N. HIGH COMM’R FOR REFUGEES, *MID-YEAR TRENDS 2014*, at 3 (2014), <http://www.unhcr.org/en-us/statistics/unhcrstats/54aa91d89/mid-year-trends-june-2014.html>; see also Adrian Edwards, *New UNHCR Report Says Global Forced Displacement at 18-year High*, U.N. HIGH COMM’R FOR REFUGEES (June 19, 2013), <http://www.unhcr.org/51c071816.html> (UNHCR report saying global forced displacement at 18-year high).

qualify them for refugee status.<sup>4</sup> The reasons for their flight include persecution, generalized violence, economic migration when violence renders their business pursuits unsustainable, poverty, climate-change induced flight from famine or rising seawaters that threaten to wipe entire states off the map, and other horrors still. Solutions to the plight of displaced people are complex and heart-wrenching, as states struggle to balance their sovereign right to expel aliens from their territory with the reality of dire humanitarian need on their doorsteps. National security concerns, real or imagined, often trump human rights. After all, refugees are people whom states are required to help. Others may legally be returned to hell.

It need not be this way. The historical record supports the normative argument that international refugee law should be changed to fit modern circumstances. By tracing the history of refugees in international law, I explain how the changing interests of states have shaped how the term “refugee” has been defined over time. In doing so, I isolate the core of what states have consistently sought to protect through refugee status: the rights of dissidents and especially minorities. Understanding the history of international refugee law, including the political context in which it developed, supports the creation of new international law for refugees and displaced people appropriate for the current era. In a companion article, I further explain the need for new international law to supplement the Refugee Convention, and outline what a Displaced Persons Convention might look like.<sup>5</sup>

This historical account also challenges current scholarly debates about human rights. Most historical and social science literature on human rights regards the great “constitutional moment” in the immediate aftermath of World War II, as the birth of international human rights law.<sup>6</sup> Other scholars situate this moment later, when transnational human rights activism became more visible in the 1970s.<sup>7</sup> This Article reveals that the roots of human rights

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4. U.N. HIGH COMM’R FOR REFUGEES, *supra* note 3, at 2.

5. Jill I. Goldenziel, *Displaced: Why We Need New International Law to Protect Refugees, Displaced People, and Human Rights*, 35 BERKELEY J. INT’L L. 1, 2–6 (forthcoming 2016).

6. The term “international constitutional moment” is borrowed from Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 1 (2002). Although Slaughter and Burke-White primarily focus on humanitarian law, the concept has been applied to the birth of international human rights law as well. *See also* ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD* 1–11 (2007); BETH A SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 3–22 (2009) (tracing the dawn of human rights to the same historical moment in the wake of World War II).

7. *E.g.*, SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 120–22 (2010).

law—in the sense of universal, liberal rights that should be enjoyed by people regardless of where they live—are much deeper.<sup>8</sup>

Protection of refugees under international law is at least as old as the modern Westphalian nation-state, and the concept of protecting those fleeing persecution has roots in all of the world's major religious legal traditions.<sup>9</sup> International refugee law was among the first major human rights projects of the fledgling United Nations. The 1951 Convention Relating to the Status of Refugees (the “1951 Convention”) developed in the same historical moment as the Universal Declaration of Human Rights and the Genocide Convention, and for similar reasons, as the recovering world sought to ban the atrocities perpetrated by the Nazis. While scholars of international law and international relations have paid far less attention to the history of the 1951 Convention than that of other human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESCR), the 1951 Convention far preceded them, entrenched and enhanced prior state practice, and was the first human rights instrument to legalize many of the same rights found in these later documents. My account thus adds to current scholarly debates and our evolving understanding of the origins and development of human rights in international law.

This Article will proceed in three parts. Part I will explain why many previous scholarly accounts of the development of international human rights law have largely ignored international refugee law, and why it is critical to correct this theoretical gap. Part II will trace the history of the international refugee regime. This account aims to add refugee law to other major accounts of the origins of international human rights law.<sup>10</sup> Because refugee rights

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8. As Moyn suggests, the definition of what constitutes human rights has changed over time. *Id.* My aim here is to trace the roots of human rights in the liberal, cosmopolitan sense in which they are now commonly understood, while acknowledging that the concepts of human rights and refugee status may have had different significance for states and individuals at other points in history.

9. See MATTHEW PRICE, *RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS* 26 (2009); see also AHMED ABOU-EL-WAFA, *THE RIGHT TO ASYLUM BETWEEN ISLAMIC SHARI'AH AND INTERNATIONAL REFUGEE LAW: A COMPARATIVE STUDY* 27–35 (2009).

10. In a four-page piece, Louis Henkin called for the integration of refugee law and human rights law, but had little space to build an argument as to why. Louis Henkin, *Refugees and Their Human Rights*, 18 *FORDHAM INT'L L.J.* 1079, 1079–81 (1995) (“It is time to bring the international law of refugees and the international law of human rights together.”). James Hathaway and Guy Goodwin-Gill have made earlier calls to rethink refugee law as human rights law, and I aim to build on their accounts with additional theory and new historical and contemporary data. See generally GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (3d ed. 2007); James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 *J. REFUGEE STUD.* 113, 113–31 (1991).

encapsulate the international community's commitment to minority rights, no understanding of the history of international human rights law can be complete without this account. I will conclude with some implications for what this analysis implies for changes to international law and our understanding of international human rights law overall.

### I. REFUGEE RIGHTS AS HUMAN RIGHTS

Most previous scholarly treatments of human rights, in both historical and social science literature, have presented one of three versions of human rights history. Two concern themselves with the great "constitutional moment" of international law, and international human rights law in particular, that followed the end of the Second World War. Historian Mark Mazower aptly terms these two approaches the "Eleanor Roosevelt version" and the "Hitler version."<sup>11</sup> In the Eleanor Roosevelt version, international human rights law developed due to the heroic actions of individuals, including Hersch Lauterpacht, Raphael Lemkin, and Roosevelt herself.<sup>12</sup> In the "Hitler version," states collectively reeled from the horrors of the Nazis and galvanized to proclaim "never again."<sup>13</sup> A third narrative, associated with historian Samuel Moyn, submits that human rights as we know it actually began only in the 1970s, when large-scale transnational activism and the convergence of previous rights movements for discrete groups brought a global consciousness of what we now know as "human rights."<sup>14</sup>

All of these versions, while cataloguing remarkable achievements of individuals and states, are incomplete. All three versions largely dismiss the historical development of international human rights and transnational activism for them prior to World War II, although nations had begun to give serious thought to the basic rights to which all people are entitled, regardless of nation-state borders. The Hitler and Roosevelt versions, in their triumphalism of individual rights, do not give sufficient consideration to the state interests that shaped the development of the international human rights regime.<sup>15</sup> As Mazower explains, individuals such as Roosevelt and Lemkin were only able to succeed because states let them.<sup>16</sup> Moreover, he notes, the

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11. Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 *HIST. J.* 379, 380 (2004).

12. See BORGWARDT, *supra* note 6.

13. SIMMONS, *supra* note 6, at 57.

14. See generally MOYN, *supra* note 7.

15. See Mazower, *supra* note 11, at 381.

16. *Id.*

“constitutional moment” was not initially experienced as such, since the full extent of the Nazi horrors had not yet been revealed.<sup>17</sup> As he explains, “we now know that the Holocaust as such was much less central to perceptions of what the war had been about in 1945.”<sup>18</sup>

Finally, all three of these versions largely ignore international refugee law in their analyses. Scholars have largely analyzed international refugee law as doctrinally distinct from international human rights law.<sup>19</sup> Scholars of international law and international relations—lawyers, political scientists, and historians alike—largely ignore international refugee law in their discussions of human rights treaties.<sup>20</sup> Major legal casebooks on international human rights law give short shrift to international refugee law, if they cover it at all.<sup>21</sup> Meanwhile, scholars of refugees often do not concern themselves with broader issues of human rights. Scholarship from the field of refugee studies, such as excellent work by Alexander Betts and James Milner, largely concern themselves with refugee policy in practice and the operation of the Office of the UNHCR.<sup>22</sup> Louis Henkin and James Hathaway, arguably the most important living scholar of refugees in the American legal academy, have both called for the integration of the refugee and human rights regimes, but stop short of providing a full theoretical account of how and why to do

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17. *Id.*

18. *Id.*

19. *See, e.g.*, Henkin, *supra* note 10 (recognizing the usual doctrinal separation between the two regimes).

20. *See, e.g.*, SIMMONS, *supra* note 6; Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407, 407–09 (2007); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1937–42 (2002); Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95, 95–96 (1999); Eric Neumeyer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 925–26 (2005). Only Harold Hongju Koh gives international refugee law a brief mention. *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

21. *See, e.g.*, HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 3–57 (3d ed. 2007) (omitting mention of international refugee law).

22. ALEXANDER BETTS, PROTECTION BY PERSUASION: INTERNATIONAL COOPERATION IN THE REFUGEE REGIME 1–16 (2009); ALEXANDER BETTS, GIL LOESCHER & JAMES MILNER, UNHCR: THE POLITICS AND PRACTICE OF REFUGEE PROTECTION 1–7 (Thomas G. Weiss & Rorden Wilkinson eds., 2d ed. 2012) [hereinafter REFUGEE PROTECTION]; GIL LOESCHER, ALEXANDER BETTS & JAMES MILNER, THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR): THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY xvi–xix (2008) [hereinafter TWENTY-FIRST CENTURY REFUGEE PROTECTION].

so.<sup>23</sup> Overall, refugee law remains misunderstood as a key element of international human rights law, although its framers were deeply concerned with protecting human rights.

*A. Why is Refugee Law Ignored by Human Rights Law Scholars Today?*

Perhaps this scholarly omission has occurred because of the distinct features of refugee law that differentiate it from other forms of human rights law. International refugee law implicates sovereignty, security, and political concerns that are unique to the human rights regime. International human rights law was carefully designed not to conflict with the principle of state sovereignty.<sup>24</sup> Human rights treaties bind states to provide certain rights to their own citizens, at least in theory. States' commitment to multilateral human rights treaties implies that the international community has an interest in protecting the human rights of citizens of other states.<sup>25</sup> In practice, however, human rights treaties suffer from a notorious lack of enforcement. States are largely unwilling to intervene in the affairs of other states to protect against human rights violations. The U.N. Secretary General's *2012 Report on the Responsibility to Protect* names only four circumstances in which humanitarian intervention is justified to protect the citizens of other states against human rights violations: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>26</sup> States have been hesitant to violate state sovereignty for even these dire abuses. Many champions of human rights law believe it will lead to a moral utopia where all can enjoy equal rights and

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23. See James C. Hathaway, *The Evolution of Refugee Status in International Law, 1920-1950*, 33 J. INT'L & COMP. L.Q. 348, 349 (1984). Oxford refugee scholar Guy Goodwin-Gill, too, defines refugee rights as human rights. See generally GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (3d ed. 2007). Refugee scholars, and human rights lawyers more generally, equate refugee rights with human rights. However, as a doctrinal matter, in the American legal and social science academies, study of the 1951 Convention has been ignored in studies of human rights treaties. See, e.g., ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 1-8 (Geoffrey R. Stone ed., 2014) (listing human rights present in all major human rights treaties except the 1951 Convention).

24. See generally Jack Donnelly, *State Sovereignty and International Human Rights*, 28 ETHICS & INT'L AFF. 225 (2014).

25. Jill I. Goldenziel, *Regulating Human Rights: International Organizations, Flexible Standards, and International Refugee Law*, 14 CHI. J. INT'L L. 453, 488 (2014).

26. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, ¶ 1, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012).

freedoms wherever they may live.<sup>27</sup> However, states, thus far, have dictated a vastly different reality.

International refugee law, by contrast, implicates state sovereignty in an important way that other international human rights treaties do not. At the core of international refugee law lies the *jus cogens* norm of non-refoulement, from which no state can derogate. Non-refoulement effectively binds states to keep within their borders anyone who might be endangered if sent back to their country of origin.<sup>28</sup> To be in compliance with international refugee law, then, signatory states must not summarily return anyone who meets the Convention definition of refugee to his country of origin. International refugee law conflicts with the basic right of a sovereign state to expel aliens from within their borders, and demands that states accord certain rights to non-citizens. Compliance with the 1951 Convention has thus created economic burdens and security issues for signatory states. The United States, Europe, and Australia, for example, have built a massive system of detention centers to house asylum-seekers who arrive within their borders until they can be processed to determine whether they are refugees.

In countries with less secure borders, particularly in the Global South, refugees have posed domestic security threats to their host countries as well as international security risks. Without social and legal protections in their host countries, and with their previous social order destroyed, refugees have formed in-group networks for welfare provision or to compete for resources within their new environment. These networks provide an alternate source of political authority to the state, and potentially a threatening one in weak states. Refugees have used camps as a locus to mobilize co-ethnic or co-group members against their countries of origin from their new host states.<sup>29</sup> In some circumstances, host countries have used refugees to destabilize their countries

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27. For an enthusiastic take on the global spread of human rights through law, see generally KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011) (discussing how “the justice norm” of prosecuting leaders for human rights abuses has spread globally).

28. The majority view among highly qualified publicists and commentators is that non-refoulement has attained the status of *jus cogens* despite some state practice to the contrary. See Walter Kälin et al., *Article 33, Para. 1*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 1327, 1347–49 (Andreas Zimmermann ed., 2011); Jean Allian, *The Jus Cogens Nature of Non-Refoulement*, 13 *INT’L J. REFUGEE L.* 533, 557–58 (2001).

29. See generally Idean Salehyan, *The Externalities of Civil Strife: Refugees as a Source of International Conflict*, 52 *AM. J. POL. SCI.* 787, 791–92 (2007).



of origin, as occurred in the Great Lakes region of Africa in the 1990s.<sup>30</sup> Refugee communities may host rebel groups, as Syrian exiles have in Turkey since the Syrian civil war. Host states may be unable to contain militant refugees, some of whom may be receiving protection and assistance inadvertently provided by international humanitarian agencies. For example, in refugee camps in Burundi and Tanzania in the 1990s, the U.N. Refugee Agency inadvertently provided assistance to Hutu rebels, who later returned to Rwanda to commit genocide.<sup>31</sup> International refugee law demands that states put themselves at risk in order to accept persecuted people, even if they are a potential security threat. International human rights law places no such burden on a state's domestic security; indeed, most observers believe that a state's compliance with international human rights law will only improve domestic complacency.

International refugee law also serves a political function for states that human rights law does not. As Matthew Price has argued, countries' ability to grant asylum, as expressed in international refugee law, plays a critical expressive function in international politics.<sup>32</sup> A state's ability to determine a citizen of another state to be a "refugee" enables one state to sanction another within the international system. Classifying a citizen of another state as a "refugee" enables a state to express judgment about the morality of the state of origin or its abuse of authority in a particular circumstance. In 2013, the case of Edward Snowden illustrated this function. By offering Snowden temporary asylum, Russia and Ecuador played a political card against the United States, expressing disdain about its invasive data-gathering policies. Human rights law, too, serves an expressive function, as states have used the language of law to condemn human rights abuses abroad. However, the expressive function of refugee law is accompanied by a more powerful expressive action. By physically accepting a refugee from another state, a state goes beyond rhetoric to intervention into another state's affairs. A host state may also be able to use that refugee strategically, to speak out and rally others against his country of origin, or to gain intelligence on rights abuses or operations there. This expressive function served an especially important purpose during the Cold War, when the United States and its allies granted

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30. See SARAH KENYON LISCHER, DANGEROUS SANCTUARIES: REFUGEE CAMPS, CIVIL WAR, AND THE DILEMMAS OF HUMANITARIAN AID 73–75 (Robert J. Art et al. eds. 2006); Idean Salehyan, *Transnational Rebels: Neighboring States as Sanctuary for Rebel Groups*, 59 *WORLD POL.* 217, 223 (2008).

31. See generally LISCHER, *supra* note 30, at 82–83.

32. PRICE, *supra* note 9, at 24–57.

refugee status in large numbers to defectors from the Soviet Union and Eastern Europe.<sup>33</sup>

On a philosophical level, international refugee law poses a challenge to the fundamental assumptions underlying human rights law. Human rights law posits that sovereign states are the guarantors of human rights and, thus, supposes that human rights are bounded by membership in a particular political community or tied to a particular territory. As Giorgio Agamben explains, politics itself is a constant process of inclusion and exclusion of determining whom the sovereign will protect and whom it will not.<sup>34</sup> A refugee, then, is the exemplar par excellence of this political process. Refugee status begins when a sovereign decides not to or fails to protect an individual's human rights to the point that the individual is compelled to disassociate himself completely from the sovereign. International refugee law presents a challenge to human rights law—and to the very notion of sovereignty—by suggesting that humans have rights independent of a sovereign. International refugee law is an acknowledgment that rights exist outside the state, and thus a threat to the concept of the benefits of sovereignty: a refugee may have more human rights outside of an oppressive state than within it. International refugee law both implies that human rights exist outside the sovereign and that when states cannot provide those human rights to their own citizens, other states are bound to provide a substitute, thereby infringing on their own sovereignty. This leads to a dilemma that may explain a doctrinal divide: if the human rights regime is based on the premise of a sovereign who can guarantee those rights, then rights that exist without a sovereign to guarantee them must be something outside of that human rights regime.

### *B. Why Refugee Law Should Be Considered Human Rights Law*

Thus, for important doctrinal reasons, scholars have largely viewed international refugee law as doctrinally separate from human rights law. Yet, an understanding of refugee law is critical for our understanding of international human rights law. The concerns of international refugee law speak to the primary interests of anyone who cares about human rights. In an era when sovereignty being questioned by scholars and states and challenged

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33. See generally CARL J. BON TEMPO, *AMERICANS AT THE GATE: THE UNITED STATES AND REFUGEES DURING THE COLD WAR* (2008).

34. See Prem Kumar Rajaram & Carl Grundy-Warr, *The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand*, 42 INT'L MIGRATION 33, 34 (2004). See generally GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 11–13 (Daniel Heller-Roazen trans., 1998).

by non-state actors, it is worth considering what human rights the international community considers to be beyond the pale of sovereignty. Refugee status begins when a sovereign state fails, by choice or otherwise, to protect the human rights of its citizens. If we believe that rights exist beyond and outside of the state, anyone who cares about human rights must care about refugee rights.

To the extent that human rights law and liberal democracy are linked—and most believe that they are—refugee law is even more important. The protection of minorities has long been a *sine qua non* of liberal democracy.<sup>35</sup> In Michael Walzer's words, individual assimilation and group recognition, by liberating either individuals or groups from persecution, are "the central projects of modern democratic politics."<sup>36</sup> If liberal democracy is the normative model for states in the international community, then the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social, and Cultural Rights (ICESCR) comprise the world's model bill of rights. All of these instruments demand that sovereign states provide rights to their citizens. Refugee law, then, must complement this bill of rights to ensure protection of minorities and dissidents who exist outside of sovereign protection. Otherwise, they would become, to use Hannah Arendt's term, "rightless."<sup>37</sup> Arendt argues that refugees, minorities, and stateless people were rightless after World War I because they were not members of any polity that could grant them rights, and thus put the lie to the idea of the universality of the Rights of Man.<sup>38</sup> International refugee law, then, came after World War II to remedy this rightlessness. International refugee law demands that states respect the human rights of such individuals and affirm their own commitment to the goals of human rights law. As the international community's normative commitment to democracy has increased, and the plight of minorities has continued to worsen, minority rights must continue to be a paramount concern.<sup>39</sup> An international legal system that gives short

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35. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 152–54 (1980).

36. Michael Walzer, *The Politics of Difference: Statehood and Toleration*, in *THE MORALITY OF NATIONALISM* 245, 255 (Robert McKim & Jeff McMahan eds., 1997).

37. ARENDT, *supra* note 1, at 147 ("Once they had left their homeland they remained homeless . . . once they had been deprived of their human rights they were rightless, the scum of the earth.").

38. See *id.*

39. U.N. Charter arts. 3–6; *European Neighbourhood Policy and Enlargement Negotiations: Conditions for Membership*, EUROPEAN COMM'N [http://ec.europa.eu/enlargement/policy/conditions-membership/index\\_en.htm](http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm) (last updated Dec. 10, 2015).

shrift to refugee rights is not truly concerned about human rights. If human rights are inalienable, they cannot be dependent on a sovereign, and ensuring rights for those whom the sovereign will not protect is of crucial importance.

The protection of religious, ethnic, racial, and national minorities to whom nation-states cannot or will not provide legal protections was among the first great projects of international law. Current international refugee law represents the international community's attempt to improve upon its past failures to protect the rights of minorities and political dissidents. Adding the history of international refugee law to previous accounts of human rights law both illuminates how state interests shaped the human rights regime and reveals how critical thinkers and actors in the human rights movement viewed the meaning of human rights. Placing the story of refugee law against the backdrop of what we know about human rights law also informs our understanding of how the refugee regime was meant to function. Previous accounts of both regimes are incomplete without an understanding of the other.

## II. THE HISTORICAL DEVELOPMENT OF INTERNATIONAL REFUGEE LAW

The definition of "refugee" in international law has evolved to reflect state interests. In the early era of international refugee law, powerful states largely determined who received refugee status. As the law developed, state practice became a source of law, and early categories created by European states took on a precedential character. The current definition of "refugee" was created by western states. However, state practice in the developing world, particularly more lenient definitions of "refugee" in regional legal instruments in Africa and Latin America, have also influenced the development and implementation of international refugee law far beyond European borders.

The development of international refugee law reflects the international community's turn from protection of group rights to protection of individual human rights. Early definitions of the refugee in international law were created in response to the perceived needs of states to provide protection for groups of refugees fleeing from specific states whose policies warranted international condemnation. As ad hoc treaties protecting different groups of people caused inconsistencies in implementation, and states became overwhelmed with increasing flows of refugees, states saw the need to restrict the definition of refugee. When the interwar Minority Rights Treaties failed and the post-World War II rights dialogue shifted from protection of group rights to individual rights, refugee law followed suit, reflecting a new concept

of individual persecution compatible with the needs of states and individuals alike.<sup>40</sup> The historical record reveals why international refugee law may have been satisfactory for the needs of states and individuals at the time it was developed, but is deeply flawed in the post-Cold War, post-9/11 context.

#### A. Pre-Westphalian Freedom from Persecution

Among the first great international legal projects was the protection of minorities and persecuted people. Because human rights scholars have focused on human rights law development in the wake of World War II, it is often forgotten that the international community endeavored to protect the rights of minorities and other persecuted people long before.<sup>41</sup> The concepts of refuge and refugees predate the modern nation-state.<sup>42</sup> The term has always referred to fleeing people. In the course of history, it has often referred to those fleeing religious persecution, and refuge has often been granted on religious grounds.<sup>43</sup>

The concept of asylum has roots in most of the world's major religions, although those to whom it would be granted varied according to cultural practices. In the Hebrew Bible, cities where manslaughterers could flee persecution became known as "cities of refuge."<sup>44</sup> In the history of state warfare, the concept of asylum dates at least as far back as the Peloponnesian War, when Athenians and Spartans alike granted refuge in their own religious temples to those fleeing persecution.<sup>45</sup> The English term "refuge" dates back to 1350–1400.<sup>46</sup> Derived from Middle English, Middle French, and Latin, it is related to the word *refuge(ere)*, which meant "to turn and flee, or run

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40. Nathaniel Berman, "*But the Alternative Is Despair*": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1900–03 (1993). While the Minority Rights Treaties were concerned with minority rights in the interwar sense of preserving the peace in Europe by ensuring basic human rights for ethnic minorities and stateless people, there is no doubt that they were concerned with providing international protection for minorities within Europe. While acknowledging the historical difference in usage of the term "minority," this Article treats the Minority Rights Treaties as a stepping-stone toward future legalization of international protection for members of minority groups in the modern, liberal-democratic sense.

41. See Slaughter & Burke-White, *supra* note 6, at 5.

42. Aristide R. Zolberg, *The Roots of American Refugee Policy*, 55 SOC. RES. 649, 651 (1988) ("Originating in France, the word was used in 1573 . . .").

43. See *id.* at 651–53.

44. On cities of refuge, see *Deuteronomy* 3:23–7:11. These biblical cities of refuge (*Ir Miklat*) are often cited as the roots of the concepts of refuge and asylum. See PRICE, *supra* note 9.

45. See generally THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 176–77 (M. Finley ed., Rex Warner trans., Penguin Books 1954).

46. *Refuge*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987).

away.”<sup>47</sup> The French *réfugié* was first used in 1573 to refer to Calvinists fleeing what is now Belgium, then under Spanish Catholic rule.<sup>48</sup> The English term “refugee” dates from 1675–85, derived from the French, reflecting Protestant flight leading up to the 1685 revocation of the Edict of Nantes.<sup>49</sup>

By the time the term had come into use, religious minorities were routinely under assault in Europe. Rulers justified expulsion projects on religious grounds and goal of building national homogeneity.<sup>50</sup> To choose but one prominent example, Spain expelled Jews from its territories in 1492, followed by Protestants from 1577 through the 1630s, and Moors in 1609.<sup>51</sup> After trying to forcibly convert their Jewish population, the Aragon eventually decided that the political necessity of forming a modern nation justified the cost of expelling an important economic class and at least two percent of their population.<sup>52</sup> Figures of those expelled vary, but range from tens of thousands to 200,000.<sup>53</sup> After some fled to Portugal and quickly met expulsion there, Jews and converted Jews dispersed throughout Southern Europe, the enemy Netherlands, and the Ottoman Empire. Only the Ottomans welcomed the Jews with open arms after a proclamation from Sultan Bayezid II gave orders to do so.<sup>54</sup> According to historian Bernard Lewis, Jews were welcome because they were an “economically active and politically reliable element.”<sup>55</sup>

Despite having large numbers of persecuted minorities, European states did not find it necessary to create formal international law that specifically protected refugees in the fifteenth through nineteenth centuries.<sup>56</sup> Multilateral

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47. *Id.*

48. Zolberg, *supra* note 42.

49. EMMA HADDAD, THE REFUGEE IN INTERNATIONAL SOCIETY: BETWEEN SOVEREIGNS 51–55 (2008); *Refugee*, *supra* note 41; *see also* Zolberg, *supra* note 42.

50. Zolberg, *supra* note 42.

51. *Id.*

52. Vernan Egger estimates tens of thousands. VERNAN O. EGGER, A HISTORY OF THE MUSLIM WORLD SINCE 1260: THE MAKING OF A GLOBAL COMMUNITY 82 (2008). Zolberg estimates that 120,000–150,000 Jews were expelled, which would amount to two percent of the Spanish population. Zolberg, *supra* note 42, at 31. Franco estimates the number at 200,000. MOISE FRANCO, ESSAI SUR L'HISTOIRE DES ISRAELITES DE L'EMPIRE OTTOMAN DEPUIS LES ORIGINES JUSQU'A NOS JOURS [ESSAY ON THE HISTORY OF THE JEWS OF THE OTTOMAN EMPIRE FROM THE BEGINNING TO THIS DAY] 37–38 (1897) (Fr.).

53. 2 YITZHAK BAER, A HISTORY OF THE JEWS IN CHRISTIAN SPAIN (Louis Schoffman trans., Varda Books 2001) (1961); HENRY KAMEN, SPAIN, 1469–1714: A SOCIETY OF CONFLICT 37 (4th ed. 2014) (citing FRANCO, *supra* note 52).

54. EGGER, *supra* note 52, at 82; BERNARD LEWIS, CULTURES IN CONFLICT 38 (1996).

55. LEWIS, *supra* note 54, at 43–44.

56. Hathaway, *supra* note 23.

treaties protecting human rights or individual rights, in general, were uncommon in this period.<sup>57</sup> European states that produced and accepted refugees were occupied with territorial conquest and consolidation of states and empires.<sup>58</sup> States responded to refugees on an ad hoc basis, and enacted few restrictions to entry.<sup>59</sup> The prohibitive cost of transport meant that refugees were largely wealthy, and states welcomed them as contributors to their economies.<sup>60</sup> Refugees, by and large, entered as individuals and not en masse, and caused few problems for state security.<sup>61</sup>

### B. Pre-World War I Legal Protections for Minorities

International law has been concerned with protecting minorities and refugees at least since the Treaty of Westphalia in 1648.<sup>62</sup> Religious and ethnic minorities remained a large political obstacle to the goal of congruity between nation and state.<sup>63</sup> The Treaty “introduced the legal concept of *jus emigrandi*: that individuals who faced religious persecution had the right to leave their state of origin and seek sanctuary elsewhere.”<sup>64</sup> The Treaty did not, however, require states to provide asylum.<sup>65</sup> In some cases, states could not control their borders and had no choice but to accept refugees. Other states would choose to provide asylum for varied reasons: out of humanitarianism, to support co-religionists, to cast aspersion on other states, or to add wealthy, skilled immigrants to their citizenry.<sup>66</sup> These objectives would often overlap.

*Jus emigrandi* soon had its first test. In 1685, 200,000 Protestants fled France after King Louis XIV revoked the Edict of Nantes, which had protected Protestants from persecution since 1598, when many were fleeing the Inquisition.<sup>67</sup> Prussia, in particular, welcomed these Huguenots due to

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57. *Id.* at 357.

58. *Id.* at 349.

59. Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT’L J. REFUGEE L. 238, 240 (2002).

60. *Id.*

61. *Id.*

62. See Stephen D. Krasner, *Compromising Westphalia*, 20 INT’L SEC. 115, 115 (1995) (discussing the limits of the Westphalian State).

63. See *id.*

64. PHIL ORCHARD, *A RIGHT TO FLEE: REFUGEES, STATES, AND THE CONSTRUCTION OF INTERNATIONAL COOPERATION* 45 (2014).

65. See Barnett, *supra* note 59, at 240–41.

66. *Id.* at 240.

67. *Id.* at 240–41.

religious affinity.<sup>68</sup> Their relatively wealthy status could not have hurt their cause.<sup>69</sup> This was, perhaps, the first modern refugee movement: it was a mass movement in an era of nation-states based on religious persecution in a time of relative peace.<sup>70</sup>

As early as 1789, refugee flows were playing an important role in international politics and causing international security concerns.<sup>71</sup> State building and nationalism were twin goals of the era.<sup>72</sup> States used mass population displacements as a tool for creating national and state identity.<sup>73</sup> Large numbers of persecuted dissidents fled the French Revolution.<sup>74</sup> Refugees helped to shift the balance of power in Europe as they fled to Austria, Prussia, Russia, and England.<sup>75</sup> These states were willing to offer refuge to cast aspersion on the new France and its hegemonic goals.<sup>76</sup> The building of unified nation-states in 1848 then led to the sometimes-deliberate expulsion of thousands of refugees from Italy, Germany, and France.<sup>77</sup> For example, 80,000 Germans were expelled from France because of the wars of German unification.<sup>78</sup> One hundred thirty thousand people who “considered themselves French left Alsace-Lorraine under the Treaty of Frankfurt in 1871.”<sup>79</sup> Despite these large numbers, most population flows were much smaller than they are today. Host states continued to welcome those refugees who were skilled and wealthy.<sup>80</sup>

By the Revolutions of 1848, it became clear that some dissidents posed security threats, and entry restrictions began to develop.<sup>81</sup> A set of British “Alien Acts” in 1793, 1796, and 1844 created limits and regulations on who could enter the country; the 1905 Alien Act differentiated between refugees (the few, persecuted individuals) and immigrants (the poor and many).<sup>82</sup> England and Switzerland continued to accept large numbers of refugees,

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68. *Id.* at 240.

69. *Id.*

70. *See* Zolberg, *supra* note 42.

71. Barnett, *supra* note 59.

72. *See* HADDAD, *supra* note 49, at 53.

73. Barnett, *supra* note 59, at 241.

74. *Id.* at 240–41.

75. *Id.*; *see also* CECILIA RUTHSTROM-RUIN, *BEYOND EUROPE: THE GLOBALIZATION OF REFUGEE AID* 15 (1993).

76. Barnett, *supra* note 59, at 240–41.

77. HADDAD, *supra* note 49, at 56.

78. *Id.*

79. *Id.* at 55.

80. Barnett, *supra* note 59.

81. *Id.* at 241.

82. HADDAD, *supra* note 49.



developing reputations as hotbeds for revolutionary exiles and causing political tensions with France and Austria.<sup>83</sup> The need for an international system to protect both persecuted individuals and international security was becoming necessary.<sup>84</sup>

While international law to protect persecuted people did not yet exist, states were beginning to lay its groundwork by the nineteenth century. A patchwork body of international legal protections for aliens began to develop, which can be viewed as the precursor to modern refugee law. Encompassed in treaties of “friendship, commerce, and navigation,” certain human rights, phrased then as “human dignities,” were granted to aliens living in trading states.<sup>85</sup> The treaties were meant to ensure that aliens did not face discrimination when they engaged in legal commercial activity and received access to judicial systems.<sup>86</sup> The rights included recognition of juridical personality, respect for physical integrity, and personal and religious freedom, but not political rights.<sup>87</sup> These rights were widely recognized as general principles of international law.<sup>88</sup> States would enforce these rights by lodging a claim in support of their own nationals, so such law did not directly benefit refugees.<sup>89</sup> However, the development of these general principles of law represented a breakthrough in international law because the treaties granted rights to citizens outside of the borders of their states, implicitly acknowledged their intrinsic vulnerability, and recognized that international protections for them were necessary.<sup>90</sup>

### C. *Interwar Minority Protection Efforts*

After World War I, the issue of minority and refugee protections became urgent. With the collapse of the great empires, the homogeneity of nation-states became a political goal once more, and the existence of minority groups resurfaced as a dilemma.<sup>91</sup> The European powers feared that the large numbers of foreign nationals displaced within Europe threatened to cause

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83. *Id.* at 56.

84. *Id.* at 55–56.

85. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 76 (2005). *See generally* ANDREAS H. ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949).

86. HATHAWAY, *supra* note 85, at 76–77.

87. *Id.*

88. *Id.* at 78.

89. *Id.* at 79.

90. *Id.*

91. HATHAWAY, *supra* note 85, at 85–86.

another international conflict.<sup>92</sup> At the Versailles peace conference, all successor states to the Ottoman and Habsburg empires were forced to sign Minority Rights Treaties in order to receive state recognition by the international community.<sup>93</sup> The League of Nations was charged with enforcement of the treaties.<sup>94</sup> The goal of these Minority Rights Treaties was to protect Eastern European minorities, particularly Jews, from persecution in the states where they lived. The treaties guaranteed religious, linguistic, racial, and national minorities rights equal with the nationals of the states where they resided, access to public employment, language rights, public funding, and also the right to maintain their language and cultural institutions.<sup>95</sup> The major powers hoped that granting these rights to minorities would help to avert another major international conflict.<sup>96</sup> From a legal perspective, the treaties represented recognition that millions of people were not protected by the ordinary laws of their states, and needed an international guarantor to ensure their basic rights.<sup>97</sup>

Early instruments of international law were developing on an ad hoc basis to protect dissidents and minorities.<sup>98</sup> After the Russian Revolution, more than one million people flooded into Europe between 1917 and 1921.<sup>99</sup> Some fled from famine and overall destruction of their communities, while others were persecuted by the Bolshevik regime.<sup>100</sup> Many of these Russians had their citizenship revoked, creating one of Europe's first major crises of statelessness.<sup>101</sup>

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92. *Id.* at 81.

93. On Minority Rights Treaties, see generally Berman, *supra* note 40. For discussion of these treaties in their historical context, see Mazower, *supra* note 11.

94. HATHAWAY, *supra* note 85, at 82.

95. *Id.* at 81.

96. *Id.* at 82–83.

97. See ARENDT, *supra* note 1, at 275.

98. Barnett, *supra* note 59, at 241.

99. As with most mass population movements, the number of people who fled Russia is contested. Hathaway puts the number at 1.5 million. HATHAWAY, *supra* note 23, at 350.

100. *Id.* at 350–51.

101. *Id.* at 351. Arendt referred to the minorities and the stateless as “cousins-germane” who were left “rightless” after World War I. See ARENDT, *supra* note 1, at 267–68. At that time, minorities and stateless alike were deprived of many of the benefits of citizenship. Many minorities were stateless, having had their citizenship revoked, and states refused to let many of them in. Many minorities and stateless could also be classified as refugees due to persecution. As discussed below, because of the overlap between these categories, the U.N. initially created a committee to draft international law on refugees and statelessness together. Eventually, two separate conventions were developed; the 1951 Convention Relating the Status of Refugees, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The latter focuses on preventing statelessness by requiring states to

The nascent League of Nations responded with the first multilateral international agreement designed to protect refugees. The post of High Commissioner for Russian Refugees was created in 1921 and given to Dr. Fridtjof Nansen. The position became personally identified with Nansen, a charismatic Norwegian statesman and Polar explorer of continental renown. His efforts succeeded in culminating The Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, which was recognized by fifty-four states.<sup>102</sup> As its name suggests, the agreement was largely concerned with providing identity papers and travel documents to stateless Russians, which became known as “Nansen passports.”<sup>103</sup> Greeks and Turks fleeing the vicious Greek-Turkish war added to these refugee numbers and were issued Nansen passports as well.<sup>104</sup> Nansen earned the 1922 Nobel Peace Prize for his efforts.<sup>105</sup>

#### *D. The Creation of Refugees as a Tool for State-Building*

States viewed refugee flows as both a problem to be resolved and a solution to some of Europe’s ailments. States used population transfer and exchange to create a better fit between nation and state.<sup>106</sup> As nationalism rose, states viewed population transfers as a means of state-building, a solution to refugee crises, and a way to prevent future interethnic conflict.<sup>107</sup> Even as such programs ostensibly aimed to protect minorities from violence, they often translated to brutal expulsions of people from their homes.<sup>108</sup> Population transfers were particularly used in post-Ottoman states, where people and minorities had previously been transferred within the Empire.<sup>109</sup> The benign-sounding term “population exchange” was first used to refer to a

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grant citizenship at birth, preventing them from withdrawing it, and preventing people from losing it in the event of territorial transfer. *See generally* U.N. HIGH COMM’R FOR REFUGEES, CONVENTION ON THE REDUCTION OF STATELESSNESS (2014), [http://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness\\_ENG.pdf](http://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf).

102. Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922, 355 L.N.T.S. 238.

103. MARK MAZOWER, DARK CONTINENT: EUROPE’S TWENTIETH CENTURY 63 (1998).

104. *Id.*

105. *Nobel Peace Prize 1922: Fridtjof Nansen*, NOBELPRIZE.ORG, [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/1922/nansen-facts.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/1922/nansen-facts.html) (last visited Nov. 4, 2016).

106. HADDAD, *supra* note 49, at 120.

107. *Id.*

108. UMUT ÖZSU, FORMALIZING DISPLACEMENT: INTERNATIONAL LAW AND POPULATION TRANSFERS 55 (2015).

109. *Id.* at 52–55.

small-scale transfer between Bulgaria and Turkey in 1913.<sup>110</sup> Another transfer occurred between Greece and Bulgaria in 1919 when 50,000 people were moved from Bulgaria to Greece and about 100,000 did the opposite.<sup>111</sup>

The best-known mass expulsion is the Greek-Turkish Population Exchange. The 1923 Convention Concerning the Exchange of Greek and Turkish Populations<sup>112</sup> was signed as part of the proceedings for the Treaty of Lausanne, which ended the Greek-Turkish War.<sup>113</sup> It provided for “a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslim [sic] religion established in Greek territory.”<sup>114</sup> The plan was controversial from the outset. At Lausanne, no individual would take responsibility for the idea of the population transfer.<sup>115</sup> Although the leaders of Turkey and Greece agreed that the populations could not live together,<sup>116</sup> they argued over the human cost. Nansen, who eventually implemented the Exchange on behalf of the League of Nations, argued that he was following orders from the great powers—Britain, France, Italy, and Japan—to protect religious minorities.<sup>117</sup> All of the drafters knew the exchange would cause massive human suffering, but believed it was in the long-term geopolitical interests of both states.<sup>118</sup>

The Exchange itself was better defined as a cruel, forced expulsion. Nearly two million Greeks and Turks were ousted into each other’s territory, most becoming refugees.<sup>119</sup> Vast suffering was undeniable, even if some localities succeeded in integrating their populations. The international community effectively condoned the creation of mass refugee flows of Greeks and Turks, perversely, to protect these minorities from persecution.<sup>120</sup> Such action was

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110. BRUCE CLARK, *TWICE A STRANGER: HOW MASS EXPULSION FORGED MODERN GREECE AND TURKEY* 53 (2006).

111. Yossi Katz, *Transfer of Population as a Solution to International Disputes: Population Exchanges Between Greece and Turkey as a Model for Plans to Solve the Jewish-Arab Dispute in Palestine During the 1930s*, 11 *POL. GEOGRAPHY* 55, 57 (1992); see also MAZOWER, *supra* note 103, at 51.

112. Convention Concerning the Exchange of Greek and Turkish Populations, Jan. 30, 1923, 32 *L.N.T.S.* 75.

113. HARRIS MYLONAS, *THE POLITICS OF NATION-BUILDING: MAKING CO-NATIONALS, REFUGEES, AND MINORITIES* 140–41 (2012).

114. Convention Concerning the Exchange of Greek and Turkish Populations, *supra* note 112, at 75; see EGGER, *supra* note 52, at 371.

115. See *supra* notes 112–13.

116. EGGER, *supra* note 52, at 71.

117. CLARK, *supra* note 110, at 44.

118. *Id.*

119. For a recent discussion of the population exchange, see MYLONAS, *supra* note 113.

120. See CLARK, *supra* note 110, at 44, 46.

ostensibly justified in the name of national homogeneity and preventing another world war.

*E. Continued League of Nations Attempts to Regulate Refugees*

At the League's request and upon Nansen's own initiative, his office's mandate expanded quickly to encompass other groups of refugees. In 1924, after the mass expulsion of Armenians from Turkey, thirty-five League states signed a treaty to grant Armenian refugees similar legal protections to those of Russian refugees.<sup>121</sup> Implementation problems quickly arose, due to considerable disagreement over definition of the terms "Russian refugees" and "Armenian refugees," which had been left vague.<sup>122</sup> By 1926, the League extended Nansen's mandate to encompass seven additional categories of refugees and stateless people in need of travel documents, primarily religious minorities.<sup>123</sup> In 1928, these protections were further expanded to include Kurds.<sup>124</sup> Nansen proposed to extend his mandate still further, to more than 125,000 people left displaced, stateless, or unable to return to their homelands after World War I, including 16,000 Jews to whom Romania refused to grant citizenship.<sup>125</sup> The League rejected these proposals as too expansive.<sup>126</sup> During this time, the League also drew a distinction between stateless people, displaced people, and refugees.<sup>127</sup> In doing so, the League signaled a willingness to protect only those who had fled their countries of origin, while tabling the problem of stateless and displaced people, especially Jews, to whom no country wished to grant citizenship.

Thus, in the interwar period, the protection of persecuted minorities and refugees, which were inextricable categories, increased in importance to the international community. The League's commitment to protecting dissidents

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121. Plan for the Issue of a Certificate of Identity to Armenian Refugees, May 31, 1924, 5 L.N.O.J. 969.

122. An intergovernmental conference was held in 1926 to define the terms, resulting in the Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 47. This document required that Russian and Armenian refugees prove that they lacked the "protection" of their states of origin and had not acquired any other nationality. Only twenty-eight states signed onto this new definition, and a successor treaty in 1928 left the terms again undefined. See Arrangement Relating to the Legal Status of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 53.

123. These included 150 Assyrians fleeing France, 19,000 Assyro-Chaldaeans fleeing the Middle East, and 150 Turkish dissidents living in Greece and the Middle East who were unable to return to their homeland. Hathaway, *supra* note 23, at 354–56.

124. *Id.* at 356–57.

125. *Id.* at 353–55.

126. *Id.* at 354–55.

127. See *id.* at 356–67.

from Russia and minorities from the former Ottoman Empire was strong. The League saw creating refugee flows and forced population displacement as part of a broader strategy to achieve homogeneity between nation and state, which was then viewed as the best way to protect human rights. But human suffering from the expulsions created a tremendous dark side to the lofty goals of peace and rights for all.

#### *F. Responses to the Nazi Rise*

The refugee situation in Europe began to change dramatically as a result of the territorial advances and political persecution wrought by the Nazi regime. The National Socialist Party declared in the early 1930s that:

None but the members of the nation may be citizens of the State. None but those of German blood, whatever their creed, may be members of the nation. No Jew, therefore, may be a member of the nation.<sup>128</sup>

Nazi policies quickly turned the ideals of the Minority Rights Treaties on their head. Germans comprised the largest minority group in Europe in the 1930s, a fact that is often forgotten.<sup>129</sup> Nazis began to use the existence of large German minorities in neighboring countries to justify territorial annexation to “protect” them.<sup>130</sup> Besides systematic policies designed to harass and extinguish non-Aryans, the Nazis also enacted brutal policies against political opponents.<sup>131</sup> Tens of thousands began to flee from Germany each year.<sup>132</sup>

#### *G. Early Protection Efforts by the League of Nations*

Faced with increasing numbers of refugees, the League of Nations recognized the need for stronger refugee protections. After Nansen’s sudden death in 1930, the League did not immediately replace him.<sup>133</sup> The League replaced the High Commissioner position with an International Office for

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128. THE WEIMAR REPUBLIC SOURCEBOOK 125 (Anton Kaes et al. eds., 1994).

129. Mazower, *supra* note 11, at 383.

130. *See id.* at 383–84.

131. JOHN SIMPSON, ROYAL INST. OF INT’L AFFAIRS, REFUGEES: PRELIMINARY REPORT OF A SURVEY 137–39 (1938).

132. Hathaway, *supra* note 23, at 362–63.

133. Shauna Labman, *Looking Back, Moving Forward: The History and Future of Refugee Protection*, 10 CHI.-KENT J. INT’L & COMP. L. 1, 6 (2010).

Refugees,<sup>134</sup> and convened an International Governmental Conference to draft the first International Refugee Convention in 1933.<sup>135</sup> The document was ratified by eight states: Belgium, Bulgaria, France, Czechoslovakia, Denmark, Great Britain, Italy, and Norway.<sup>136</sup> The document was applicable only to Russian, Armenian, and assimilated refugees, as defined by the deliberately imprecise refugee agreements of 1926 and 1928.<sup>137</sup> It was largely restricted to providing refugees with travel and identity documents.<sup>138</sup> Still, this early international refugee law was concerned with protecting particular ethnic and national groups, especially religious minorities, who were persecuted and fled their countries of origin and unable to return.

The Office of the High Commissioner quickly became consumed with protecting refugees from the Reich. In 1933, American James McDonald was appointed “High Commissioner for Refugees coming from Germany” (Jewish and Other).<sup>139</sup> MacDonalld resigned in 1935 in the face of widespread opposition by European states to his attempts to resettle Jewish refugees, stating that he was “virtually powerless” given the League’s refusal to intervene in Germany to stop their flight.<sup>140</sup>

MacDonalld’s successor, Sir Neill Malcom, arranged four narrow international agreements in response to Nazi territorial advances and persecution of minority groups.<sup>141</sup> Echoing earlier territorial definitions in the Russian and Armenian refugee arrangements, these treaties were confined to refugees from newly captured Nazi territory, such as the Saar and the Sudetenland.

Even as the Nazi terror worsened, states were unwilling to admit Jewish refugees. As such, they increasingly sought to keep the definition of protected

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134. *Id.*

135. Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199.

136. *Id.* at 199–217.

137. *Id.* at 203; *see also* Hathaway, *supra* note 23, at 357–59.

138. *See, e.g.*, Convention Relating to the International Status of Refugees, *supra* note 135, at 205 (“Each of the Contracting Parties undertakes to issue Nansen certificates, valid for not less than one year, to refugees residing regularly in its territory.”).

139. Labman, *supra* note 133, at 6–7.

140. JACQUES VERNANT, *THE REFUGEE IN THE POST-WAR WORLD* 25 (1953).

141. Additional Protocol to the Provisional Arrangement and to the Convention Concerning the Status of Refugees Coming from Germany, Sept. 14, 1939, 198 L.N.T.S. 141; Council Resolution on Refugees from the Sudetenland, Jan. 17, 1939, 20 L.N.O.J. 72; Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 192 L.N.T.S. 59; Provisional Arrangement Concerning the Status of Refugees Coming from Germany, July 4, 1936, 172 L.N.T.S. 75; Plan for the Issue of a Certificate of Identity to Refugees from the Saar, May, 24, 1935, 16 L.N.O.J. 1681; Labman, *supra* note 133, at 5–8.

persons under these agreements very narrow.<sup>142</sup> State signatories were adamant that German refugees and stateless people had to be outside German territory and to prove that they could not receive the protection of the German government.<sup>143</sup> Economic migrants were excluded, as were those moving for personal convenience.<sup>144</sup> In May 1938, following the Anschluss, the League of Nations extended the High Commissioner's mandate to include minority groups and dissidents fleeing Austria.<sup>145</sup> The High Commissioner succeeded in creating a new 1938 Convention Concerning the Status of Refugees Coming from Germany, to protect those with a bona fide fear of persecution.<sup>146</sup> However this document was signed by only three states: Belgium, Great Britain, and France.<sup>147</sup> The wider world was not willing to protect Jews and other victims of the Nazis.

Thus, the interwar years saw an increasing number of international agreements to protect refugees. These were narrow agreements that developed on an ad hoc basis, in response to particular political events, and usually on the basis of group protections. As the system of Minority Rights Treaties collapsed, concern with protecting religious and ethnic minorities and victims of political persecution remained at the core of each successive legal instrument. However, these treaties flatly failed to protect Jews from genocide.

#### *H. Refugee Protection Efforts Beyond Europe*

The plight of refugees—and the League of Nations' failure to protect them—began to attract attention outside Europe. By 1938, 150,000 German Jews, or one in four, had fled the country.<sup>148</sup> The Anschluss in 1938 brought another 185,000 Jews under German control.<sup>149</sup> The United States, which was not a member of the League of Nations, called its own conference at Evian in 1938 with the stated goal of coordinating support for Jews who had fled or

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142. See Hathaway, *supra* note 23, at 363–66.

143. *Id.*

144. *Id.*

145. Roughly fifteen thousand German-speaking refugees forced to leave the Sudetenland but who could not repatriate to Germany were also assisted by the High Commissioner. *Id.* at 366.

146. Labman, *supra* note 133, at 7 n.35.

147. *Id.*

148. *The Evian Conference*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007698> (last visited Nov. 4, 2016).

149. VERNANT, *supra* note 140, at 106.



wished to flee Germany.<sup>150</sup> Franklin Roosevelt, under intense pressure to assist refugees, wished to use the conference to deflect domestic and international criticism.<sup>151</sup>

The Evian Conference was a failure. Thirty-two countries attended, along with a representative from the High Commissioner's office, non-governmental groups, and non-governmental organizations (NGO) representing Jewish organizations from nearly every country in Europe.<sup>152</sup> Roosevelt refused to send the Secretary of State or another high-level official to the conference, reflecting his ambivalence toward the issue.<sup>153</sup> At the conference, the U.S. representative announced that it would make its quota of 19,000 German and Austrian refugees available to Jews, but claimed that it was not in position to take more Jews due to economic pressure and unemployment as the country recovered from the Great Depression.<sup>154</sup> Other countries gave similar excuses.<sup>155</sup> Only the Dominican Republic agreed to take 100,000 Jewish refugees in exchange for substantial sums of money.<sup>156</sup>

The Nazis were emboldened by other countries' unwillingness to accept Jewish refugees at the conference. On November 9, 1938, the Nazis launched an assault against Jewish communities within their control that became known as *Kristallnacht*, the night of broken glass.<sup>157</sup> Thirty thousand Jews were arrested and sent to concentration camps.<sup>158</sup> Jewish-owned buildings were ransacked and destroyed.<sup>159</sup> More than 1,000 synagogues<sup>160</sup> and 7,000 Jewish businesses were destroyed or damaged.<sup>161</sup> Germany ultimately unleashed the "Final Solution" to exterminate the Jews entirely. Perversely,

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150. RICHARD BREITMAN, *FDR AND THE JEWS* 106 (2013); *The Evian Conference*, *supra* note 148.

151. *The Evian Conference*, *supra* note 148.

152. *Id.*

153. *Id.*

154. *Id.*

155. BREITMAN, *supra* note 150, at 109.

156. *Id.* at 109, 130–31.

157. *Id.* at 113–14.

158. *Id.* at 114.

159. *Id.*

160. *Id.*

161. *Kristallnacht*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005201> (last updated July 2, 2016).

the High Commissioner's office received the Nobel Peace Prize again in 1938 for its efforts to assist German refugees.<sup>162</sup>

The one positive outcome of Evian was the creation of the Intergovernmental Committee on Refugees to aid Jewish resettlement from Germany.<sup>163</sup> The Committee became the first international body to recognize that people still living in their countries of origin might qualify as refugees because they would be forced to immigrate.<sup>164</sup> Its original mandate included racial, religious, and ethnic minorities and political dissidents still living in Germany and Austria as well as those who had already left but had not yet received permanent legal protections elsewhere.<sup>165</sup> In 1943, the mandate was expanded to include people "who, as a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs."<sup>166</sup> It was updated again in 1946 to include people who were "unwilling or unable to return to their country of nationality or of former habitual residence."<sup>167</sup> This language foreshadowed the definition of refugee that would eventually be entrenched in the 1951 Convention.

### I. *Post-World War II Attempts at Protection*

After World War II, as word of Nazi atrocities spread to a horrified world, minority groups were found scattered across Europe.<sup>168</sup> Jews and others "liberated" from concentration camps were often forced to remain there, for lack of anywhere else to turn.<sup>169</sup> Without access to whatever remained of their property and resources, many were forced to wear either their old concentration camp uniforms or SS garb taken from defeated soldiers.<sup>170</sup> As

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162. *Nobel Peace Prize 1938: Nansen International Office for Refugees*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1938/nansen-facts.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1938/nansen-facts.html) (last visited Nov. 4, 2016).

163. See VERNANT, *supra* note 140, at 26–27.

164. Hathaway, *supra* note 23, at 371.

165. *Id.*

166. *Id.*

167. *Id.* This expansion allowed for refugees from the Sudetenland and Spanish Republicans to be included in the Committee's mandate.

168. Lisa H. Malkki, *Refugees and Exile: From "Refugee Studies" to the National Order of Things*, 24 ANN. REV. ANTHROPOLOGY 495, 499 (1995).

169. *Id.*

170. JAY HOWARD GELLER, *JEWS IN POST-HOLOCAUST GERMANY, 1945–1953*, at 24 (2005).

one observer put it, it was unclear which of the two wardrobe choices they hated more.<sup>171</sup>

Exact numbers of those displaced vary widely.<sup>172</sup> In 1939, President Franklin Roosevelt estimated that twenty million would be displaced by the war's end; in April 1945, Hannah Arendt placed the number at up to forty million.<sup>173</sup> At the end of the war, approximately eight million civilians in Germany qualified as displaced persons under U.N. and Allied military directives.<sup>174</sup> Six to seven million of them were forcibly returned to their countries of origin in 1945.<sup>175</sup> Approximately 1.2 million others would not or could not return home.<sup>176</sup> Regardless of the actual numbers, the existence of tens of millions of displaced persons throughout Europe could hardly be ignored.

While it is commonly thought that European displacement was primarily a Jewish problem, millions of others were displaced.<sup>177</sup> Jewish refugees comprised fewer than ten percent of those registered by the U.N. or Allies by early 1946.<sup>178</sup> Hundreds of thousands fled to Palestine, remaining stateless until the founding of Israel in 1948.<sup>179</sup> Millions more Jews and non-Jews were stranded amid the ruins of Europe, struggling to recoup their basic human dignity.<sup>180</sup>

Moreover, displaced persons registered by the U.N. and Allies represented only a small fraction of Europe's total displaced population.<sup>181</sup> Nine to twelve million ethnic Germans were expelled from East-Central Europe at the war's end, with several hundred thousand dying in the process.<sup>182</sup> Other large

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171. Cf. MICHAEL J. PROUDFOOT, *EUROPEAN REFUGEES: 1939–52: A STUDY IN FORCED POPULATION MOVEMENT 175–76* (1956). Referring to the workers liberated from camps and farms who were roaming the countryside in Germany and Eastern Europe after the end of World War II, Proudfoot states, “after years of forced labour, these people *had developed a profound hatred for all things German*, and a desire for revenge . . . [D]isplaced persons developed the attitude that any German's possessions that might be useful . . . was theirs to take”). *Id.* (emphasis added).

172. See Hannah Arendt, *The Stateless People*, 8 CONTEMP. JEWISH REC. 137, 141 (1945); *Long Range Plan for Refugee Care*, N.Y. TIMES, Oct. 18, 1939, at 17.

173. See Arendt, *supra* note 172; *Long Range Plan for Refugee Care*, *supra* note 172.

174. GERARD D. COHEN, IN WAR'S WAKE: EUROPE'S DISPLACED PERSONS IN THE POSTWAR ORDER 5 (2011).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 6.

179. *Id.* at 15.

180. *Id.* at 5–6.

181. *Id.* at 6.

182. *Id.*

populations included 250,000 ethnic Italians forced from Istria and Dalmatia; 520,000 ethnic Ukrainians, Belarusians, and Lithuanians transferred from Poland by the end of 1946, and 1.5 million ethnic Poles expelled from Soviet Ukraine, Belarus, and Lithuania by 1948.<sup>183</sup>

The League of Nations' failure to prevent the Second World War quickly discredited the organization and its related offices.<sup>184</sup> The international community, recognizing the great need to provide legal protections to displaced people within Europe, created a new organization to succeed the High Commissioner's office.<sup>185</sup> The United Nations Relief and Rehabilitation Administration (UNRRA) was established in 1943, even before the War ended, and before formal establishment of the U.N. itself.<sup>186</sup> UNRRA had the narrow mandate of repatriating displaced people to their home countries, while refugees who were unable to return home were referred to the Intergovernmental Committee.<sup>187</sup> As the Cold War began, many Eastern Europeans refused to repatriate, and UNRRA refused to force them.<sup>188</sup> Thousands, if not millions, remained trapped in camps.<sup>189</sup>

### *J. The International Refugee Organization*

It was imperative for the fledgling United Nations to make displaced people an early priority.<sup>190</sup> No organization with a mandate to preserve international peace and security and encourage respect for human rights could do otherwise and maintain legitimacy.<sup>191</sup>

Faced with unprecedented population displacement, the international community needed to redefine the term "refugee" for the new world order.<sup>192</sup> In 1946, the U.N. General Assembly resolved to replace the prior refugee

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183. *Id.* at 6–7.

184. RUTH HENIG, *MAKERS OF THE MODERN WORLD: LEAGUE OF NATIONS* 173 (2010).

185. Hathaway, *supra* note 23, at 372.

186. *Id.*

187. *Id.*

188. CORINNE LEWIS, *UNHCR AND INTERNATIONAL REFUGEE LAW: FROM TREATIES TO INNOVATION* 43–44 (2012).

189. *Id.*

190. Hathaway, *supra* note 23, at 373–74.

191. Hathaway, *supra* note 23, at 378.

192. G.A. Res. 8 (I), at 12 (Feb. 12, 1946). The General Assembly recommended the creation of a special Committee to define refugee "recognizing that the problem of refugees and displaced persons . . . is one of immediate urgency and recognizing the necessity of clearly distinguishing between genuine refugees and displaced persons . . . and the war criminals." *Id.*

agreements with a more comprehensive document.<sup>193</sup> In the interim, among the U.N.'s early acts was to establish the International Refugee Organization (IRO) as a temporary agency in April 1946.<sup>194</sup> By 1947, the IRO had assumed the responsibilities of the Intergovernmental Committee and UNRRA, making its definition the only international legal definition of "refugee."<sup>195</sup>

With the creation of the IRO, the U.N. decided to handle the refugee problem holistically, and to define refugee in the most detailed terms yet.<sup>196</sup> The IRO was charged with assisting any person:

who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.<sup>197</sup>

The IRO would assist four additional groups of people: 1) those considered refugees before World War II for reasons of race, religion, nationality or political opinion, 2) victims of the Nazis or their allies, 3) victims of the Spanish Falangists, and 4) Jews, foreigners, or stateless persons who had resided in Germany or Austria, were victims of Nazi persecution, and who had been detained in or returned to one of those countries and not yet resettled.<sup>198</sup> Excepting those in groups two and four, people would only become of concern to the organization if they could be repatriated or had "valid objections" to returning to their countries of nationality or former habitual residence.<sup>199</sup> The chief ground for having a valid objection was persecution or fear of it, thus ensconcing the link between persecution and refugee status in international law.<sup>200</sup>

The IRO soon became known as "the largest travel agency" and "mass transportation system in the world."<sup>201</sup> After sorting out imposters, the IRO would assist "genuine" refugees and displaced persons "to return to their countries of nationality or former habitual residence, or to find new homes

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193. *Id.*

194. Hathaway, *supra* note 23, at 374.

195. *Id.* at 376.

196. Paul Weiss, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193, 210–11 (1954) (citing G.A. Res. 62 (I) (Dec. 15, 1946)).

197. IRO CONST. Annex I, pt. 1, § A(2).

198. *Id.* Annex 1, pt. 1, § A(1)(a)–(c), (3).

199. *Id.* Annex 1, pt. 1, § C(1).

200. *Id.* Annex 1, pt. 1, § C(1)(a)(i)–(iii).

201. COHEN, *supra* note 174, at 32.

elsewhere.”<sup>202</sup> The IRO would also provide “legal and political protection” for refugees, terms that were left intentionally vague.<sup>203</sup> The IRO established international agreements to secure travel documents and legal protections for refugees.<sup>204</sup> The IRO eventually had an annual budget four times that of the United Nations, 40% of which was provided by the United States.<sup>205</sup> It resettled nearly one million refugees between 1947 and 1951.<sup>206</sup>

The staff of the IRO also tackled its mission with the zeal that comes with the desire to serve a higher purpose. Paul Weiss, among other IRO spokesmen, believed that their mission lay beyond protecting refugees and instead would “enforce a new standard of international conduct” linked to the emerging human rights regime.<sup>207</sup> Indeed, the IRO’s advocacy succeeded in including individual rights for refugees and stateless persons in the 1948 Universal Declaration of Human Rights and other international instruments.<sup>208</sup> The IROs humanitarian relief work also influenced how refugee assistance would be perceived in the future.<sup>209</sup> By 1945, the displaced person camps had evolved into “an alternative welfare state for the stateless.”<sup>210</sup> IRO assistance evolved to include “food, clothes, and housing . . . child welfare, healthcare, recreational and artistic activities, sport, education, language, and vocational training, as well as employment counseling.”<sup>211</sup> Although many today would view this activity as humanitarian assistance, IRO staff viewed it as part of their human rights-based mission, important to restoring the dignity of the refugee before they could restore his citizenship.<sup>212</sup>

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202. IRO CONST. pmb., ¶ 3.

203. Weiss, *supra* note 196, at 211.

204. LEWIS, *supra* note 188, at 10.

205. IRO CONST. Annex II, § 2(A)–(B).

206. Labman, *supra* note 133 at 9. Of these, 239,000 were resettled in the United States, 182,000 in Australia, 132,000 in Israel, 123,000 in Canada, and 170,000 in Europe. *Id.*

207. Paul Weiss, *Future of Elan’s Freedom: How IRO Will Enforce a New Standard of International Conduct*, 6 WIENER LIBR. BULL. 6, 6–8 (1948) (cited in COHEN, *supra* note 174, at 96).

208. See COHEN, *supra* note 174, at 97.

209. *Id.* at 66.

210. *Id.*

211. *Id.*

212. See *id.*

*K. A Permanent Problem*

Up until this time, the U.N. had considered refugee issues to be temporary.<sup>213</sup> Accordingly, its refugee assistance organizations had mandates designed to last only a few years.<sup>214</sup> But by the early 1950s, two to three million refugees had already been assisted by international organizations, with no end in sight.<sup>215</sup> Despite the continuing clarification of the refugee definition and consolidation of previous refugee regimes within the IRO, the organization was unable to solve the refugee problem as the international community had hoped.<sup>216</sup> The IRO itself estimated that by the time its mandate expired in June 1950, 292,000 displaced persons in Europe would remain whom they had been mandated to protect.<sup>217</sup> The IRO has the mandate to assist only about a quarter of the total displaced population.<sup>218</sup> As forced population transfers continued after the war, the IRO was not authorized to assist the millions who had been expelled.<sup>219</sup>

Refugees became an issue of international concern, particularly in the United States. By 1950, *The New York Times* was frequently running featured articles about the plight of the European displaced.<sup>220</sup> The newspaper estimated that ten million were displaced in Europe by 1950, due to the war and subsequent fighting and persecution.<sup>221</sup> Meanwhile, millions more had been displaced outside of Europe, by the Korean War, the bloody birth of

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213. Weiss, *supra* note 196, at 208.

214. *Id.*

215. *Id.*

216. LEWIS, *supra* note 188, at 80.

217. *Id.*

218. *Id.* at 93.

219. *Id.*

220. See, e.g., Michael L. Hoffman, *Central Europe's Refugees Still a Problem of the Age: Some of the Refugees in Europe Seeking New Homes*, N.Y. TIMES, Jul. 20, 1950, at 1 [hereinafter Hoffman, *Central Europe's Refugees*]; Michael L. Hoffman, *Refugee Pressure Appears Renewed: Western Europe Receives Again Hundreds Earlier Thought Settled by the I.R.O.*, N.Y. TIMES, Jul. 22, 1950, at L10; C.L. Sulzberger, *Refugee Epidemics Feared by Karachi: International Help Said to be Urgently Needed for Eight Million Who Fled India*, N.Y. TIMES, Apr. 11, 1950, at L9; *After I.R.O. – What?*, N.Y. TIMES, Jul. 26, 1950, at L24; *Care of Refugees Shifted*, N.Y. TIMES, Apr. 30, 1950, at L3; *I.R.O. Offers to Aid Korean Fugitives*, N.Y. TIMES, Aug. 5, 1950, at L7; *Refugee Problem Far from Solved: U.N. Commissioner Proposes to Set up 11 Field Offices in Lands Hardest Hit*, N.Y. TIMES, Jul. 16, 1951, at L10; *Vatican Aide Sees Long D.P. Problem: Holds Refugees Will Need Help Long After Scheduled End of the I.R.O. in 1951*, N.Y. TIMES, Mar. 22, 1950, at L22.

221. The New York Times estimated the number at eight to ten million as of 1950. Hoffman, *Central Europe's Refugees*, *supra* note 220.

Pakistan and Bangladesh, and conflicts elsewhere.<sup>222</sup> In July 1950, *The New York Times* editorial page beseeched the world to act:

the dreadful fact remains that several million uprooted human beings still exist in Europe without homes and even, in all too many cases, without hope

. . . .

. . . the refugee problem cannot simply be ignored. In political, economic, and above all, in human terms, it still demands the attention of the civilized world.<sup>223</sup>

The need for a permanent, binding instrument to protect refugees had become clear.

### 1. Power Politics Intervene

Power politics quickly affected the IRO's operations. While the entire international community agreed that minorities should be protected, the idea that political dissidents should be protected as refugees was sharply contested.<sup>224</sup> At the behest of the Western bloc, the IRO went further than previous definitions of "refugee" by extending protection to political dissidents.<sup>225</sup> Both the Soviet bloc and France strenuously objected to this expansion of the term.<sup>226</sup> The French delegate to the U.N., backed by the Soviet delegate, vehemently argued that political refugees should be the responsibility of those countries that chose to grant them asylum.<sup>227</sup> When the Western bloc prevailed in including political dissidents, the Soviets refused to participate in the IRO from its outset.<sup>228</sup>

The Soviets quickly moved to stall the IRO.<sup>229</sup> The developing Cold War meant that the Eastern Bloc was unwilling to allow an organization largely funded by the West to operate freely.<sup>230</sup> The IRO could only operate in those areas controlled by Western armies. In light of the developing Eastern Bloc,

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222. On Bangladesh, see GARY J. BASS, *THE BLOOD TELEGRAM* (2013).

223. *After I.R.O. – What?*, *supra* note 220, at L24.

224. Hathaway, *supra* note 23, at 378.

225. *Id.*

226. *Id.*

227. *Id.*

228. See Kristen Walker, *Defending the 1951 Convention Definition of Refugee*, 17 *GEO. IMMIGR. L.J.* 583, 589 (2003).

229. *See id.* at 591.

230. *Id.* at 589.



many refugees from the Soviet Union and Eastern Europe refused to return, and the West hardly encouraged them to do so.<sup>231</sup> In contentious debates in the General Assembly and elsewhere, the Soviets accused the West of forcibly preventing displaced Easterners from returning home and using them for forced labor.<sup>232</sup> While the United States argued for expansion of the term “refugee” on the basis that individuals had the right to seek “personal freedom” through migration, the Eastern bloc argued that it was wrong to “indirectly saddle democratic governments with liability for the maintenance of their emigrated enemies.”<sup>233</sup> The Soviets called for forced repatriation rather than supporting those who chose to remain in camps.<sup>234</sup> The Soviets also called out Western hypocrisy, noting that Africans fleeing wars of independence from their colonial masters represented “true” refugees, while the IRO remained focused on serving Western and European interests.<sup>235</sup>

Western interests did, indeed, affect the scope of whom the IRO would protect. The IRO did not assist Palestinian, Korean, or South Asian refugees.<sup>236</sup> The birth of the State of Israel in 1948 offered a partial solution to the refugee crisis in Europe while creating a new one in the Middle East. Hundreds of thousands of Palestinians became refugees in neighboring Arab states.<sup>237</sup> Existing U.N. agencies had their mandates restricted to Europe, so the U.N. created another new agency to assist displaced Palestinians, the United Nations Relief and Works Agency, or UNRWA.<sup>238</sup> The U.N. expected UNRWA to be temporary, lasting only a few years until the Palestinian refugee problem was resolved.<sup>239</sup> Its mandate and programs, and the refugee camps it administers, continue to this day.<sup>240</sup> A similar organization was set up to assist Korean refugees by late 1950, the U.N. Korean Reconstruction

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231. See LEWIS, *supra* note 188, at 114.

232. See Walker, *supra* note 228, at 591.

233. U.N. GENERAL ASSEMBLY, DOCUMENTS OFFICIELS DE LA SESSION DE L'ASSEMBLEE GENERALE 416 (1946)

234. COHEN, *supra* note 174, at 21.

235. *Id.*

236. See GIL LOESCHER, UNHCR AND WORLD POLITICS: A PERILOUS PATH 57 (2001).

237. *Id.* at 56.

238. When the 1951 Convention was drafted, Arab governments also lobbied for Palestinians to be excluded, fearing that their inclusion would deflect international attention from solving the Palestinian problem. ALEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 26–27 (1998); Irial Glynn, *The Genesis and Development of Article 1 of the 1951 Refugee Convention*, 25 J. REFUGEE STUD. 134, 140 (2011).

239. See generally LOESCHER, *supra* note 236, at 63.

240. See U.N. RELIEF & WORK AGENCY, <http://www.unrwa.org> (last visited Nov. 5, 2016).

Agency (UNKRA).<sup>241</sup> Both organizations were primarily funded by the United States and thus largely under U.S. control.<sup>242</sup>

Because they were protected by other U.N. agencies, Palestinians and Koreans were excluded from the definition of “refugee” that was eventually adopted in the 1951 Convention.<sup>243</sup> The millions displaced by independence movements in South Asia in 1947 were left completely unprotected by international law. Loescher and Glynn have noted that Western interests shaped who received protection and who did not.<sup>244</sup> Both the Palestinians and Koreans were given Agencies that “contributed to the United States goal of stabilizing areas deemed under threat of Communism,” and the Palestinian agency supported United States goals in protecting its nascent Israeli ally.<sup>245</sup> Meanwhile Indians and Pakistanis displaced in 1947 were not covered by another U.N. Agency or the 1951 Convention since they were outside the scope of United States and Western interests.<sup>246</sup>

## 2. Legalization of Human Rights and Refugee Rights

While U.N. Agencies worked to protect refugees, the U.N. General Assembly was otherwise occupied with the Convention on the Prevention and Punishment of the Crime of Genocide. The Genocide Convention was adopted by the U.N. General Assembly on December 9, 1948, and entered into force on January 12, 1951.<sup>247</sup> The Genocide Convention represented the culmination of years of tireless campaigning by lawyer Raphael Lemkin, who relentlessly visited states to ensure support for it outside of ordinary General Assembly channels.<sup>248</sup> Jacob Robinson and Louis Henkin, who were

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241. LOESCHER, *supra* note 236.

242. *Id.* at 57, 64.

243. *Id.* at 57.

244. *See id.*; Glynn, *supra* note 238.

245. Glynn, *supra* note 238.

246. LOESCHER, *supra* note 236.

247. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

248. Lemkin’s battle is discussed at length in SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 47–60 (2002). More recent work by historians has suggested that the Genocide Convention as a project relating to international criminalization of genocide than a project of international human rights law. However, this work suggests that Lemkin was primarily concerned with human rights projects such as the UDHR interfering with his efforts to establish the Genocide Convention. Moreover, others whom he recruited to his cause saw the Genocide Convention as a companion to other human rights efforts. *See generally* Mira Siegelberg, *Unofficial Men, Efficient Civil Servants, Raphael Lemkin in the History of International Law*, 15 J. GENOCIDE RES. 297 (2013).

concurrently involved in drafting the 1951 Convention, assisted Lemkin in his efforts.<sup>249</sup> The Genocide Convention prohibited systematic state actions “committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”<sup>250</sup>

Although scholarly debate exists as to whether the Genocide Convention was designed as a human rights instrument or an instrument of criminal law, it undoubtedly represented a critical step toward creating binding international law to protect minority rights.<sup>251</sup> Naming and defining the crime made the term available and accessible to politicians, government officials, journalists, and activists who could use it to shame perpetrators, and eventually, to prosecute them. It was against the backdrop of Lemkin’s work that the U.N. began to proscribe other categories of human rights violations, including the expulsion of persecuted people based on the very same group of categories. It is no coincidence that international refugee law ranked high on the agenda of a fledgling U.N. determined to rectify the mistakes of the League of Nations and prevent another world war.

The plight of refugees and displaced people, however, was conceived as a human rights issue from the start. In the late 1940s, prominent jurists viewed the legal and political consequences of the displaced people crisis to have a profound impact on the nascent human rights project.<sup>252</sup> The French jurist Roger Nation-Chapotot, for example, said that international protection of displaced persons tested global commitment to “the exercise of man’s free will.”<sup>253</sup> Refugees were seen not merely as stateless people deprived of citizenship, but victims of violations of their individual human rights. As Hannah Arendt argued, the “rightlessness” of the refugees and the stateless was a curse upon Europe as well as upon these deprived individuals.<sup>254</sup> Nations were, for the first time, unable to ignore the displaced persons crisis. As she wrote:

The problem of statelessness on so large a scale had the effect of confronting the nations of the world with an inescapable and perplexing question: whether or not there really exist such “human

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249. Gilad Ben-Nun, *The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention*, 27 J. REFUGEE STUD. 101, 102 (2014).

250. Genocide Convention, *supra* note 247.

251. See generally Siegelberg, *supra* note 248 (questioning whether the Genocide Convention was conceived as a human rights instrument).

252. COHEN, *supra* note 174, at 83.

253. *Id.*

254. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 295 (1951).

rights” independent of all specific political status and deriving solely from the fact of being human?<sup>255</sup>

Despite Arendt’s well-known and impassioned cry, most displaced persons were not, in fact, stateless.<sup>256</sup> But the two categories did overlap and most certainly entailed a deprivation of rights. For Arendt, the existence of refugees and stateless people meant that humans did not really have “the right to have rights.”<sup>257</sup> Their existence, then, called into question the very idea of whether human rights, independent of the state, existed at all.

For many intellectuals, elites, and policymakers, the problem of refugees, stateless, and displaced people constituted the human rights issue par excellence that would challenge and shape the entire emerging human rights regime. The right to seek and enjoy asylum was included in the declaratory Universal Declaration of Human Rights, for the first time conceptualizing asylum as an individual right that was multilaterally recognized, even if not legally binding.<sup>258</sup> Indeed, the Refugee Convention and the Genocide Convention were the first two documents to give binding legal force to the rights that were merely declared in the Universal Declaration of Human Rights.<sup>259</sup> International lawyers celebrated the passage of the Refugee Convention as a watershed moment for the recognition of individuals—and individual rights—as a subject of international law.<sup>260</sup>

### 3. The U.N. Tries Again

The U.N. recognized that its prior efforts to assist refugees were insufficient. In 1946, the U.N. General Assembly resolved to replace the prior refugee agreements with a more comprehensive document.<sup>261</sup> Three years later, in 1949, the U.N. finally began to act. The U.N. Economic and Social Council (EcoSoc) authorized the creation of an Ad Hoc Committee on Statelessness and Related Problems.<sup>262</sup> This committee was tasked to answer

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255. Hannah Arendt, “*The Rights of Man*” *What Are They?*, 3 MOD. L. REV. 24, 25 (1949). Arendt’s own conception of exactly how the rights of refugees, stateless, and displaced people related to human rights was quite complex and skeptical. She placed little faith in the politics of human rights to improve the plight of these groups, even as she viewed their situation as a human rights issue. See, e.g., COHEN, *supra* note 174, at 85.

256. COHEN, *supra* note 174, at 84.

257. *Id.*

258. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

259. COHEN, *supra* note 174, at 84.

260. *Id.* at 94–95.

261. G.A. Res. 8 (I), at 12 (Feb. 12, 1946).

262. U.N. ESCOR 248/B (XI) (Aug. 8, 1949).

the question of whether it was desirable to draft a new convention to provide more permanent protection to refugees and stateless people, and if so, to draft it.<sup>263</sup>

Later that year, the U.N. also began to design a unique agency to supervise whatever Convention states would develop.<sup>264</sup> EcoSoc asked the Secretary General to plan for a new organization to assist refugees, and to give it a new, broader mandate.<sup>265</sup> In December 1949, the General Assembly resolved to create the United Nations High Commissioner for Refugees (UNHCR).<sup>266</sup> The Resolution authorized the agency to operate for three years starting in January 1951, reflecting states' disagreement over the political implications of creating a permanent refugee agency.<sup>267</sup>

#### 4. International Legalization: The 1951 Convention Relating to the Status of Refugees

The 1951 Convention was drafted for refugees, by refugees. Before the Ad Hoc Committee on Statelessness met for the first time, three men in the legal office of the IRO prepared a template of the Convention.<sup>268</sup> Foremost among them was IRO legal adviser Paul Weis.<sup>269</sup> Weis made the protection of refugees and stateless people his life's work after experiencing their plight himself. Born in Austria, Weis was imprisoned in Dachau following the Anschluss.<sup>270</sup> After several months, he was released, only to be detained as an enemy alien in Britain.<sup>271</sup> Following his release to London, he joined the Grotius Society, an organization that incubated many of the international civil servants who later became the framers of post-World War II international law.<sup>272</sup>

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263. *Id.*; see also Kälin et al., *supra* note 28; Leslie Chance, *New Convention, Protocol Drafted*, 8 U.N. BULL. 231, Mar. 1950, at 231–33.

264. On administrative functions of UNHCR, see generally Goldenziel, *supra* note 25, at 455–57.

265. LEWIS, *supra* note 188, at 49.

266. G.A. Res. 428 (V), Statute of the Office of the United Nations High Commissioner, at 46 (Dec. 3, 1949); see REFUGEE PROTECTION, *supra* note 22, at 13.

267. *Id.*

268. Glynn, *supra* note 238, at 135.

269. *Id.*

270. Sarah J. A. Flynn, *The Weis Archive and Library Collection at the Refugee Studies Programme*, 9 J. REFUGEE STUD. 89, 89 (1996).

271. *Id.* at 89–90.

272. *Id.* at 90.

Weis worked for the World Jewish Congress during the war and, in 1947, became a legal adviser to the International Refugee Organization.<sup>273</sup> He received his doctorate in international law from the London School of Economics in 1954.<sup>274</sup> He later joined UNHCR as a legal adviser, a position he retained until his retirement in 1967, after which he continued to advise the organization until his death.<sup>275</sup> He was the chief architect of the 1961 Convention on Statelessness and Related Problems, and he authored seminal documents on the protection of refugees and stateless people well until his later years.<sup>276</sup> Weis's writings, and his commentary on the travaux préparatoires of the 1951 Convention, form much of what we know about the framing of international refugee law.

Besides Weis, many other delegates to the Ad Hoc Committee had long careers devoted to human rights, and knew each other from their prior work. The other two drafters from the IRO office were Gustave Kullman and Jacques Rubenstein.<sup>277</sup> Kullman, a Swiss legal expert, served as Deputy High Commissioner for Refugees in the League of Nations during World War II.<sup>278</sup> After Rubenstein escaped the Bolshevik Revolution, he assisted in penning the 1928 Arrangement on Russian Refugees and the 1933 Refugee Convention, and lobbying internationally for both of them.<sup>279</sup> The UK Representative, Samuel Hoare, had been Deputy High Commissioner under Nansen.<sup>280</sup> Jacob Robinson, the Israeli Representative and his brother Nehemiah Robinson, the Representative from the World Jewish Congress, had been Weis's mentors at the WJC.<sup>281</sup> Jacob Robinson served as Senior Legal Adviser to the prosecution team at Nuremberg, under U.S. Chief Counsel (and later Supreme Court Justice) Robert Jackson.<sup>282</sup> Later, he worked for the U.N. on the drafting of the Human Rights Commission's Legal Framework and Genocide Convention.<sup>283</sup> Louis Henkin served as the U.S. delegate from his post in the State Department's U.N. Division.<sup>284</sup>

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273. *Id.*

274. *Id.*

275. *Id.*

276. *See generally* Paul Weis, *Development of Refugee Law*, 3 MICH. Y.B. INT'L LEGAL STUD. 27 (1982).

277. Glynn, *supra* note 238, at 135–36.

278. *Id.*

279. *Id.* at 135.

280. Ben-Nun, *supra* note 249, at 107.

281. *Id.*

282. *Id.* at 105.

283. *Id.* at 106.

284. *Id.*

Henkin and Robinson, too, had been working on draft Conventions for more than two years before the time of the first meeting of the Ad Hoc Committee.<sup>285</sup>

Concern for protecting human rights motivated the drafters of the 1951 Convention in both the IRO and the Ad Hoc Committee on Statelessness and Related Problems. In Weis's words, the goal of the drafters was to "place refugees on equal footing with the citizens of the countries of refuge, in conformity with the principle of non-discrimination set forth in the Universal Declaration of Human Rights."<sup>286</sup> To this end, the drafters included a specific reference to Article 14 of the UDHR, the right to seek and enjoy asylum in other countries, in the Convention's preamble.<sup>287</sup> Weis acknowledged, however, that this was an unattainable goal in many ways. He noted that even in countries with "very liberal reception polic[ies]," it was clearly not possible to give refugees the same treatment as nationals, and no country would truly act in this way.<sup>288</sup>

The human rights lawyers were faced with a challenge. Their goal was to create a draft that would appeal to as many states as possible and that would include all categories that might eventually fall under the High Commissioner's mandate. The IRO draft convention included a right to asylum, as did the Universal Declaration of Human Rights, in addition to refugee protections.<sup>289</sup> Despite its creation of a potentially far-reaching international legal right, Kullman believed that the draft was "'realistic' in the sense that it aims at not going beyond what can reasonably be demanded of a liberal democratic state."<sup>290</sup>

## 5. Politics and Human Rights Collide

Despite the best intentions of these men, politics quickly began to overshadow concerns with human rights. Against the backdrop of rising Cold War tensions, dialogue over the Convention soon devolved into the rhetoric of the Eastern and Western blocs. The initial Ad Hoc Committee comprised delegations from thirteen states: Belgium, Brazil, Canada, China (Taiwan), Denmark, Israel, Poland, Turkey, Soviet Union, the United Kingdom, United

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285. *Id.* at 119.

286. PAUL WEIS, *THE REFUGEE CONVENTION: TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY* 15 (2004).

287. *Id.* at 30.

288. *Id.* at 15.

289. *Id.* at 14.

290. Glynn, *supra* note 238, at 136.

States and Venezuela.<sup>291</sup> NGOs and representatives of specialized U.N. agencies also participated in the drafting process.<sup>292</sup>

From the meeting's start, politics once again began to crowd out human rights. A threshold challenge faced the Committee. As its Chairman, Leslie Chance of Canada explained, "There are refugees who are stateless—there are refugees who are not stateless—there are many, many stateless who cannot possible [sic] be regarded as refugees."<sup>293</sup> The delegates clashed over the issue of whether stateless people should be included in the Convention.<sup>294</sup> The U.K. and Belgium supported an inclusive document that would include both refugees and stateless people.<sup>295</sup> The United States strenuously argued that the rights of refugees were more pressing.<sup>296</sup> The United States argued that refugees presented a bigger, more urgent, and distinct problem of humanitarian needs.<sup>297</sup> The Committee also noted that the IRO's work was soon to end, and that UNHCR was soon to be up and running.<sup>298</sup> They knew it would be important to have a new convention up and running by the time the High Commissioner began his role.<sup>299</sup>

The Soviets opposed protecting refugees at all.<sup>300</sup> They feared that the West would use the Convention against them politically. The Soviet Union wanted to quell protests from those whose citizenship it had revoked following the Bolshevik Revolution.<sup>301</sup> It balked at the United States' characterization of refugees as a more pressing problem. The Soviets characterized refugees as "traitors who are refusing to return home to serve their country together with their fellow citizens."<sup>302</sup> After France supported

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291. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 54.

292. *Id.*

293. Chance, *supra* note 263, at 231.

294. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 54.

295. *Id.* at 56.

296. U.N. Ad Hoc Comm. on Statelessness & Related Problems, U.N. Doc. E/AC.32/SR.3 (Jan. 17, 1950).

297. *See* U.N. Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/AC.32/SR.2 (Jan. 26, 1950) (detailing the statement of Mr. Henkin of the U.S.).

298. *Id.*

299. Chance, *supra* note 263.

300. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 54.

301. LEWIS, *supra* note 188, at 36.

302. U.N. GAOR, 5th Sess., 325th plen. mtg. at 671, U.N. Doc. A/1682 (Dec. 14, 1950) (statement of Mr. Soldatov of the U.S.S.R.); *see* James Hathaway, *Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 145 (1990). For background on the development of a Cold War rift on international refugee law, *see* Georg Schwarzenberger, *The*



the United States' position, the matter of statelessness was tabled pending discussion of a second convention.<sup>303</sup>

In protest, the Soviet and Polish delegations resigned from the Committee early in the meeting. They refused to participate in the drafting of or sign the eventual 1951 Convention.<sup>304</sup> The official reason for their withdrawal was the defeat of the Soviet motion to unseat Taiwan, which they did not consider a legitimate U.N. member.<sup>305</sup> However, it is widely recognized that the Soviets likely opposed the creation of a new international convention to protect refugees, much as they opposed the IRO before it.<sup>306</sup> The so-called universal commitment to human rights was beginning to crack.

## 6. Who Is a Refugee?

The delegates to the Ad Hoc Committee viewed broad international commitment as critical to solving refugee issues.<sup>307</sup> Since 1922, each successive international legal instrument developed for refugee protection had fewer states parties than the preceding one.<sup>308</sup> The U.N. did not want an overbroad Convention that states would be unlikely to sign.<sup>309</sup>

Western countries, led by the United States, wanted the definition of refugee to be broad enough to cover any dissidents leaving the Eastern bloc.<sup>310</sup> However, they wanted the definition to be precise enough that Soviets could not use it to their political advantage. The Soviets were beginning to trumpet communism's rhetoric of socio-economic rights in the General Assembly to assert their superiority over the United States' claims to promote human

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*Impact of the East-West Rift on International Law*, 36 TRANSACTIONS OF THE GROTIUS SOC'Y 229, 243 (1950).

303. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 57. The Convention Relating to the Status of Stateless Persons, was eventually passed on September 28, 1954 and entered into force on June 6, 1960. The Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

304. Walker, *supra* note 228, at 591.

305. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 54.

306. *Id.*

307. LEWIS, *supra* note 188, at 135; Walker, *supra* note 228, at 594–95.

308. LEWIS, *supra* note 188, at 56.

309. Walker, *supra* note 228, at 593.

310. *Id.* at 591; *see also* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 471–72.

rights. For this reason, the delegates decided to exclude socio-economic rights from the definition.<sup>311</sup>

In the end, key terms within the definition of refugee were left intentionally vague.<sup>312</sup> This would allow states wiggle room in their own interpretations of the Convention. Much dialogue during the drafting process focused on how to determine who was a “bona fide” refugee. However, all procedures for making this determination were ultimately left out of the text.<sup>313</sup>

Surprisingly, there was little debate over the core of the definition of “refugee”: the protection of people persecuted on the basis of race, religion, nationality, or political opinion.<sup>314</sup> This definition of refugee was, by this point, already well defined by previous international legal instruments and the IRO Constitution.<sup>315</sup> The international community’s concern with protecting the rights of minorities, included in the Universal Declaration of Human Rights, further bolstered the ideal of protection of minority rights entrenched by the 1951 Convention. According to Weis, deliberation on the definition of the term “refugee” reflected governments’ desire to clearly define refugees, who deserved international protection, versus others who did not need or deserve it.<sup>316</sup>

As Israeli delegate Jacob Robinson explained, a divide quickly developed between the so-called “reception countries” and “immigration countries.”<sup>317</sup> Reception countries, like France, Britain, Belgium and Denmark, were already hosting millions of refugees and could not expel them. By contrast, immigration countries like the United States, Canada, Australia, and Brazil could cherry-pick the refugees whom they would accept. The two groups had very different sets of interests in negotiating the Refugee Convention.

Delegates, citing their state’s values and the aims of the UDHR, expressed their intentions to promote human rights. France and the U.K., in particular, asserted their moral authority over the immigration countries.<sup>318</sup> They initially expressed lofty goals of broadly defining “refugee” to include all unprotected

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311. Hathaway, *supra* note 10, at 148–50.

312. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 50.

313. *Id.* at 50–51.

314. *See* Glynn, *supra* note 238, at 141.

315. *Id.*

316. Weis, *supra* note 196, at 199.

317. Gilad Ben-Nun, *The British-Jewish Roots of Non-Refoulement and Its True Meaning for the Drafters of the 1951 Refugee Convention*, 28 J. REFUGEE STUD. 93, 96 (2014).

318. *Id.*

people.<sup>319</sup> While acknowledging its own concern with masses of refugees, France proposed broad language that would extend refugee protection to anyone seeking asylum, for whatever reason, and anyone fearing persecution, whether inside or outside his country of nationality.<sup>320</sup>

The United States favored a more narrow definition along the lines of the IRO's mandate, which had enumerated which groups of European refugees it would assist. Louis Henkin deftly argued that certain refugee groups in the world were simply too large for the United States to grant protection to them. Citing the 600,000 Palestinians already under U.N. protection, six million ethnic Germans who had returned to Germany from elsewhere in Europe, and new Kashmiri and Indian refugees, he described a universal definition as an infeasible "blank cheque" that would "undertake obligations towards future refugees, the origin and number of which would be unknown."<sup>321</sup>

Paul Weis summarized the debates:<sup>322</sup>

The United States does not want to include unknown groups in the definitions, fearing that this may result ultimately in financial commitments. France and Great Britain were in favour of a broad definition of refugees—the United States in favour of enumeration. The latter point of view prevailed.

A working group comprised of France, the U.K., the United States, and Israel and attended by Paul Weis analyzed the definitions in the IRO Constitution.<sup>323</sup> The U.K. and France eventually withdrew their liberal proposals. France agreed that many states would be unwilling to sign onto such a broad definition. Eventually, they converged on a definition that closely resembled the U.S. proposal. By the time the Committee completed its draft in February, 1950, lofty goals of protecting all those seeking asylum had begun to fall.

## 7. The Conference of Plenipotentiaries

As the Committee's draft circulated, support for the Convention began to wane. EcoSoc just barely adopted the definition of refugee drafted by the Ad

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319. Glynn, *supra* note 238, at 137 (citing a conversation between Paul Weis and Gustave Kullmann stating the U.K. initially wanted a definition that "included all unprotected persons").

320. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 309.

321. Glynn, *supra* note 238, at 138 (internal quotation marks omitted).

322. *Id.* at 137 (internal quotation marks omitted).

323. *Id.*

Hoc Committee. The definition was adopted by only a minority vote in August 1950. Seven countries, including Britain, Canada, Chile, and Belgium, abstained, protesting that failure to create a broader definition of refugee would restrict future U.N. work in this area.<sup>324</sup> The United States continued to advocate for a restrictive definition of refugee that would apply only to Europe. It stated that it would not sign the Convention. It argued that the Convention was inapplicable to the United States since aliens were already treated equally to U.S. nationals once they were admitted, and that it could not be bound by an international agreement on who and how many people to admit.<sup>325</sup> Canada took an almost identical position. Pakistan protested because the draft excluded non-Europeans.<sup>326</sup> France also argued that it did not need to sign because it already did not turn refugees away if they lacked the proper papers.<sup>327</sup> European countries began to express concerns that the Committee's definition of refugee, which was restricted to pre-1950 Europe, would be administratively impossible given the numbers of refugees European countries were already hosting.<sup>328</sup>

To ensure the widest possible support for the Convention, EcoSoc called for a Conference of Plenipotentiaries to debate the terms of the Convention and ratify it. By the time the General Assembly convened the conference, excitement over the document had waned. It had already become apparent that no worldwide agreement would be signed.<sup>329</sup> Delegates from only twenty-four states convened in July 1951, although forty-one had initially voted for a new treaty in the General Assembly.<sup>330</sup> Two observer states, NGOs, and international organizations joined them in Geneva. Despite waning support for the Convention in the U.N., some delegates and observers still hoped to draft a Convention that could apply to the entire world.

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324. Michael L. Hoffman, *W.F.T.U. Rebuked on Korea Question*, N.Y. TIMES, Aug. 8, 1950, at 8.

325. Michael L. Hoffman, *U.N. Nations Cool to Refugee Bill*, N.Y. TIMES, July 5, 1951, at 18.

326. *U.N. Assembly to Get Draft on Refugee Aid*, N.Y. TIMES, Aug. 1, 1950, at 3.

327. Hoffman, *supra* note 325.

328. Michael L. Hoffman, *U.N. Draft Limits Refugees' Hopes*, N.Y. TIMES, Aug. 12, 1950, at 12.

329. Hoffman, *supra* note 325.

330. *Id.*

## 8. Legalizing the Definition of Refugee

The definition of “refugee” was hotly contested and consumed the bulk of the drafters’ time.<sup>331</sup> The crux of the debate over the definition of refugee was states’ concerns with balancing their commitments to human rights with national security concerns. Most states at the conference were terrified of overcommitting themselves to unforeseen numbers of refugees. France and Britain were especially concerned about being overrun by refugee claims from their colonial interests, many of whom were contemporaneously engaged in struggles for self-determination.<sup>332</sup> France began to favor a more restrictive definition of “refugee.”<sup>333</sup> The new French representative, Robert Rochefort, noted that France had a more discriminatory naturalization policy that did not match up with the liberal definition of “refugee” that it had previously advocated.<sup>334</sup> The reality on the ground may also have affected France’s change of heart. France, at the time, hosted two million refugees in makeshift camps.<sup>335</sup>

Others shared Britain and France’s fears. Sweden and Turkey expressed concern that the Convention might create a “pull factor” for refugees.<sup>336</sup> They claimed that security concerns and infrastructural limitations might also limit their ability to manage refugees.<sup>337</sup> Sweden noted that it would like to continue its liberal policies toward refugees, “but the fact must be taken into account that its capacity for absorbing large numbers was limited and that . . . considerations of national security must play a certain part.”<sup>338</sup> The Italian, Turkish, and Lebanese delegates echoed these concerns.<sup>339</sup> Like France and Britain, the United States seemed torn between its own commitment to human rights ideals, its desire to manipulate human rights as

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331. THE COLLECTED TRAVAUX PRÉPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES 9 (Alex Takkenberg & Christopher Tahbaz eds., 1990) [hereinafter THE COLLECTED TRAVAUX PRÉPARATOIRES].

332. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 60–61; Walker, *supra* note 228, at 594–95.

333. Glynn, *supra* note 238, at 138–39.

334. *Id.* at 139.

335. Gilad Ben-Nun, *From Ad Hoc to Universal: The International Refugee Regime from Fragmentation to Unity 1922–1954*, 34 REFUGEE SURV. Q., no. 2, 2015, at 23, 38. Personal reasons may also have played a role in France’s about face. Rochefort had ambitions to be at least deputy High Commissioner for refugees, and he suspected that an American would be appointed as High Commissioner. Despite his best efforts to ingratiate himself, he did not get the job.

336. Walker, *supra* note 228, at 593–94.

337. *Id.*

338. Walker, *supra* note 228, at 593.

339. *Id.* at 593–94.

an element of its Cold War foreign policy strategy, and its skepticism of international law.

The Conference agreed to keep the definition of refugee narrow. The Conference accepted a British amendment to the draft definition to stress that refugees' reasons for fearing persecution must be directly connected to their flight abroad.<sup>340</sup> This agreed-upon definition, then, which stands today, says that a refugee is someone who:

[O]wing to wellfounded [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.<sup>341</sup>

The "well-founded fear of persecution" requirement in the 1951 Convention definition replaced the approach of prior refugee protection agreements, which delineated places of origin or categories of people to be protected.<sup>342</sup> The term "persecution" was left deliberately undefined, with France wanting to link it to violations of human rights found in the UDHR, and the United States wanting to leave it vague so that it could reserve its small resettlement capacity for dissidents from the Soviet bloc.<sup>343</sup>

The Plenipotentiaries agreed that reservations to the refugee definition, Article 1 of the Convention would be impermissible. Under international law, reservations cannot be accepted if they conflict with the object and purpose of the treaty.<sup>344</sup> The refugee definition lay at the core of the Convention itself.

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340. THE COLLECTED TRAVAUX PRÉPARATOIRES, *supra* note 331, at 13; THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 323.

341. 1951 Convention, *supra* note 2.

342. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 335.

343. *Id.*

344. Declarations, however, were acceptable and were made by four states. The Netherlands, Turkey, Ecuador, and Mexico all clarified that their signing of the 1951 Convention did not imply their acceptance of prior international agreements involving refugees, to which they were not parties. The Netherlands also refused to regard Ambionese transported by the Netherlands after Indonesian independence as refugees. In the boldest declaration, Mexico clarified that its Government would determine refugee status without prejudice to the Convention definition. See THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 312–13.

### 9. Temporal and Geographic Restrictions

The primary controversy over Article 1 of the Convention was whether the Convention would be universally applicable or include temporal and geographic restrictions. Most countries did not wish to sign onto a Convention that would commit them to the protection of indeterminate numbers of refugees.<sup>345</sup> Ultimately, to ensure the broadest possible acceptance of the Convention, the Conference of Plenipotentiaries adopted a restriction limiting the Convention to events occurring before 1951.<sup>346</sup>

The inclusion of a geographic restriction was even more controversial. The United States and most European states, led by France, wanted to limit the Convention to events happening within Europe.<sup>347</sup> Many countries did not wish to open themselves to refugee claims emanating from the developing world. Other states wanted a more “universalist” definition, making the Convention applicable throughout the world.<sup>348</sup>

France strenuously argued that all refugee problems were regional.<sup>349</sup> Therefore, adopting a universal definition to solve all refugee problems would be “futile.”<sup>350</sup> States favoring a Europe-only definition also noted that previous refugee agreements had been limited in their geographical scope.<sup>351</sup> Venezuela and Colombia backed the French and American view.<sup>352</sup>

Most other European states, led by Britain and Belgium, backed a more universal definition that would apply beyond Europe.<sup>353</sup> Italy and Germany were exceptions. Iraq and Egypt supported a broader definition. Other developing states, particularly Pakistan and India, vigorously protested any geographic restriction.<sup>354</sup> They argued that such a limitation would undermine

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345. *Id.* at 350–51.

346. 1951 Convention, *supra* note 2; THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 322.

347. THE COLLECTED TRAVAUX PRÉPARATOIRES, *supra* note 331, at 12.

348. The terms “Europeanists” and “Universalists” have often been used to describe the two camps. *See, e.g.*, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 471.

349. *Id.*

350. *Id.*

351. *Id.* at 470.

352. Glynn, *supra* note 238.

353. Ben-Nun, *supra* note 335; Glynn, *supra* note 238, at 140.

354. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 269–71.

the universality of the Convention and its human rights aims.<sup>355</sup> NGOs also supported a more universal definition.<sup>356</sup>

Canada and Sweden pleaded for a compromise.<sup>357</sup> Eventually, the Holy See brokered a deal. Individual states would have the choice to limit the scope of the Convention to events occurring in Europe.<sup>358</sup> The Convention would underscore its universal aims elsewhere in the text. The Convention required states to declare, at the time of signature, ratification, or accession, whether they intended the Convention to be geographically limited to events occurring in Europe.<sup>359</sup>

Once “refugee” was defined, states remained preoccupied with protecting their national security. The most hotly contested provision was Article 9 of the Convention, which permitted a state to take provisional measures with respect to a particular person on national security grounds “in time of war or other grave and exceptional circumstances,” pending determination that the person is a “bona fide refugee.”<sup>360</sup> At the core of the Convention is the *jus cogens* norm of non-refoulement. *Jus cogens* norms are considered so integral to international law that they cannot be violated by any state, even those that have not signed the Convention.<sup>361</sup> Non-refoulement is the concept that no signatory state will return a refugee to his country of origin if “his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”<sup>362</sup> Most states did not contest the inclusion of non-refoulement, nor the statement that states could not derogate from it. However, Weis noted the difficulty of requiring states “to refrain from actions which may lead to the return of a refugee to a country where he may become the victim of persecution” without conflicting with the doctrine of a state’s unlimited right to regulate the admission of aliens.”<sup>363</sup>

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355. *Id.*

356. Glynn, *supra* note 238.

357. *Id.*

358. *Id.* at 140–41.

359. Paul Weis, *The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties*, 42 BRIT. Y.B. INT’L. L. 39, 40 (1967) (discussing 1951 Convention, *supra* note 2). States could also limit the scope of the Convention *ratione personae*, per the terms of Article 40 of the Convention. 1951 Convention, *supra* note 2, at art. 40.

360. HATHAWAY, *supra* note 86, at 262.

361. *See id.* at 28–31.

362. *See* 1951 Convention, *supra* note 2, at art. 33.

363. Weis, *supra* note 197, at 198–99.



## 10. Human Rights Versus Security Interests

Thus, with the signing of the 1951 Convention and the creation of UNHCR, states crafted a delicate compromise between human rights and their sovereign right to restrict entry to their borders. On one hand, the international community moved solidly toward treating refugee rights as human rights guaranteed to individuals rather than legal protections for particular groups. Although states could opt into a geographical restriction, the Convention was also the first refugee agreement that was explicitly designed to be universal in application to all refugees, regardless of their country of origin.<sup>364</sup> The concern of the drafters with protecting the rights of racial, religious, and national minorities was clear.<sup>365</sup> However, security concerns limited the definition of refugee, and most discussion centered on ensuring that the Convention was not unduly onerous on states. Much of the Convention was left intentionally vague, requiring interpretation by domestic courts with respect to even some very basic issues of who counted as a refugee.<sup>366</sup>

While other commentators have argued that the inclusion of the term “political persecution” was merely a relic of Cold War politics, the historical record does not support this claim.<sup>367</sup> The use of the category of persecution on the basis of political opinion was later used expressively as a foreign policy tool against the Soviet Union, as discussed above.<sup>368</sup> However, the category of political persecution was already established in previous refugee instruments that the 1951 Convention succeeded.<sup>369</sup> Zimmerman notes that, despite the lack of participation by Eastern bloc countries in the drafting, it is unlikely that the definition of refugee would have looked any different absent the Cold War context.<sup>370</sup> The Cold War merely affected only the scope of the

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364. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 60.

365. *Id.* at 54–55.

366. *Id.* at 50.

367. See Michael S. Teitelbaum, *Immigration, Refugees, and Foreign Policy*, 38 INT’L ORG. 429, 430–32 (1984).

368. PRICE, *supra* note 9, at 6, 24.

369. Weis, *supra* note 359, at 39.

370. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 59, 67. *But see* Hathaway, *supra* note 23, at 371, 375 (stating that the “political opinion” category of the 1951 Convention was directly influenced by Cold War politics at the time).

limitations, which were deliberately formulated so as not to exclude refugees from communist Europe as long as communist regimes were in power.<sup>371</sup>

While the Convention was an achievement for human rights, it was a victory for state interests as well. Many refugee advocates perceived state interests to have prevailed.<sup>372</sup> Weis and his colleagues were “horrified” by the results.<sup>373</sup> In correspondence to Kullman, Weis said, “The less clear, however, the definitions are, the more scope there will be for divergences of interpretation . . . I have a dim vision of the chaos that will ensue.”<sup>374</sup> Kullman replied that the temporal restriction “was not merely unjust but also impractical.”<sup>375</sup> Rubenstein noted that governments were stubbornly stuck to the view that history began in 1939 and ended in 1944, and thus were blinded to refugees occurring in any other circumstances.<sup>376</sup> While many delegates entered the conference of Plenipotentiaries with the highest of hopes, they were dashed by power politics and stringent state security measures enacted in a world still reeling from the scars of war.

#### 11. UNHCR’s Role

The U.N. designed UNHCR as a unique administrative agency.<sup>377</sup> UNHCR’s Statute defined a refugee as anyone who previously enjoyed the protection of the IRO, along with those meeting a definition of “refugee” nearly identical to that in the 1951 Convention, but containing no geographic or temporal restriction. Effectively, the agency’s operations were based on the legal principle of complementarity: the international organization would step in to grant a remedy where sovereign states had failed.<sup>378</sup> UNHCR’s Statute defined its work as primarily legal. The agency’s goal was to provide

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371. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY, *supra* note 28, at 56.

372. Glynn, *supra* note 238, at 137.

373. *Id.*

374. *Id.* at 138 (quoting Weis, *supra* note 359, at 42).

375. *Id.*

376. *Id.*

377. On administrative functions of UNHCR, see Goldenziel, *supra* note 25 at 464–67.

378. See Itamar Mann, *The Exodus Encounter: Towards a Foundational Theory of Human Rights*, 50 TEX. INT’L L.J. 1, 8 (2015). Compare to complementarity in international criminal law, in which an international court steps in only when state courts do not have the capacity to fulfill their legal obligations to society. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998).

international protection to refugees, a vague term that was understood to mean legal protections that states were unable to provide.<sup>379</sup>

As the U.N. saw it, UNHCR had four primary responsibilities related to international refugee law: “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”<sup>380</sup> For the U.N.’s purposes, UNHCR’s job was to work with governments to establish legal arrangements for refugees through international conventions and otherwise.<sup>381</sup> According to its statute, UNHCR was not to serve as a humanitarian organization in its own right, but could facilitate and coordinate private organizations wishing to assist refugees.<sup>382</sup> Thus, researchers have observed that UNHCR was initially designed “to do very little and do only what states told it to do.”<sup>383</sup> European states and the United States still viewed its existence as temporary, and in any case, within their control.

## 12. The Expansion of International Refugee Law: The 1967 Protocol

Over time, discrepancies between the 1951 Convention and the realities faced by states throughout the world became increasingly problematic. Like most international law, the concept of international refugee law developed in Europe. Its application then became problematized as it spread elsewhere. First, the Convention’s temporal limitation, and its acceptance by some states and not others, created a disjuncture in the legal status between those who became refugees before and after 1951.<sup>384</sup> Particular problems arose upon the Hungarian refugee crisis of 1956 and the Soviet occupation of Czechoslovakia in 1968.<sup>385</sup> Thanks to the legal genius of Paul Weis, UNHCR interpreted these as after-effects of earlier events, and those displaced were given refugee status.<sup>386</sup> However, other discrepancies in treatment remained based on the temporal restriction.<sup>387</sup>

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379. Weis, *supra* note 1966, at 211.

380. G.A. Res. 428, *supra* note 266.

381. Weis, *supra* note 1966, at 211.

382. G.A. Res. 428 (V), *supra* note 266.

383. MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 73 (Roger Haydon ed., 2004).

384. *Id.*

385. *Id.*

386. LEWIS, *supra* note 188, at 123.

387. BARNETT & FINNEMORE, *supra* note 383.

Second, the Convention's geographic limitation, and its acceptance by some states and not others, caused problems of interpretation. Hundreds of thousands of refugees fled from Africa and Asia during the 1950s and 1960s, as colonization gave way to fierce fights over self-determination.<sup>388</sup> As these states began to approach the U.N. and UNHCR for assistance, it became clear that such a geographic restriction was no longer tenable. Moreover, the Organization for African Unity had, by this time, adopted a broader definition of the term "refugee" in its own regional Convention, and was pressuring UNHCR to adopt that definition.<sup>389</sup> Because of the geographic restriction, UNHCR was becoming increasingly criticized for providing "irregular" assistance to groups of refugees—and indeed, whether it considered groups of displaced people to be refugees at all—based on their countries of origin and relationship to Cold War politics.<sup>390</sup>

Third, an increasing discrepancy arose between the legal definition of refugee and the broader scope of UNHCR's mandate as defined in its statute.<sup>391</sup> In the face of growing numbers of refugees in Africa and elsewhere, UNHCR grew increasingly frustrated with its limited support from the international community, as accessions to the Convention were lower than expected.<sup>392</sup> As Cold War rhetoric continued to dominate discussion of refugees in the U.N., the Soviet Union repeatedly pointed out that the Convention was never adopted by the U.N. itself, but by an unrepresentative Conference of Plenipotentiaries comprising only twenty-six states that were primarily from Western Europe.<sup>393</sup> UNHCR sought to revise or create new

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388. Weis, *supra* note 359.

389. The Organization for African Unity's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa defines a refugee as, "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." Organization for African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10 1969, 1001 U.N.T.S. 45 [hereinafter Organization for African Unity]; *see also* U.N. ESCOR, 1453d Meeting, U.N. Doc. ST/LIB/SER.B/E.32 (Nov. 18, 1966) [hereinafter U.N. 1453d Meeting] (statement of Mr. Waldron-Ramsey, del. of the United Republic of Tanzania).

390. LEWIS, *supra* note 188, at 69.

391. Weis, *supra* note 359 (saying this discrepancy is actually between the personal scope of the Convention and the "competence *ratione personae*" of UNHCR defined in its statute).

392. Sara Davies, *Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol*, 19 INT'L J. REFUGEE L. 703, 703 (2008). Only fifty states by that time were parties. *See also* U.N. 1453d Meeting, *supra* note 389, (statement of High Comm'r Prince Sadruddin Aga Khan).

393. Weis, *supra* note 359, at 46–47.

international refugee law to make it more widely and universally applicable.<sup>394</sup>

Non-Western states pushed successfully to change the 1951 Convention to reflect their needs.<sup>395</sup> In 1965, the Carnegie Endowment of International Peace, with support from the Swiss government and in consultation with UNHCR, held a “Colloquium on Legal Aspects of Refugee Problems with particular reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner for Refugees” in Bellagio, Italy.<sup>396</sup> Thirteen legal experts from across the world participated in their personal capacities, including Louis Henkin, who was still working for the U.S. State Department. The experts agreed that, for humanitarian reasons, it was now imperative for refugees not currently covered by the Convention to be given similar benefits by way of a binding international instrument.<sup>397</sup> The urgency of the situation meant that there was no time to prepare and adopt a new Convention or revise the existing one.<sup>398</sup> Instead, they proposed a Protocol to the Convention to remove the temporal and geographic restrictions in the 1951 Convention. So as not to deter state parties to the Convention from accepting the Protocol, they permitted existing declarations limiting the application of the Convention to continue unless states explicitly withdrew them.<sup>399</sup> The High Commissioner polled the states parties to the Convention and found them to be overwhelmingly enthusiastic about the removal of the dateline.<sup>400</sup> Recognizing the urgency of the situation ExCom, through EcoSoc, submitted the draft Protocol to the General Assembly so that the Secretary General could open the Protocol for government accession as quickly as possible.<sup>401</sup>

On many levels, the Protocol was a tremendous success. It expanded Convention protections to refugees throughout the world. Since 1967, the numbers of states parties to the Convention or Protocol grew from 50 to

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394. Davies, *supra* note 392, at 705–06.

395. Several states first raised the need for an amendment to the Convention in the 1964 and 1965 meetings of ExCom, the Executive Committee of the High Commissioner’s Program. Weis, *supra* note 359, at 41.

396. *Id.*

397. *Id.* at 42–43.

398. *Id.* at 43.

399. *Id.*

400. U.N. 1453d Meeting, *supra* note 389 (statement of High Comm’r Prince Sadruddin Aga Khan).

401. *Id.* This procedure was followed because it was necessary to submit through committee since the recommendation came from experts outside the U.N. process. *See* LEWIS, *supra* note 188, at 70, 219–20.

147.<sup>402</sup> The United States, which initially refused to sign the 1951 Convention, acceded to the Protocol in 1968. However, Gil Loescher has noted that Western states were motivated to sign the 1967 Protocol to restrict refugee protections, not to increase them. The existence of the Organization of African Unity's expansive definition encouraged Western countries to sign on to the lesser of two known evils.<sup>403</sup>

### 13. Post-1967: Legal Contraction, Aid Expansion

Nominally, the 1951 Convention has succeeded in harmonizing refugee law. Many states, including the United States, have revised their refugee and asylum policies to bring them into line with international refugee law, although neither the Convention nor the Protocol require this. The United States, for example, enacted the Refugee Act of 1980 in large part to match the standards of international refugee law.

However, the 1951 Convention and 1967 Protocol are widely regarded as increasingly irrelevant because of their inapplicability to modern displacement crises.<sup>404</sup> Scholarly criticisms focus on the fact that the 1951 Convention does not provide a legal basis for protecting most of the world's displaced people, including those displaced by civil conflict, famine, and natural disaster. Most strikingly, the 1951 Convention offers no guidance to states facing mass influxes of refugees, which overwhelm state processing capacity, even in wealthier states. Critics have also noted that the Convention relies on displacement outside the state as a solution to refugee problems rather than requiring the international community to address the systematic cause of refugee outflows. After all, the Convention imposes no requirement for states not to persecute or expel their citizens; it merely guarantees them certain rights if they are able to flee to a signatory country. Divergent application of the term "refugee" from state to state sows confusion in the community of asylum-seekers and encourages irregular migration, often

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402. Of these states, only four retain the geographic restriction to refugees in Europe: Turkey, Congo, Madagascar, and Monaco. Madagascar, Monaco, and St. Kitts and Nevis also retain the temporal restriction to refugees since 1951. See U.N. High Comm'r for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last visited Nov. 6, 2016).

403. GILL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* 80 (2001).

404. See, e.g., Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 295–96 (1998); 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, 115–18 (1997); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 243–46 (1997).

linked to human smuggling and related criminal enterprises. Because the Convention requires refugees to flee their countries of origin to be accorded rights, those without means to flee may actually be the most vulnerable and remain unprotected.

The lack of provisions for international burden-sharing in the 1951 Convention leaves poor states, which house most of the world's refugees, especially vulnerable to conflict spillover when refugees flood into their borders. Most of the world's refugees originate and are displaced within Africa and the Middle East, where the majority of countries are not signatories to the Convention. Even in countries in these regions that are Convention signatories, asylum regimes are often weak or absent, which means most of the world's refugees have no legal basis on which to rely for protection.

Recognizing the problem of population displacement beyond the plight of refugees, some countries have made regional agreements to address these issues. These efforts have largely failed. The 1969 Organization for African Unity (OAU) Refugee Convention and 1984 Cartagena Declaration for Refugees in Latin America expand the definition of refugee to include people who have fled violent conditions or disturbances in public order.<sup>405</sup> However, both documents are non-binding, states have been slow to incorporate them into their domestic law, and they include no burden-sharing mechanisms. EU directives, most recently a set of 2011 Directives meant to be adopted in June 2015, are largely focused on curbing migration, although they do allow for "subsidiary protection" for people fleeing generalized conditions of violence who do not qualify for refugee status.<sup>406</sup> Recent caselaw shows that EU states are not following the directives, and many states have opted out of the most recent directive. Temporary Protection (TP) regimes have been adopted by some states in response to humanitarian emergencies. However, TP regimes are applied haphazardly, sow confusion by differing from state to state, and arguably have been used by countries to avoid their obligations under the 1951 Convention.<sup>407</sup> The "Deng Principles" on internal displacement are not binding and are left to individual states to adopt in their own policies and

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405. See, e.g., Organization for African Unity, *supra* note 389; Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees* (Nov. 22, 1984), [https://www.oas.org/dil/1984\\_Cartagena\\_Declaration\\_on\\_Refugees.pdf](https://www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf).

406. Council Directive 2011/95/EU, 2011 O.J. (L 337) 9.

407. European Council of Refugees & Exiles, *Position of the European Council on Refugees and Exiles on Temporary Protection in the Context of the Need for a Supplementary Refugee Definition*, 9 INT'L J. REFUGEE L. 534, 535–36 (1997); Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L. 279, 298 (2000).

caselaw, and do not address the root causes of displacement that may cause both internal and external displacement. None of these documents deals with all of the causes of modern flows of displaced people that have threatened international peace and security. Moreover, the protections associated with all of these documents are ambiguous because of terms left undefined, lack of state will or capacity, or because such non-binding regional agreements may clash with the aims of the 1951 Convention.

The dire humanitarian need engendered by forced displacement requires international action beyond the regional label. An international problem of this scope requires an international solution. However, additional legal protections for displaced people must not come at the expense of the minority rights that states have always sought to preserve through international law. Discussing what such a Displaced Persons Convention might look like lies beyond the scope of this Article, but I discuss the theoretical basis for such a convention and outline it in a companion piece.<sup>408</sup>

#### CONCLUSION

As international interventions are increasingly justified on humanitarian grounds, and states are increasingly willing to cede some of their sovereignty to international institutions, it is worth revisiting the principles that animated the creation of international refugee law to begin with. The protection of minority rights was a goal of international law even before the modern international human rights regime was born. Some of the earliest efforts at international protection of human rights were aimed at the protection of individuals who were persecuted by their states on the basis of political opinion, or who were unable or unwilling to be protected by states based on their religion, race, ethnicity, or membership in a particular social group. The core value of protecting these people became renamed, crystallized, entrenched, and reaffirmed in the international refugee regime as we know it today.

As perennial debates about the permissibility of violating state sovereignty to protect human rights have again resurfaced, an examination of international refugee law reveals when states have always been willing to yield sovereignty to protect human rights. The existence of international refugee law affirms the existence of core values of international human rights law that exist beyond the bounds of sovereignty. The wide acceptance of international refugee law, and especially of non-refoulement as a *jus cogens* norm, tells us that states are willing to cede some of their sovereignty to

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408. Goldenziel, *supra* note 5.



protect human rights, and have been since long before the development of the modern human rights regime. The rights of members of minority groups are so important that, for centuries, states have been willing to cede some of their sovereign right to determine who may enter and leave their borders to protect them. An examination of international refugee law reveals that certain values exist even outside the bounds of national law, and that those values must lie at the core of any universal human rights law for today's world.

More generally, international refugee law sheds light on the fundamental question of the role of the individual as a subject of international law. The protection of the individual in international law has long been the subject of heated scholarly debate. In an international system based on sovereignty, states are the primary subject of international law. International law is made by states to regulate the behavior of states. However, international refugee law is an affirmation by the community of nations that states owe duties to individuals who are not their own citizens. The existence of refugee law suggests that states have legal duties to people beyond the borders of their own political community, and beyond the boundaries where their own laws can reach. States agreed to this basic notion that individuals fleeing persecution deserve some basic legal protections long before the modern conception of an international community of nation-states came to be. Refugee law reflects a cosmopolitan notion that wherever one flees, he will retain some basic rights and duties as citizens of the world.<sup>409</sup> Those who support the ideals of a liberal international community bound by common respect for fundamental freedoms must take refugee protections seriously.

The protection of minorities is foundational to the democratic ideals to which the international community aspires. Refugee rights, which represent minority rights on an international scale, must therefore be preserved. While the world is not the same as it was in 1951, the lessons of World War II should still animate the international human rights regime today. Prevention of the evils that the Nazis perpetrated remains a yardstick against which to measure the effectiveness of human rights protections. As John Hart Ely eloquently argued:

It's not good enough to answer that the Holocaust couldn't happen here. We can pray it couldn't, I believe it couldn't, but nonetheless we should plan our institutions on the assumption that it could . . . . A regime this horrible is imaginable in a democracy only because it

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409. See generally Noah Feldman, *Cosmopolitan Law?*, 116 *YALE L.J.* 1022, 1024–26 (2007) (discussing cosmopolitanism and law).

so quintessentially involved the victimization of a discrete and insular minority.<sup>410</sup>

International refugee law responds to Nazi atrocities by protecting minorities from persecution, whomever today's perpetrator may be, or wherever in the world they may flee. By adding displaced persons to those who receive international protection, states can affirm their commitment to cooperating to solve international humanitarian problems. By continuing to uphold the distinctive rights of refugees, the world can continually affirm that the systematic persecution of minorities will never occur again. International refugee law provides that human rights know no borders, moving us one step closer to a world in which universal human rights can be realized.

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410. ELY, *supra* note 355, at 181–82.