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A Reconsideration of the Underlying Premise of Refugee Law

James C. Hathaway*

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* Associate Professor, Osgoode Hall Law School of York University, Toronto. Submitted in partial fulfillment of the requirements for the degree of Doctor of Science of Law in the Faculty of Law, Columbia University. The author is fully responsible for the views expressed, but is grateful for the critiques of Gervase Coles, John Evans, Richard Gardner, Lisa Gilad, Harry Glasbeek, Guy Goodwin-Gill, Arthur Murphy, and Oscar Schachter; and the contributions of his students past and present, in particular Suzanne Egan, Kati Liao, Jeffrey Meade, David Petrasek, Steve Smart, Maureen Smith, and Steven Tress.

Refugee law is often thought of as a means of institutionalizing societal concern for the well-being of those forced to flee their countries, grounded in the concept of humanitarianism[1] and in basic principles of human rights.[2] In practice, however, international refugee law seems to be of marginal value in meeting the needs of the forcibly displaced[3] and, in fact, increasingly affords a basis for rationalizing the decisions of states to refuse protection.[4] This Article is an inquiry into the underlying premise of international refugee law, with a view toward critically assessing its actual and potential relevance in meeting the needs of refugees in a universal context.

It is my argument that neither a humanitarian nor a human rights vision can account for refugee law as codified in the United Nations Convention Relating to the Status of Refugees[5] and the Protocol[6] adopted under its authority.[7] If conceived of in humanitarian terms, refugee law would be a politically neutral response to the needs of suffering persons who have in some way been forced to leave their homes.[8] The law would not focus on the "how" or "why" of the need for protection, but rather would inquire only into the extent of the

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1. International protection is granted to refugees for reasons of humanity. The founding fathers of international law—Grotius, Suarez, and Wolff—viewed asylum as a natural right of the individual and a duty of the State. They believed that, in pursuance of an international humanitarian duty, States which granted asylum were acting on behalf of the *civitas maxima* or the community of States. Today, we translate the idea of universal society into the humanitarian duty of international protection of refugees, and the individual right of the refugee to seek international protection.

Puno, *The Basis and Rationale of International Refugee Law*, 7 PHILIPPINES Y.B. INT'L L. 143, 144 (1981); *see also* Hofmann, *Refugee-Generating Policies and the Law of State Responsibility*, 45 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 694 (1985); Tsamenyi, *The Boat People: Are They Refugees?*, 5 HUM. RTS. Q. 348, 364 (1983).

2. Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L.J. 483, 483 (1985).

3. *See, e.g.*, Stein, *The Nature of the Refugee Problem*, in HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW 47, 52 (A. Nash ed. 1988).

4. U.S. COMM. FOR REFUGEES, THE ASYLUM CHALLENGE TO WESTERN NATIONS 8 (1984) ("Sorely pressed by the size of immigrant flows generally and responding to their own population and economic pressures, many national governments have applied a rigorous standard in judging whether they should grant an individual refugee status.").

5. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954) [hereinafter Convention].

6. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force October 4, 1967) [hereinafter Protocol]. The primary objective of the Protocol was to remove the temporal limitation of the Convention, which restricted refugee status to persons whose fear of persecution stemmed from an event that occurred before January 1, 1951.

7. *See, e.g.*, Goodwin-Gill, *Refugees: The Functions and Limits of the Existing Protection System*, in A. Nash ed., *supra* note 3, at 165–66.

8. "Humanitarian activity seeks to alleviate suffering without concern as to how or why it occurred or as to the cause of which the victim may be either partisan or opponent. Strict neutrality is an absolute necessity of international humanitarian activity . . . ." Crabb, *The Definition of Refugee as Belonging to International Humanitarian Law*, 21 ALLAHABAD WKLY. REP. BULL. 36, 37 (1983).

denial of physical security or liberty leading to and consequent upon departure. The essence of a refugee law inspired by humanitarianism would be the establishment of a general commitment to, at the least, meeting the basic human needs of refugees, whether by the provision of temporary material assistance, the facilitation of return to their country, or the grant of asylum abroad. Humanitarian principles would require states to make a meaningful and needs-based contribution to the human welfare of all involuntary migrants, whatever the cause for their flight.[9]

Alternatively, a foundation in notions of human rights protection would dictate a form of refugee law in which at least the most basic elements of human liberty and need would be protected.[10] While cultural, political, and economic factors have thus far precluded international consensus on what constitutes the fundamental elements of human rights law,[11] there is agreement that some meaningful, albeit not fully comprehensive, level of international protection is appropriate.[12] As traditionally stated, the human rights paradigm for refugee law would not hold every involuntary migrant to be a refugee,[13] but would focus instead on the cause for flight.[14] Relevant questions would thus include: Was the putative refugee denied one of the

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9. Puno, *supra* note 1, at 149 ("If the welfare of the refugee is of concern to the international community, then the rationale of refugee law is the *civitas maxima*, or the community of states, and the provisions of refugee law constitute a humanitarian duty.").

10. *See, e.g.*, Meron, *Teaching Human Rights: An Overview*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 1, 16–17 (T. Meron ed. 1984). The linkage between the denial of human rights and refugee status has been expressly posited by the Council of Europe. Thomas, *Refugees: A New Dimension in International Human Rights*, 70 AM. SOC'Y INT'L L. PROC. 58, 69 (1976). The Cartagena Declaration of ten Latin American states, approved by the General Assembly of the Organization of American States in 1985, recognizes a human rights rationale for refugee law. United Nations High Commissioner for Refugees, (UNHCR), *O.A.S. General Assembly: An Inter-American Initiative on Refugees*, 27 REFUGEES 5 (1986).

11. *See, e.g.*, Sinha, *Human Rights: A Non-Western Viewpoint*, 67 ARCHIV FÜR RECHTS UND SOZIAL PHILOSOPHIE 76, 88 (1981).

12. As long as there are different social, economic, cultural and ideological circumstances in the world, so long as there are different religious traditions, there will be different concepts of human rights. In a pluralistic world we must accept pluralism also in the field of human rights. But there will be always one basic core of human rights, [a] few irreducible humanitarian principles determined by human dignity which have to be respected under all circumstances.

Pahr, *Human Rights in a Pluralistic World*, in LECTURES OF THE INTERNATIONAL INSTITUTE OF HUMAN RIGHTS SIXTEENTH STUDY SESSION 4–6 (1985).

13. *See generally* G. Coles, The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry (Mar. 1988) (unpublished manuscript, available at the Refugee Law Research Unit, Osgoode Hall Law School, Ontario, Canada).

14. *See, e.g.*, Melander, *The Protection of Refugees*, 18 SCAND. STUD. J. 153, 158 (1974) ("[T]here must be a plausible danger of persecution for political reasons, a danger of arbitrary measures against a person's life or liberty. Consequently, it is necessary to make an objective appraisal of the circumstances which have been invoked.").

fundamental human rights guaranteed by international law?[15] How serious was the infringement of that right? To what extent was an effective remedy short of flight available? In essence, was the decision to seek protection in another state reasonable in view of the prevailing norms of international human rights law?[16] To codify a standard of conduct in international human rights law is to remove it from the realm of pure discretion, to constrain somewhat the scope for the exercise of power politics, and to provide a basis upon which states may be called upon to account for their behavior.[17] While law provides no guarantee of compliance in a world of sovereign nation states in which coercive authority is denied to the international community,[18] it nonetheless creates a context in which respect for basic human rights can be addressed and at least occasionally promoted.

Current refugee law does not fully embody either humanitarian or human rights principles. This Article will demonstrate that modern refugee law in fact rejects the goal of comprehensive protection for all involuntary migrants and imposes only a limited duty on states, far short of meeting the needs of refugees in a comprehensive way. Similarly, even in relation to the arguably narrower principles of human rights, refugee law falls short, with the focus of rights protection limited to civil and political liberties, and with definitional and procedural frameworks which favor attainment of political goals at the

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15. It has been argued that the focus on governmental misconduct inherent in the human rights foundation of refugee law may seriously undermine constructive response to the problems of refugees. *See* Garvey, *supra* note 2, at 484 ("When labelled as persecutors, [states] react as governments always react. They assert their sovereignty and castigate as politically motivated the human rights claims made against them. To censure these governments as persecutors is often the surest route to exacerbating a refugee crisis because it diminishes the opportunity to gain their necessary cooperation.").

16. The core meaning of persecution readily includes the threat of deprivation of life or physical freedom. In its broader sense, however, it remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship, or freedom of movement.

G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 38–39 (1983).

17. To the extent of [international human rights] obligations, the strict doctrine of national sovereignty has been cut down in two crucial respects. First, how a State treats its own subjects is now the legitimate concern of international law. Secondly, there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign States within their own territories and in the exercise of their internal jurisdictions, and may therefore be regarded as ranking in the hierarchy of laws even above national constitutions.

P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 15 (1984).

18. *See, e.g.*, Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 3 U. ILL. L.F. 609, 635 (1979) ("Since there is no organized superior sanction, the system ultimately relies for its implementation on autolimitation and restraint on the part of states. This self-restraint results from the continuation of an individual and collective state of opinion that the prevailing practices ought in the main to continue to be observed.").

expense of an even-handed assessment of risk to human dignity. Refugee law is unresponsive to the needs of most refugees, who must accept whatever emergency assistance is voluntarily provided for them through official or nongovernmental initiatives.[19]

The explanation for these shortfalls in refugee law can be found in the fact that the pursuit by states of their own well-being has been the greatest factor shaping the international legal reponse to refugees since World War II. Current refugee law can be thought of as a compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk.[20] Its purpose is not specifically to meet the needs of the refugees themselves (as both the humanitarian and human rights paradigms would suggest), but rather is to govern disruptions of regulated international migration in accordance with the interests of states.

The resulting state of compromise in the international protection of refugees is problematic for two principal reasons. First, it represents a weak international commitment to refugees. While laudable efforts are made by a variety of agencies to attend to the immediate needs of refugees often unmet by the narrow scope of legal protection, both emergency assistance and durable solutions are beyond their exclusive control and can be frustrated by the exercise of negative state discretion.[21] Second, the current trend of dealing with most involuntary migrants on an extralegal basis results in the differential treatment of persons similarly at risk. Although the few refugees who fall within the scope of the formal legal protection system enjoy less than fully adequate rights,[22] they may at least invoke protection against return to their state of origin[23] and are entitled to enjoy secure conditions of

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19. INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, REFUGEES: THE DYNAMICS OF DISPLACEMENT 49 (1986).

20. Refugee law . . . developed alongside immigration control and the rise, or entrenchment, of the nation-state. Coerced and other uncontrolled population movements challenge that aspect of sovereignty subsumed within the principle of community and self-determination. Refugee law—the identification and selection of a limited class of persons in need who are to be considered worthy of protection and assistance—meets halfway or less the challenge of the inevitable.

Goodwin-Gill, *supra* note 7, at 168.

21. [U]NHCR's effectiveness is necessarily conditioned by the fact of the sovereignty of States. Thus, no assistance program can be initiated unless by invitation and agreement of the State in which it will be run. Likewise, no State is bound to admit UNHCR personnel. The protection that can be provided without presence is likely to be less than usually effective.

Id. at 166. Moreover, as is discussed later in the Article, the availability of funding and nature of the assistance to be rendered, if any, is wholly within the discretion of donor states and organizations.

22. *See* Adelman, *Obligation and Refugees*, in A. Nash ed., *supra* note 3, at 82.

23. Convention, *supra* note 5, at art. 33(1).

exile until they may safely return.[24] The numerous refugees who do not qualify must make do with whatever protection and assistance states and international institutions are prepared to offer. Because state response to refugees should be based on their predicament rather than on the basis of value-laden distinctions, the selective focus of refugee law is invidious.

It is therefore necessary to consider the reformulation of the international legal response to the needs of refugees. Because international law must be agreed to by, rather than imposed upon, states, and because states have proved assiduously resistant to assuming obligations viewed as inconsistent with their own national interests, it appears that the most viable approach to a renegotiation of international refugee law would be to dispense with a formal universal commitment to the provision of secure conditions of exile. We should instead emphasize regional and interest-driven protection in tandem with a general obligation to share the burden of addressing refugee needs. This kind of regime would be capable of revitalizing the role of international law in the protection of refugees and of moving it in a more comprehensive and needs-based direction.

I. THE EMERGENCE OF LAW TO GOVERN REFUGEE MOVEMENTS AND STATUS

Refugee law, with its predominant emphasis on the establishment of secure conditions of exile, is fundamentally a product of European political culture. The first international legal standards governing the protection of refugees were designed by European states after World War I for the protection of European refugees;[25] therefore, the role of refugee law reflected the political norms of European society.[26]

In particular, the evolution of the nation-state system dramatically affected the nature of the collective response to the needs of involuntary migrants. In the medieval era,[27] the rulers of Europe were motivated by universalist political philosophy to open their doors to many groups forced by various circumstances to seek sanctuary away from their homes. The practice of sheltering those compelled to flee was contin-

24. Refugees are, for example, entitled to juridical status, access to gainful employment, and welfare. *Id.* arts. 12–14.

25. All of the refugee accords in force between 1922 and 1950 embraced only European refugees. *See* A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 9–16 (1966).

26. *See, e.g.*, Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348, 352 (1984); *see also* J. VERNANT, THE REFUGEE IN THE POST-WAR WORLD (1953); Holborn, *The Legal Status of Political Refugees, 1920–1938*, 32 AM. J. INT'L L. 680 (1938).

27. *See generally* H. KOHN, NATIONALISM: ITS MEANING AND HISTORY 12–13 (1965); W. ULLMANN, PRINCIPLES OF POLITICS AND GOVERNMENT IN THE MIDDLE AGES 19 (1961).

ued during the era of liberalism, both as an acknowledgment of individual liberties and as a means of promoting communal enrichment.[28] By the beginning of the twentieth century, however, the view in Europe of the state as an instrument for carrying out a spiritually inspired mandate had been discarded in favor of a conceptualization of the state as an independent political apparatus dedicated to advancing the general good of its own population.[29] This shift away from a commitment to the effectuation of a higher law and the emergent narrow focus on perceived self-interest led to two types of restrictionist policy that closed borders to many would-be migrants.[30]

First, a belief emerged that national sovereignty was best assured by a linkage between cultural similarities and political organization.[31] The spirit of the American and French revolutions had imbued states with the conviction that a "people" should be entitled to political self-determination within a defined territory and that the legitimacy of the state was in some sense contingent on the extent to which its actions promoted a common cultural consciousness.[32] States thus came to use control over immigration as a means of excluding those persons whose backgrounds differentiated them from the national norm[33] and who might as a result constitute threats to the unity of the nation-state.[34]

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28. *See generally* M. MARRUS, THE UNWANTED: EUROPEAN REFUGEES IN THE TWENTIETH CENTURY 6–7 (1985) ("Central governments pursued their own interests by facilitating immigration and discouraging or even forbidding emigration. Whether to be taxed, to contribute to the growth of manufactures and commerce, to offer specialized knowledge, or to join the military, talented or affluent foreigners were frequently deemed useful to society and welcomed with open arms by European monarchs or municipalities."); R. NATHAN-CHAPOTOT, LA QUALIFICATION INTERNATIONALE DES RÉFUGIÉS ET PERSONNES DÉPLACÉES DANS LE CADRE DES NATIONS UNIES 33–47 (1949).

29. *See* H. KOHN, *supra* note 27, at 188 ("[T]he state emancipated itself by secularization and found a new basis for its actions in the rational principles of the *raison d'etat*, the reason of the state.").

30. *See* G. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 96 (1978).

31. Kamenka, *Political Nationalism—The Evolution of the Idea*, in NATIONALISM, THE NATURE AND EVOLUTION OF AN IDEA 8 (E. Kamenka ed. 1973) ("Nationalism (l'amour national) took the place of the love of mankind in general (l'amour général)."); *see also* A. SMITH, THEORIES OF NATIONALISM 16 (1971).

32. *See, e.g.*, H. KOHN, *supra* note 27, at 23.

33. Nationalism continues to play a role in exclusion of refugees. "[T]he lines of sovereignty . . . have become even more sharply drawn. One convenient means of delineating such boundaries has been the encouragement of national and racial homogeneity reinforced by immigration restrictions in areas where freedom of movement has long been unimpeded." Fowler, *The Developing Jurisdiction of the United Nations High Commissioner for Refugees*, 7 HUM. RTS. J. 119, 120 (1974).

34. The view has been expressed that there is some legitimacy to concerns arising from the immigration of significant numbers of culturally dissimilar persons:

> The problems of cross-cultural flows need careful examination. These problems can be of a quite different kind from those encountered in intra-cultural flows. It can be one kind of problem to have a mass flow within an area which is a region in a broad cultural sense; it

Second, the emergence of systems of national economics led states to be more concerned with promoting the general economic well-being of their own populations.[35] The vantage point of state interest permitted, and arguably required, the subjugation of humanitarian instincts to the attainment of national economic goals.[36] Immigration came to be seen less as a means of addressing the needs of fleeing individuals or of recognizing their right to self-determination, and more as a vehicle for facilitating the selection by states of new inhabitants who could contribute in some tangible way (such as skills or wealth) to the national well-being.[37] International migration was no longer to be a function of the particularized needs or ambitions of the would-be immigrants, but was instead to be closely controlled to maximize the interests of sovereign nation-states.[38]

This desire by European states to establish normative standards and control mechanisms to stem the arrival of less desirable immigrants coincided with a series of major population displacements within Europe during the early part of the twentieth century.[39] The most prominent migrations were the flight of some one to two million Russians between 1917 and 1922 and the exodus during the early 1920's of hundreds of thousands of Armenians from Turkey.[40] Due to the social crisis engendered by the forced emigration of huge numbers of refugees, policies of selecting immigrants on the basis of national advantage alone were obliged to yield.[41]

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can be quite another to have a mass flow across regions which are distinctively different in respect of civilizations and history.

G. COLES, PROBLEMS ARISING FROM LARGE NUMBERS OF ASYLUM-SEEKERS: A STUDY OF PROTECTION ASPECTS 9 (1981).

35. H. KOHN, THE IDEA OF NATIONALISM 198–99 (1944).

36. Fowler, *supra* note 33, at 120 ("Governments suffering from one of the worst economic depressions of all times [during the 1930's] were increasingly apathetic to the need for taking in more people who might become wards of the state.").

37. In the U.S., for example, "qualitative controls were a way of ensuring that only the best, the brightest, and the most productive immigrants were admitted . . . ." Scanlan, *Immigration Law and the Illusion of Numerical Control*, U. MIAMI L. REV. 819, 823 (1982).

38. *See* Krenz, *The Refugee as a Subject of International Law*, 15 INT'L & COMP. L.Q. 90, 95 (1966).

39. Grahl-Madsen, *The League of Nations and the Refugees*, 20 ALLAHABAD WKLY. REP. BULL. 86, 86 (1982) ("[O]ne of the really pressing problems which arose in the wake of the First World War and the ensuing great revolutions, was the exodus of the great masses of human beings seeking refuge in foreign countries.").

40. *Memorandum sur la question des réfugiés russes*, Conference des organisations russes 4 (1921); *see also* J. SIMPSON, REFUGEES: PRELIMINARY REPORT OF A SURVEY 21–22 (1938).

41. Chamberlain, *The Mass Migration of Refugees and International Law*, 7 FLETCHER F. 93, 102 (1983) ("In situations of mass migration, the fact is that those states wishing to control their own borders are often those most completely unable to do so . . . . Even though asylum is recognized in customary law as at the discretion of nation states, discretion can seldom be used when one is faced with thousands of people encamped on one's borders.").

A. 1920–1938: Humanitarianism Qualified

In this historical context, refugee law originated as an attempt to accommodate the reality of a largely unstoppable flow of involuntary migrants across European borders within the broader policy of restricting immigration.[42] In its initial form, refugee law thus constituted a largely humanitarian exception to the protectionist norm,[43] with the screening of immigrants eliminated for large groups of fleeing persons.[44]

The first refugee accords emerged between 1922 and 1926 to address the influx of Russian and Armenian refugees.[45] These agreements were extended to several similarly situated refugee groups in 1928[46] and to political and religious dissidents from the Saar in 1935.[47] In the wake of National Socialism, those victims of the Nazi regime able to escape their homelands were similarly protected.[48] Administrative responsibility was entrusted to several international agencies[49] authorized to issue identity and travel documents to refugees as a means of facilitating their entry into countries of asylum.[50] There was no attempt to stop or even to control the movements of refugees, but rather only an effort to regularize their status in the state of reception or resettle-

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42. *See* M. MARRUS, *supra* note 28, at 51–81.

43. The exclusive jurisdiction of states to control the entry of persons into their territory is now constrained by an increased recognition of protection as a humanitarian duty. G. GOODWIN-GILL, *supra* note 30, at 138.

44. For example, in the case of Russian refugees, "[o]n presentation of the certificate (which identifies the bearer as a Russian refugee), the refugee may in certain circumstances be admitted into the State which he wished to enter . . . ." Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922, para. 5, 355 L.N.T.S. 238.

45. These are the Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, *supra* note 44, and the Arrangement Relating to the Issue of Certificates of Identity to Russian and Armenian Refugees, May 12, 1926, 2004 L.N.T.S. 48.

46. Specifically contemplated were Assyrian, Assyro-Chaldaean and assimilated refugees, and certain Turkish refugees. Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, June 30, 1928, 2006 L.N.T.S. 65.

47. 16 LEAGUE OF NATIONS O.J. 1681 (1935).

48. Additional Protocol Concerning the Status of Refugees Coming from Germany, Sept. 14, 1939, 4634 L.N.T.S. 142; Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 4461 L.N.T.S. 61; Provisional Arrangement Concerning the Status of Refugees Coming from Germany, July 4, 1936, 3952 L.N.T.S. 77.

49. The responsible organizations during this period included the League of Nations High Commissioner for Refugees (1921–1930), the Nansen International Office (1930–1938), the High Commissioner's Office for Refugees from Germany (1933–1938), and the High Commissioner's Office for All Refugees (1938–1946). Melander, *supra* note 14, at 153 n.2.

50. The first refugee definitions were formulated in response to the international legal dilemma caused by the denial of State protection . . . . The refugee definitions were designed to correct this breakdown in the international order and accordingly embraced persons who wished to have the freedom of international movement but found themselves in the anomalous situation of not enjoying the legal protection of any State.

Hathaway, *supra* note 26, at 358.

ment. States further agreed to guarantee certain basic rights to refugee immigrants by international convention.[51]

Yet even in this largely humanitarian phase of refugee law, the nation-state philosophy and promotion of national economic goals restricted its application. First, only those persons who had succeeded in leaving their country were assisted;[52] states were reluctant to recognize even the most compelling humanitarian claims of persons still within their state of origin. Second, the international agencies[53] which were entrusted with control over the protection of refugees were not guaranteed any funds to provide relief aid to refugees. Rather, they were merely entitled to seek out and coordinate the spending of externally financed contributions.[54] Third, the refugees, once admitted to a contracting state, enjoyed no guarantee of nationalization,[55] but rather were able to invoke only the more limited range of rights established by either domestic law on aliens or applicable international conventions.[56] Fourth, and perhaps most importantly, refugee law at this time evinced a willingness to assist only some, but not all, persons forced to live outside their state of origin. When the High Commissioner of the League of Nations sought leave in 1927 to extend protection to several categories of European refugees "who hitherto have had no means of subsistence and are unable in their present position to obtain any,"[57] he was met with the reply that "the mere fact that certain classes of persons are without the protection of any national government is not sufficient to make them refugees . . . ."[58] Assistance was explicitly limited to only those persons whose displacement could be attributed to World War I, although the High Commissioner's report made it clear that the degree of humanitarian need

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51. The Convention "secured freedom of access to the law courts, and the most favourable treatment in respect to welfare, relief, and taxation; it exempted the refugees from the reciprocity principle; it provided for the optional institution of refugee committees in every country, and it foresaw certain modifications of the measures restricting employment." Holborn, *supra* note 26, at 690.

52. *Report by the High Commissioner*, League of Nations Doc. 1927.XIII.3, at 13 (1927).

53. *See supra* note 49.

54. Holborn, *supra* note 26, at 687.

55. For both legal and economic reasons, the states were unwilling to take the obvious and easiest way of settling the status of the refugees; that is, by naturalization . . . . From the economic side, there was the fear that the refugee, if nationalized, might more easily become a charge on public assistance.

Holborn, *supra* note 26, at 682.

56. It is noteworthy that while 54 and 38 states initially agreed to collaborate in the recognition of certificates of identity for Russian and Armenian refugees, respectively, L. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME 9 (1975), only eight states went on to ratify the first international convention (in 1933) that placed specific obligations on states in terms of their treatment of these refugees. P. ROHN, WORLD TREATY INDEX 259 (2d ed. 1983).

57. *Report by the High Commissioner*, *supra* note 52, at 7.

58. 8 LEAGUE OF NATIONS O.J. 1137 (1927).

of the rejected groups was at least as great as that of the refugees to whom protection had been extended.[59]

In these various ways, the humanitarianism of the early European refugee laws was significantly attenuated. Through a combination of refusal to embrace internal refugees, an unwillingness to make legally binding commitments to refugee relief, the provision to refugee immigrants of less than full rights, and discrimination in refugee definition, states demonstrated a determination to limit the scope of the altruistic humanitarian exception to existing immigration norms.

B. 1938–1950: Human Rights Protection Qualified

The movement of refugee law away from principles of humanitarianism intensified between 1938 and 1950. In particular, the determination of refugee status on the basis of a broadly defined lack of protection came to an end. No longer was it enough to be a member of a group of displaced or stateless persons; rather, a particularized analysis of each claimant's motives for flight was requisite to recognition as a refugee. With the assumption of international responsibility for refugee protection by the Intergovernmental Committee on Refugees in 1938,[60] only those individuals forced to emigrate "on account of their political opinions, religious beliefs [or] racial origin"[61] qualified for assistance. Similarly, the United Nations Relief and Rehabilitation Administration (UNRRA)[62] insisted on concrete evidence[63] of persecution; the successor International Refugee Organization (IRO)[64] required the demonstration of "valid objections"[65] to return to the state of origin.

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59. The excluded groups included 9000 Ruthenians unable to migrate from Austria and Czechoslovakia; some 16,000 Jews living in Bukowina, Bessarabia, and Transylvania who were unable to secure citizenship; and approximately 110,000 refugees in Central Europe, mostly former Hungarians, many of whom were desirous of emigrating, but were unable to do so because they lacked passports. *Report by the High Commissioner*, *supra* note 52, at 14.

60. *See generally* J. SIMPSON, REFUGEES: A REVIEW OF THE SITUATION SINCE SEPTEMBER 1938, at 2–3 (1939).

61. Resolution of the Committee, I.C.R. Doc., July 14, 1938.

62. While the United Nations Relief and Rehabilitation Administration (UNRRA) was not established in order to provide assistance to refugees, there were many individuals among those for whom UNRRA was responsible who feared persecution were they to be repatriated. J. VERNANT, *supra* note 26, at 30–31. UNRRA Resolution 71, passed in August 1945, resulted in an explicit shift of the organization's mandate to include refugee protection. UNRRA JOURNAL 152 (1945).

63. No concrete evidence of persecution was, however, required of victims of "discriminatory Nazi legislation." UNRRA European Region Order 40(I), July 3, 1946.

64. The International Refugee Organization (IRO) was established by the United Nations in December 1946 as successor to the Intergovernmental Committee on Refugees and UNRRA. 1 U.N. GAOR (67th plen. mtg.) at 1454, U.N. Doc. A/265 (1946).

65. Constitution of the International Refugee Organization, part I(C)(1), *opened for signature* Dec. 15, 1946, 18 U.N.T.S. 3.

The move to a more individuated conception of refugeehood signalled the shift from a refugee law based on general humanitarian concern to provide *en bloc* protection, to a more selective focus on assisting persons whose basic human rights were jeopardized.[66] This evolution is traditionally explained in two ways.

First, the massive nature of the refugee problem during and immediately after World War II[67] arguably made it necessary to reserve limited international resources to assist the "most deserving" among the multitude of displaced and suffering persons. As already noted, the human rights perspective on refugee law provides an enhanced ability to fine-tune the refugee determination process, thus offering the assurance that refugee recognition is fair within the context of an inability to meet the full range of human needs.[68]

Second, the choice of a human rights framework was consistent with the more general political response to the atrocities of Nazi Germany.[69] The recognition that some constraints on a state's authority over its citizens are necessary[70] led to the inclusion of human rights protection as a cornerstone of the Charter of the United Nations in 1945,[71] followed by the elaboration of a detailed International Bill of Rights commencing in 1948.[72] It was contextually logical that refugee

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66. The Western states that advocated the individuated definition argued the importance of facilitating the right of individuals to migrate in search of personal freedom and liberty. 1 U.N. GAOR C.3 (8th mtg.) at 23, U.N. Doc. A/C.3/22 (1946).

67. Throughout the last year of the war, all the liberating armies in Europe found masses of refugees under foot, whom few tried to differentiate . . . . At the end of September [1945], the Western Allies cared for nearly seven million displaced persons; the Soviets claimed they took charge of an equal number. The largest group, in both cases, were Soviet citizens, over 7.2 million forced laborers and prisoners of war who had survived the ordeal of wartime Germany.

M. MARRUS, *supra* note 28, at 298–99.

68. *See supra* notes 10–16 and accompanying text.

69. P. SIEGHART, *supra* note 17, at 14–15 ("When the Second World War . . . ended, the victorious nations determined to introduce into international law new concepts designed to outlaw such events for the future, in order to make their recurrence at least less probable. The means adopted were the establishment of new intergovernmental agencies . . . and the development within these fora of a new branch of international law, specifically concerned with the relations between governments and their own subjects.").

70. *Id.*

71. The Preamble to the Charter of the United Nations, declares that: "We the Peoples of the United Nations Determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . do hereby establish an international organization to be known as the United Nations." UNITED NATIONS CHARTER, preamble.

72. This includes the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, *entered into force* Jan. 3, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); and the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entereded into force* Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966).

law should follow the more general pattern of achieving some measure of basic protection from abusive national authority through the adoption of a human rights strategy.

Yet, much as the humanitarian premise was not completely adhered to during the first phase of refugee law,[73] so was the influence of the human rights paradigm mitigated during this second period. On the one hand, refugee law suffered from the general conceptual narrowness of human rights during this era.[74] The prevailing notion of human rights only addressed a narrow aspect of human dignity: the civil and political rights firmly rooted in Western political thought and consistent with Western political goals.[75] The economic, social, and cultural goals promoted by the socialist bloc were not regarded as rights enforceable by law[76] and the developmental needs of the Third World were largely excluded from the scope of human rights protection.[77]

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73. *See supra* notes 52–59 and accompanying text.

74. *See* Sinha, *supra* note 11, at 88:

> [T]he Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social, and Cultural Rights . . . have, by and large, issued from one particular concept of social order. The inspiration for this approach has come from such successful documents as the English Bill of Rights, or the American Plantation Declarations and the Declaration of Independence, or the French Declaration des Droits de l'Homme et du Citoyen. However, the reason for the success of the single-catalog approach in any of these particular societies has been due to the existence of a set of conditions there, namely, that the society was held together by one dominant culture defining its values, that it entertained one dominant ideology . . . .

Id.

75. A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 148 (1986); *see also* Pahr, *supra* note 12, at 5. A broader vision of what consitutes human rights is offered by Schachter: "[f]ew will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers a profound affront to his sense of dignity and intrinsic worth. Economic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity." Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 851 (1983). Throughout this Article the expression "civil and political rights" includes protection based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and is used to distinguish these aspects of human dignity recognized in the International Covenant on Civil and Political Rights, *supra* note 72, from the socio-economic rights guaranteed by the International Covenant on Economic, Social, and Cultural Rights, *supra* note 72.

76. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs* in T. Meron ed., *supra* note 10, at 213. As one author queries, "The so-called economic and social rights, insofar as they are intelligible at all, impose no . . . universal duty . . . . When the authors of the United Nations Covenant on Economic and Social Rights assert that 'everyone has the right to social security,' are they saying that everyone ought to subscribe to some form of world-wide social security system from which each in turn may benefit in case of need? If something of this kind is meant, why do the United Nations Covenants make no provision for instituting such a system? And if no such system exists, where is the obligation, and where the right?" M. CRANSTON, WHAT ARE HUMAN RIGHTS? 69 (1973).

77. Article 28 of the Universal Declaration of Human Rights is perhaps the only standard of the era to address this issue, at least in general terms: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." Universal Declaration of Human Rights, *supra* note 72. "[A]t the United Nations the enunciation and reiteration of an inseparable link between human rights and development are

The preoccupation of this period's refugee agreements with the protection of persons whose civil and political rights were endangered, to the exclusion of others whose human dignity was offended in some different way, is concededly understandable in historical context. Nonetheless, it must be recognized that the linkage between refugee law and human rights was selective in a way that reinforced the economic and political hegemony of major Western states during this time.[78]

Moreover, the civil and political rights framework incorporated in the refugee accords of the immediate post-war years was susceptible to ideologically inspired interpretation. In particular, an early UNRRA definition[79] and the IRO definition,[80] both adopted in 1946, were applied by some states to include political dissidents within the scope of refugee protection.[81] No demonstrable evidence of humanitarian need, no plea of past or anticipated persecution was required: the mere assertion of ideological incompatibility between the refugee claimant and the state of origin was treated as proof of refugee status.[82] This approach reflects the Cold War politics of the Western states that dominated the refugee agencies[83] and caused much resentment on the part of East Bloc states, which argued that they were being saddled

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of recent vintage . . . ." Nanda, *Development and Human Rights: The Role of International Law and Organizations*, in HUMAN RIGHTS AND THIRD WORLD DEVELOPMENT 291 (G. Shepherd, Jr. and V. Nanda eds. 1985).

78. The International Covenant on Civil and Political Rights, for example, "in part, was drafted as an *ex post facto* statement of allied war aims in the Second World War." Lippman, *Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights*, 26 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 221, 273 (1979).

79. UNRRA Resolution 71, August 1945, *supra* note 62, provided simply for the extension of protection to "persons who have been obliged to leave their country or place of origin or former residence." This definition was interpreted by the Washington office of UNRRA to apply to political dissidents, resulting in significant criticism by both the London UNRRA office and East Bloc states. UNRRA JOURNAL 82–83, 85–86 (1946); UNRRA Outgoing Cable No. 1675, Feb. 9, 1946; and UNRRA Incoming Cable No. 8855, Dec. 28, 1945.

80. The essence of the IRO definition provided that persons who "in complete freedom and after receiving full knowledge of the facts . . . expressed valid objections to returning" to their state of origin might be assisted by the Organization. Constitution of the International Refugee Organization, *supra* note 65, at part I(C)(1).

81. With regard to the IRO, see 1 U.N. GAOR (30th plen. mtg.) at 416, U.N. Doc. A/45 (1946).

82. *See* 1 U.N. GAOR C.3 (8th mtg.) at 23, U.N. Doc. A/C.3/23 (1946).

83. *See* M. MARRUS, *supra* note 28, at 343:

> In practice, the IRO became the instrument of the Western powers, chiefly the United States, which contributed over half of its operating funds. Sharply critical of the previous UNRRA operation, American policy makers determined to control the workings of the new organization—justified, they felt, by the huge American share of the IRO budget. Three successive executive secretaries who ran the administrative operations were Americans, and while they directed an international staff from forty nations, there was no mistaking their style.

Id.

with "liability for the maintenance of their emigrated enemies."[84] The incorporation of the vague language of objections deemed "valid"[85] in the refugee definition left sufficient flexibility for politically inspired deviations[86] from a strict human rights approach to the granting of refugee status, resulting in the international protection of persons whose ideology coincided with that of the dominant Western powers.[87]

In sum, the pre-1950 refugee accords and arrangements established protection regimes which compromised humanitarian instincts with protectionism, and concern for the promotion of human rights with the advancement of political goals. The two primary trends of this period—the rejection of a humanitarian basis for refugee law in favor of a more selective human rights focus, and the definition of human rights in terms consistent with the ideology of the more powerful states—set the stage for the development of contemporary refugee law.

C. 1950 and Beyond: Self-Interested Control

International refugee law today derives from the Convention Relating to the Status of Refugees,[88] drafted between 1948 and 1951. The fundamental tenets of the Convention have proved enduring[89] and have been buttressed by the 1967 Protocol Relating to the Status of Refugees,[90] international institutions,[91] regional accords,[92] and national laws and practices.[93] The balance of this Article examines the main features of modern refugee law, drawing on both the international

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84. 1 U.N. GAOR (30th plen. mtg.) at 416, U.N. Doc. A/45 (1946).

85. *See supra* note 80.

86. The Government of France joined East Bloc states in arguing the impropriety of assisting political dissidents within the context of a refugee protection system. 1(2) U.N. ESCOR Spec. Supp. 1 at 20, U.N. Doc. E/REF/75 (1946).

87. M. MARRUS, *supra* note 28, at 344 ("After a few months of operation, it became clear to IRO officials that there was little prospect for repatriation, given the hostility of most Eastern European refugees to the Soviet regime . . . . IRO workers hoped to resettle refugees in Western Europe, identifying ways in which new immigrants could assist postwar construction.").

88. Convention, *supra* note 5.

89. *See* G. GOODWIN-GILL, *supra* note 16, at 149–50.

90. Protocol, *supra* note 6.

91. While the United Nations High Commissioner for Refugees (UNHCR) is the primary refugee relief organization of the United Nations, it is assisted by such other agencies as UNESCO, UNICEF, and UNDP, as well as by more than 200 nongovernmental organizations that contribute to its humanitarian assistance programs. *See* Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449, 460–64 (1981).

92. Among the more significant regional efforts are the resolutions of the Council of Europe on the subject of asylum, the recognition of a right to asylum in the American Convention on Human Rights of the Organization of American States, and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. *See* Grahl-Madsen, *International Refugee Law Today and Tomorrow*, 20 ARCHIV DES VÖLKERRECHTS 411, 412–13 (1982).

93. *See generally* G. GOODWIN-GILL *supra* note 16, at 165–204.

legislative history and on the nature of the international legal regime as it has emerged.

The general tenor of the Convention's drafting history and subsequent evolution in practice may be summarized in three points. First, it maintained a strategically conceived definitional focus in refugee law: the principle of comprehensive humanitarian or human rights based protection for all refugees and similarly situated persons was rejected by a majority of states. Second, a universalist approach to refugee protection was defeated in favor of a Eurocentric legal mandate derived from a highly selective definition of international burden-sharing. Third, and most important, states opted to take direct control of the process of refugee determination and have established an international legal framework that permits the screening of applicants for refugee protection on a variety of national interest grounds. The cumulative effect of these trends has been the legitimation of a political rationale for refugee law, the evolution of a two-tiered protection scheme that shields Western states from most Third World asylum seekers, and the transfer to states of the authority to administer refugee law in a manner consistent with their own national interests. In sum, the current framework of refugee law, even if it were to be fully and universally implemented, is largely inconsistent with the attainment of either humanitarian or human rights ideals on a universal scale.

II. THE REJECTION OF COMPREHENSIVE PROTECTION

In 1949 the Secretary General of the United Nations proposed a revised and consolidated convention relating to the status of all persons without international protection.[94] In response, the Economic and Social Council approved the drafting of a convention which would extend comprehensive humanitarian protection both to persons who lacked formal or de jure protection (stateless persons), and to persons who lacked de facto protection, notwithstanding their retention of a particular nationality (refugees).[95]

The initiative to draft the new convention stemmed from the Secretary General's concern for the consistency of treatment in regard to an undifferentiated problem of statelessness, *de jure* or *de facto*.[96] He hoped "to tackle the problem of stateless persons as such . . . [because] all stateless persons must in principle be treated alike."[97] This boldly humanitarian plan, however, did not survive political scrutiny. As one

94. *U.N. Department of Social Affairs, A Study of Statelessness*, U.N. Doc. E/1112 (1949).
95. 6 U.N. ESCOR, Economic and Social Council Res. 116 (VI)D, Mar. 1–2 (1948).
96. *U.N. Department of Social Affairs, A Study of Statelessness, supra* note 94, at 79.
97. *Id.* at 1.

nongovernmental observer at the final conference noted, the deliberations

> had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee. The draft Convention had at times been in danger of appearing to the refugee like the menu at an expensive restaurant, with every course crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances.[98]

A. Strategic Limitations

From the beginning, states sought to limit the scope of protection in ways that suited their own interests, with interests stratified along Eastern and Western ideologies. The Soviet Union and its allies argued that the notion of comprehensive protection was "based on false premises."[99] While de jure stateless persons should be assisted by the United Nations,[100] the socialist bloc objected vigorously to protection for refugees,[101] whom they viewed as "traitors who are refusing to return home to serve their country together with their fellow citizens."[102] The notion of refugee status grounded in social or ideological incompatibility was condemned as an attempt by Western states to advance "sinister political purposes."[103] Thus, the Soviet alliance declined to participate in the work of the committees that drafted the Refugee Convention.[104]

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98. Statement of Mr. Rees of the International Association of Voluntary Agencies, U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting at 4, U.N. Doc. A/CONF.2/SR.19, at 4 (1951).

99. *See* Statement of Mr. Kulazhenkov of the U.S.S.R., 4 U.N. ESCOR 626 (1949) ("[T]he manner in which the problem of statelessness had been treated by the Secretary-General was based on false premises in so far as the concept of statelessness had been misinterpreted and confused with the problem of refugees and displaced persons . . . . The core of the problem was still, as it had always been, repatriation.").

100. *Id.* at 640.

101. *See* Statement of Mr. Soldatov of the U.S.S.R., in 5 U.N. GAOR (325th plen. mtg.) at 670, U.N. Doc. A/1682 (1950) ("The United Nations should not concern itself with [persons unwilling to avail themselves of the protection of the country of their nationality] since they refuse to accept assistance from the government of the country of which they are nationals and refuse to co-operate with their own people in the reconstruction of their country on new and democratic foundations.").

102. *Id.* at 671.

103. Statement of Mr. Katz-Suchy of Poland, 11 U.N. ESCOR, Refugees and Stateless Persons: Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1703/Add.1, at 2 (1950).

104. "The [refugee] definitions were worked out in the period 1949–51, *i.e.*, at a time when the cold war between East and West had reached its height and when in fact the Eastern Bloc boycotted the United Nations." Melander, *supra* note 14, at 160; *see also* Statement of Mr. Kulazhenkov of the U.S.S.R., 4 U.N. ESCOR 640 (1949) ("[The U.S.S.R] would not be a

The state delegates that ultimately met to prepare the Convention, predominantly Western,[105] brought to the drafting table their own ideological partisanship. Notwithstanding the humanitarian plea by the United Kingdom to include all "unprotected persons" within the international mandate,[106] the ultimate decision was to *exclude* the stateless persons (whose interests the Soviet Union had sought to protect)[107] and to protect *only* refugees. France and the United States in particular asserted that refugees presented a more serious problem of humanitarian need:[108] the problems of stateless persons were characterized as distinct,[109] less urgent than the needs of refugees,[110] and fundamentally giving rise to less of a social problem[111] than those of

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party to such dangerous confusion between two perfectly separable categories of people [stateless persons and "refugees"] . . . . That policy was prompted by the desire to secure and exploit a steady supply of cheap labour.").

105. Melander, *supra* note 14, at 160. The states that participated in the work of the Ad Hoc Committee on Refugees and Stateless Persons included Belgium, Brazil, Canada, China, Denmark, France, Israel, Turkey, the United Kingdom, the U.S., and Venezuela. U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Second Meeting, U.N. Doc. E/AC.32/SR.2 (1950).

106. The United Kingdom proposed to extend protection to both persons without a nationality and persons who did not wish to accept the protection of their state of nationality. U.N. ESCOR, Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/AC.32/L.2 (1950). This approach was supported by Belgium. U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Fourth Meeting, at 5, U.N. Doc. E/AC.32/SR.4 (1950).

107. U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Draft Report, at 5, U.N. Doc. E/AC.32/L.38 (1950).

108. *See* Statement of Mr. Henkin of the U.S., U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Second Meeting, at 6, U.N. Doc. E/AC.32/SR.2 (1950) ("The applicability of the draft convention should . . . be limited to refugees. It should not be based upon a confusion between the humanitarian problems of the refugees and the primarily legal problems of stateless persons, which should be dealt with by a body of legal experts, but should not be included in the proposed convention."); *see also* Statement of Mr. Rain of France, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Second Meeting, at 7, U.N. Doc. E/AC.32/SR.2 (1950) ("Almost all refugees were in need, a fact which gave the problem its special urgency. The same could not be said of stateless persons who were not also refugees.").

109. *See* Statement of Mr. Henkin of the U.S., U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Second Meeting, at 5, U.N. Doc. E/AC.32/SR.2 (1950) ("Like the French Government, the Government of the United States considered that the problem of refugees differed from that of stateless persons and ought to be considered separately.").

110. *See supra* note 108 and accompanying text; *see also* Statement of Mr. Guerreiro of Brazil: "It was . . . indisputable that refugees and *de facto* stateless persons were more unfortunately placed than *de jure* stateless persons, and it was therefore more urgent to remedy their situation." U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Third Meeting, at 4, U.N. Doc. E/AC.32/SR.3 (1950). A variety of other delegates supported this position, including those from Denmark and Turkey. *Id.* at 6.

111. "[I]ncluding in the convention provisions to cover stateless persons who were not refugees . . . was secondary in the sense that the situation of stateless persons who were not refugees did not raise any urgent social or humanitarian problem." Statement of Mr. Rain of France, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Third Meeting, at 4, U.N. Doc. E/AC.32/SR.3 (1950).

refugees. As such, it was argued that the Convention should address the more pressing needs of refugees,[112] particularly those persons who could meet the test of fundamental incompatibility vis-à-vis their state of origin.[113] No substantiation of the purportedly lesser claim of stateless persons was offered, however, despite the British insistence that there was no qualitative difference between the humanitarian needs of refugees and stateless persons.[114] Thus, the international legal rights of stateless persons were not established until the coming into force of the Convention Relating to the Status of Stateless Persons[115] in 1960, more than six years after the entry into force of the Refugee Convention.[116] Moreover, this division of the problem of internationally unprotected persons into two parts permitted the establishment of different standards of treatment for refugees and stateless persons[117] and, more importantly, has permitted states to give lower priority to meeting the humanitarian needs of the lower profile stateless population.[118]

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112. *See* Statement of Mr. Rain of France, *supra* note 108, at 4, ("The question of the elimination of statelessness was basically different from that of the status of refugees. It was [more] a continuing concern of the world community than an acute situation which required immediate remedial measures.").

113. The major conceptual expansion of the refugee concept advocated by the U.S. was to "['n]eo-refugees', the definition of which was broad enough to allow the inclusion of persons who had left their home since the Second World War as a result of political, racial or religious persecution, or those who might be obliged to flee from their countries for similar reasons in the future." Statement of Mr. Henkin of the U.S., U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Third Meeting, at 10, U.N. Doc. E/AC.32/SR.3 (1950).

114. *See* Statement of Sir L. Brass of the United Kingdom, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Third Meeting, at 8, U.N. Doc. E/AC.32/SR.3 (1950).

115. Convention Relating to the Status of Stateless Persons, Sept. 23, 1954, 360 U.N.T.S. 5158 (entered into force June 6, 1960).

116. *See supra* note 5.

117. [A]lthough the Ad Hoc Committee took the view that the United Nations would not wish to be burdened indefinitely with machinery for the protection of stateless persons generally, it had recognised that they needed protection and that the United Nations had an interest in them; it had, therefore, prepared a separate instrument relating to them. The draft Convention on the Status of Refugees, however, *gave somewhat greater benefits*, it being assumed that States would be willing to go further in respect of refugees than in respect of stateless persons generally, in view of the greater humanitarian factors involved.

Statement of Mr. Henkin of the U.S., 11 U.N. ESCOR Social Committee, Summary Record of the Hundred and Fifty-Eigth Meeting, at 13, U.N. Doc. E/AC.7/SR.158 (1950) (emphasis added). While the structure of the two Conventions is quite similar, stateless persons do not benefit from the exemption from restrictive measures imposed on aliens engaged in wage-earning employment (guaranteed to refugees by article 17(2) of the Refugee Convention); they may not invoke the obligation of states to use their best efforts to secure the settlement of individuals trained in a liberal profession (as may refugees pursuant to article 19(2) of the Refugee Convention); and perhaps most significantly, stateless persons do not benefit from the protection against penalties for illegal entry (guaranteed to refugees by article 31 of the Refugee Convention).

118. As of January 1, 1988, the 1951 Refugee Convention and 1967 Refugee Protocol had been ratified by 100 and 101 states, respectively. In stark contrast, the Convention Relating to

There was likewise no commitment to grounding refugee law in the promotion of international human rights; French efforts to link refugee status to violations of fundamental human rights and to the general human right to seek asylum[119] were summarily rejected as "theoretical" and "too far removed from reality."[120] In sum, neither a holistic view of humanitarian need nor of human rights protection was seen as the appropriate foundation for the new convention.

B. Promotion of Western Political Objectives

The rejection of comprehensive humanitarian or human rights coverage is explained by the conviction of most Western states that their limited resettlement capacity[121] should be reserved for those whose flight was motivated by pro-Western political values. As anxious as the Soviets had been to refuse international protection to social and ideological emigrants for fear of exposing their weak flank,[122] so were the Western states anxious to underscore the plight of dissidents from Communist regimes by bringing them within the scope of an inter-

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the Status of Stateless Persons had been ratified by only 34 states. Marie, *International Instruments Relating to Human Rights: Classification and Chart Showing Ratifications as of 1 January 1988*, 9 HUM. RTS. L.J. 113, 128–29 (1988).

119. *See* Statements by Mr. Rain of France, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Third Meeting at 7, 15, U.N. Doc. E/AC.32/SR.3 (1950).

120. The delegate of Israel, for example, argued that a broad definition of a refugee based on human rights principles would be

> [t]oo abstract and too far removed from reality, and departed from the tradition of the United Nations . . . . The French draft in particular wished to some extent to scrap what might be called the legal precedents in the matter and to take the Universal Declaration of Human Rights as the sole point of departure. Members of the United Nations could hardly be asked to discard the experience already acquired by that Organization in exchange for abstract formulas.

Statement of Mr. Robinson of Israel, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, at 9, U.N. Doc. E/AC.32/SR.5 (1950); *accord* Mr. Larsen of Denmark, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, at 4, U.N. Doc. E/AC.32/SR.6 (1950).

121. *See, e.g.*, Statement of Mr. Rochefort: "The European countries . . . already had to bear a very heavy load of refugees . . . . France, for her part, was responsible for far too great a number of refugees to seek to extend her generosity to parts of the world which took no interest in the solution of such problems." Statement of Mr. Rochefort of France, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 12, U.N. Doc. A/CONF.2/SR.19 (1951).

122. The U.S.S.R. delegation considers that persons who collaborated in any way with the enemies of the democratic countries should not be regarded as refugees or enjoy the protection of the United Nations. It considers it essential to exclude from the category of persons who receive United Nations assistance not only those who, during the war, fought actively on the side of the enemy against the people and government of their country, but all those other traitors who are refusing to return home to serve their country together with their fellow citizens.

Statement of Mr. Soldatov of the U.S.S.R., 5 U.N. GAOR (325th plen. mtg.) at 671, U.N. Doc. A/1682 (1950).

nationally recognized refugee regime.[123] In the end, it was agreed to restrict the scope of protection in much the same way as UNRRA had done: only persons who feared "persecution" in the sense of being denied basic civil and political rights would fall within the international mandate.[124]

This phraseology was clearly adequate to comprise the traditional preoccupations of racial and religious minorities and would moreover bolster the condemnation of Soviet bloc politics through international law in two ways. First, the persecution standard was a known quantity, having already been employed to embrace Soviet bloc dissidents under the IRO regime.[125] It was understood that the concept of "fear of persecution" was sufficiently open-ended to allow the West to continue to admit ideological dissidents to international protection.[126] More-

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123. Post-war refugees "[c]rossing borders as a result of a desire to escape the consequences of the communist takeover of Eastern Europe . . . were generally welcomed by the States of Western Europe *if only for propaganda reasons.*" Hyndman, *Asylum and Non-Refoulement: Are These Obligations Owed to Refugees under International Law?*, 57 PHILIPPINES L.J. 50 (1982) (emphasis added); *accord* Statement of Mr. Rochefort of France.

> [T]he definition of the term "refugee" . . . was based on the assumption of a divided world. If, however, it was considered that a single text should cover both refugees from western Europe seeking asylum in the countries beyond the "Iron Curtain" and refugees from the latter countries seeking asylum in western Europe, [it was unclear] what the moral implications of such a text would be. The problem of refugees could not be treated in the abstract, but, on the contrary, must be considered in the light of historical facts. In laying down the definition of the term "refugee," account had hitherto always been taken of the fact that the refugees principally involved had originated from a certain part of the world; thus, such a definition was based on historical facts. Any attempt to impart a universal character to the text would be tantamount to making it an "Open Sesame."

Id. U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 15, U.N. Doc. A/CONF.2/SR.22 (1951).

124. The Convention defines "refugee" as follows:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who . . . [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country . . . .

Convention, *supra* note 5, at art. 1(A)(2).

125. The representative of France had observed that the definition of neo-refugees could be interpreted very broadly. The fact was that it already appeared in the IRO Constitution where its meaning was quite clear: it would have to have the identical meaning in the convention. It did not apply to all types of refugees wherever they might be, but only to those who had become refugees as a result of events which had followed the outbreak of the second world war.

Statement of Mr. Henkin of the U.S., U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems at 5, U.N. Doc. E/AC.32/SR.5 (1950).

126. *See, e.g.*, Statement of Mr. Robinson of Israel, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 6, U.N. Doc. A/CONF.2/SR.22 (1951) ("[T]he word 'events' had originally been included . . . in an attempt to designate, in a somewhat camouflaged manner, the new categories of post-war refugees that had emerged as a result of the political changes which had supervened in parts of central and eastern Europe."); *see also* Statement of Mr. Warren of the U.S., U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 15, U.N. Doc. A/CONF.2/SR.21 (1951).

over, the new Refugee Convention added significantly to the scope for ideologically influenced interpretations by allowing each contracting state to make its own eligibility determinations.[127] Thus, for example, the United States and others have routinely assumed that all persons in Communist states are by definition in fear of persecution.[128]

Second, the precise formulation of the persecution standard meant that refugee law could not readily be turned to the political advantage of the Soviet bloc. The refugee definition embraces only persons who have been disfranchised by their state on the basis of race, religion, nationality, membership of a particular social group, or political opinion, areas where East Bloc practice has historically been problematic.[129] Unlike the victims of civil and political oppression, however, persons denied even such basic rights as food, health care, or education, (*i.e.*, the socioeconomic rights,[130] where the Western states have a poor record) are excluded from the international refugee definition, unless that deprivation stems from civil or political status. By mandating protection for those whose civil and political rights are jeopardized, without at the same time protecting persons whose socioeconomic rights are at risk, the Convention continued the lopsided and politically biased human rights rationale for refugee law of the immediate post-war years.

In sum, the first main feature of modern international refugee law is its rejection of comprehensive humanitarian or human rights based assistance in favor of a more narrowly conceived focus. The opting out of the Eastern Bloc from the design of the Convention allowed Western

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127. *See infra* text accompanying note 220.

128. The administrative interpretation and application of the Convention definition of refugee in the United States has been traditionally subject to both subtle and not so subtle political distortion. The intimate involvement of the policy-making wing of the State Department in the INS refugee and asylum determination process causes this distortion . . . . The overall result has been the infiltration of geopolitical considerations . . . . The determination of which persons fall within the Convention definition of refugee is affected significantly by political factors in all [Western] countries, with the possible exception of France. The extent to which the refugee decision is politicized, however, varies widely among these countries.

Sexton, *Political Refugees, Nonrefoulement and State Practice: A Comparative Study*, 18 VAND. J. TRANSNAT'L L. 778–79, 804 (1985).

129. *See generally* AMNESTY INTERNATIONAL, REPORT 1987 at 279–332 (1987). For example, in regard to the U.S.S.R., the Report notes "[n]o improvement in the harsh and arbitrary treatment of prisoners of conscience in 1986. Although it has learned of fewer political arrests, Amnesty International was disturbed that the Soviet authorities continued to imprison many citizens whose conscience had led them to dissent peacefully from official policies, and to apply compulsory psychiatric measures to others." *Id.* at 320.

130. The expression "socio-economic rights" is used in this Article to encompass the aspects of human dignity set out in the International Covenant on Economic, Social, and Cultural Rights, *supra* note 72, and to distinguish them from civil and political rights. *See supra* note 75; *see also* Jackson, *Measuring Human Rights and Development by One Yardstick*, 15 CA. W. INT'L L.J. 456, 460 (1985).

states to take hold of the process and to construct a refugee protection system that was consistent with their own desire to give international legitimacy to their efforts to shelter self-exiles from the socialist states.[131]

III. THE ESTABLISHMENT OF SELECTIVE BURDEN-SHARING

A. Eurocentric Conventional Focus

In addition to their desire for refugee law to conform to strategic political objectives, the states that drafted the Convention created a rights regime initially limited to the redistribution of the refugee burden from the shoulders of front-line European states.[132] Those states which had been forced to cope with the bulk of the human displacement caused by World War II argued that all members of the United Nations should contribute to the resettlement of the remaining war refugees arriving from the Soviet bloc.[133] At the same time, non-European states, joined by the United Kingdom and Belgium, took the position that it was inappropriate for a United Nations convention to deal only with refugees from one particular region.[134] As the delegate from China noted, "[T]he text as it stood would apply only to European refugees, whereas it had to be remembered that other

131. "Undoubtedly, the Convention was tailored by the Western bloc for its own purposes in dealing mainly with the Eastern European refugee situation, favouring a particular characterization of the cause of the refugee problem and a particular solution." G. Coles, *supra* note 13, at 15–16.

132. Mr. Desai of India summarized the redistributive purpose succinctly: "[i]n effect, an appeal was made to all governments to accord the same treatment to all refugees, in order to reduce the burden on contracting governments whose geographical situation meant that the greater part of the responsibility fell on them." 11 U.N. ESCOR (166 mtg.) at 18, U.N. Doc. E/AC.7/SR.166 (1950). As Mr. Rochefort of France explained, "[o]ne region in the world was ripe for treatment of the refugee problem on an international scale. That region was Europe. One problem was ready to form the subject of an international convention, namely, the problem the European refugees." U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 12, U.N. Doc. A/CONF.2/SR.19 (1951); *see also* Holborn, *International Organizations for Migration of European Nationals and Refugees*, 20 INT'L J. 333 (1965).

133. *See, e.g.*, Statement of Mr. Rochefort, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 12, U.N. Doc. A/CONF.2/SR.3 (1951) ("[t]he non-European countries in whose territories European refugees were living did not wish to enter into commitments in respect of them.").

134. *See* Statement of Mr. Hoare of the United Kingdom, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 17, U.N. Doc. A/CONF.2/SR.19 (1951); Statement of Mr. Delhaye of Belgium, 11 U.N. ESCOR 277 (406th mtg.) (1950); *see also* Statement of Mr. Caledron Puig of Mexico, 11 U.N. ESCOR (160th mtg.) at 4, U.N. Doc. E/AC.7/SR.160 (1950); Statement of Mr. Bernstein of Chile, 11 U.N. ESCOR (156th mtg.) at 19, U.N. Doc. E/AC.7/SR.156 (1950) ("[T]he definition of the term 'refugee' in the draft Convention was not in accordance with accepted legal principles, and should be broadened, since there would undoubtedly be refugees from other areas than the continent of Europe.").

groups of people outside Europe might also stand in need of legal protection, either immediately or in the future."[135] The problem of refugees was not, it was argued, strictly a European phenomenon: if non-European states were to commit themselves to guaranteeing rights to immigrant European refugees, then surely it was appropriate for European states to assume a similar obligation toward refugees from other parts of the world.[136] This view prevailed during the General Assembly's consideration of the refugee accord,[137] with the result that the delegates to the Conference of Plenipotentiaries were presented with a draft convention of universal application.[138]

The European states in attendance at the Conference reacted negatively to the General Assembly's proposal. France in particular was incensed that non-European states seemed to want the benefits of universal coverage, without themselves being willing to provide the guarantees sought by the front-line European states: "[O]nly a small fraction of the 41 governments that had voted for [the universal definition] in the General Assembly had been willing to come to Geneva to sign the Convention, and nearly all those who had done so were European countries."[139] In the face of the alleged hypocrisy of most non-European states, it was successfully argued that the Convention should deal only with the refugees then of interest to the Western states that dominated the Conference.[140] This goal was to be

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135. Statement of Mr. Cha of China, 11 U.N. ESCOR (161st mtg.) at 7, U.N. Doc. E/AC.7/SR.161 (1950).

136. *See, e.g.*, Statement of Mr. Brohi: "[t]he Pakistan delegation was of the opinion that the problem of refugees was not a European problem only and thought, therefore, that the definition of the term 'refugee' should cover all those who might properly fall within the scope of that term." 11 U.N. ESCOR (399th mtg.) at 215 (1950); *see also* G. Coles, Approaching the Refugee Problem Today 5 (1987) (unpublished manuscript, available at the Refugee Law Research Unit, Osgoode Hall Law School, Ontario, Canada).

> Not surprisingly, many non-Western countries either rejected the Western approach or regarded it as concerning only the European refugee situation. Almost all the Socialist countries denounced the politics behind this approach, which were, of course, a complete change from the wholesale enforced returns organized by the Allies at the end of the War, and they criticized vehemently both the Statute and the Convention. The Arab States, also, were unhappy, and they inserted a provision in both instruments to ensure that neither was to be considered as applying to Palestinian refugees. The Asian countries kept their distance, as did a number of major Latin American countries.

Id.

137. The refugee definition as adopted by the General Assembly (on a 41-5-10 vote) did not distinguish between European and other refugees. 5 U.N. GAOR (325th plen. mtg.) at 672, U.N. Doc. A/PV.325 (1950).

138. The resolution of the General Assembly "[r]ecommend[ed] to Governments participating in the Conference to take into consideration the draft Convention submitted by the Economic and Social Council and, in particular, the text of the term 'refugee' as set forth in the annex . . . ." Draft Convention Relating to the Status of Refugees, U.N. Doc. A/1751 (1950).

139. Statement of Mr. Rochefort of France, *supra* note 133.

140. *See* Statement of Mr. Rochefort of France, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 13, U.N. Doc. A/CONF.2/SR.3 (1951) ("Around

achieved by limiting the scope of mandatory international protection to refugees whose flight was prompted by a pre-1951 event within Europe.[141] If the other states of the world were not prepared to commit themselves to the protection of European refugees, Europe would not leave itself open to the claims of outsiders.[142]

This concern over equitable burden-sharing was buttressed by two other, more questionable, preoccupations that argued for a Eurocentric focus in refugee law. First, it was posited that the need of European refugees for legal protection, rather than material assistance, distinguished this group from all other refugees in the world.[143] In other words, it was argued that because international protection for this group could be secured without the provision of any direct financial assistance,[144] the Convention should deal with European needs on a priority basis.

Second, and more forcefully put, was the contention that it was simply not pragmatic to create a universal refugee protection system premised on humanitarianism.[145] There was great fear that a general commitment to refugees would constitute a "blank check"[146] that would commit states in advance to respond to future, unforeseeable

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the conference table were assembled only those countries which were interested in European refugees, and in those circumstances the European countries could not be expected to agree to assume responsibilities in respect of refugees from countries which were not represented.").

141. The Convention as adopted by the Conference of Plenipotentiaries did not address the needs of persons whose flight was caused by post-1951 events. Convention, *supra* note 5, at art. 1(A)(2). As discussed later in the Article, states were *required* to protect only European refugees, although they might elect to declare the Convention applicable to all post-1951 refugees without distinction. *Id.* art. 1(B)(1)(b) and 1(B)(2).

142. But as Mr. Rochefort explained,

> [i]f it had become possible to consider the adoption of an international convention on European refugees, that was because the problem had been the subject of international agreements for twenty-five years. It was conceivable that by the adoption of special conventions, the way could be paved for the provision of genuinely international protection of other types of refugees in other countries.

Statement of Mr. Rochefort of France, 11 U.N. ESCOR (166th mtg.) at 23, U.N. Doc. E/AC.7/SR.166 (1950).

143. As one delegate noted, the extension of protection to non-European refugees was rejected by numerous delegates because they did not need *legal* protection. *See* Statement of Mr. Henkin of the U.S., 11 U.N. ESCOR (161st mtg.) at 7, U.N. Doc. E/AC.7/SR.161 (1950).

144. European refugees "[w]ere the only refugees in respect of whom international protection without international financial assistance had any meaning." Statement of Mr. Rochefort of France, 11 U.N. ESCOR (161st mtg.) at 8, U.N. Doc. E/AC.7/SR.161 (1950). In view of the many economic rights guaranteed to refugees protected by the Convention, this argument is of questionable validity.

145. *See* Statement of Mr. Larsen of Denmark, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems at 4, U.N. Doc. E/AC.32/SR.6 (1950) ("[W]hile admitting the humanitarian merits of a broad definition, the delegate of Denmark reminded the Committee that politics was the art of the possible.").

146. *See* Statement of Mr. van Heuven Goedhart, High Commissioner for Refugees, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 12, U.N. Doc. A/CONF.2/SR.21 (1951).

events. This was like "being asked to buy a pig in a poke"[147] and might dissuade states from signing the Convention.[148] In part, the fear stemmed from numbers. Canada, for example, expressed its reluctance to undertake "responsibility towards any large group of refugees included in a general definition."[149] Perhaps more fundamentally, there was concern about negative public reaction to a definition that would accord rights to refugees of unknown origin.[150] Because states such as the United States, Canada, and Australia restricted immigration to Europeans, the assumption by European states of obligations of universal scope might precipitate social dislocation as a result of the incentive such a regime would offer to would-be refugee migrants from outside Europe.[151]

Not surprisingly, there was opposition to this insistence on a Eurocentric definition. Pakistan bluntly asserted that the restrictive ap-

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147. Statement of Mr. Shaw of Australia, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 17, U.N. Doc. A/CONF.2/SR.21 (1951).

148. *See* Statement of Miss Meagher of Canada, 11 U.N. ESCOR (159th mtg.) at 6, U.N. Doc. E/AC.7/SR.159 (1950) ("[T]here were grounds for believing that a less satisfactory convention signed by a large number of governments would be preferable to a more satisfactory one to which only a few governments would accede."); *see also* Statement of Mr. Larsen of Denmark, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems at 5, U.N. Doc. E/AC.32/SR.6 (1950) ("[A] broad, general definition would frighten many Governments.").

149. Statement of Mr. Chance of Canada, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems at 8, U.N. Doc. E/AC.32/SR.4 (1950).

150. *See* Statement of Mr. Rochefort of France, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 11, U.N. Doc. A/CONF.2/SR.19 (1951) ("[N]either the total number of refugees, nor their distribution by nationality of origin, was yet known. The absence of the words 'in Europe' therefore raised a whole series of problems. The French Government could not undertake to accede to the Convention until those problems had been resolved."); *see also* Statement of Mr. Robinson of Israel, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems at 9, U.N. Doc. E/AC.32/SR.5 (1950) ("While it was proper to state general principles, national legislatures and public opinion required that they should be adapted to practical needs.").

151. What countries would in fact consider extending the benefits of the Convention to Arab refugees in Palestine? The immigration countries? Their laws did not provide for the immigration of refugees from countries outside Europe. The European countries? They already had to bear a very heavy load of refugees . . . . All refugee problems could not be dealt with in the same convention, for to do so would be to risk jeopardising what could certainly be done for the sake of something which could not perhaps be achieved.

Statement of Mr. Rochefort of France, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 12, U.N. Doc. A/CONF.2/SR.19 (1951). The remarks of Mr. Hoare of the United Kingdom bear witness to the general concern regarding immigration from outside Europe:

> [T]he United Kingdom delegation did not favour a solution by which obligations which they could not fulfil would be imposed on the States which signed the Convention; he had merely tried to show that the fears of some countries that they would be overwhelmed by an influx of refugees unless the words "in Europe" were re-instated were not well-founded.

U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 24, U.N. Doc. A/CONF.2/SR.19 (1951).

proach was hypocritical;[152] others pleaded the disadvantage[153] at which the restriction would place "thousands, and, in the future, perhaps even hundreds of thousands of persons."[154] Belgium led an effort to re-orient discussion away from hostility over burden-sharing, and toward the humanitarian needs of refugees.[155] The best that could be attained, however, was three fairly minor compromises. First, refugees in receipt of material assistance from other UN organizations (notably the Palestinians) would be included within the scope of the Convention if and when that assistance might come to an end.[156] Second, a Swiss initiative,[157]bsequently modified by the Holy See,[158] enabled particular states to opt to extend protection to refugees from outside Europe.[159]

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152. Statement of Mr. Brohi of Pakistan, 11 U.N. ESCOR (161st mtg.) at 21, U.N. Doc. E/AC.7/SR.166 (1950).

153. *See* Statement of Mr. Cha of China, *supra* note 135 and accompanying text; *see also* Statement of Mr. Brohi of Pakistan: "The United States representative had contended that refugees from Palestine, India and Pakistan did not stand in need of legal protection. That assertion could be very easily refuted . . . ." 11 U.N. ESCOR (161st mtg.) at 8, U.N. Doc. E/AC.7/SR.161 (1950); Statement of Mr. Anker of Norway. U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 14, U.N. Doc. A/CONF.2/SR.22 (1951).

154. Statement of Mr. Habicht of the International Association of Penal Law, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 26, U.N. Doc. A/CONF.2/SR.19 (1951).

155. *See* Statement of Mr. Herment of Belgium, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 7, U.N. Doc. A/CONF.2/SR.20 (1951) ("The French representative had expressed his disappointment at the absence from the Conference of representatives of certain countries, and had indicated that the French Government was not disposed to assume obligations towards countries which did not intend to reciprocate. Was it not, however, a matter of obligations assumed by States vis-à-vis refugees, rather than one of commitments and obligations between States?").

156. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Convention.

Convention, *supra* note 5, at art. 1(D). The amendment, proposed by Egypt, was adopted on a 14-2-5 vote by the Conference of Plenipotentiaries, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 9, U.N. Doc. A/CONF.2/SR.29 (1951), and was intended "[t]o make sure that Arab refugees from Palestine who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function would automatically come within the scope of the Convention." Statement of Mr. Mostafa Bey of Egypt, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 6, U.N. Doc. A/CONF.2/SR.29 (1951).

157. Statement of Mr. Schurch of Switzerland, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 15, U.N. Doc. A/CONF.2/SR.20 (1951).

158. Statement of Monsignor Comte of the Holy See, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 4, U.N. Doc. A/CONF.2/SR.23 (1951).

159. For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951," and each Contracting State shall make a declaration at the time of signature,

Third, the Final Act of the Conference included what was characterized as a "pious hope"[160] that it would be applied by states as having "value as an example exceeding its contractual scope."[161] In essence, though, the definition adopted was intended to share out the European refugee burden without any binding obligation to reciprocate by way of the establishment of rights for, or the provision of assistance to, non-European refugees. It was not until more than fifteen years later that the New York Protocol[162] expanded the scope of the Convention to include refugees from all regions of the world.[163]

This commitment to Eurocentrism by the imposition of a date and geographic limitation was accompanied by an expressed preference for meeting the needs of other refugees in the world by regional rather than international solutions.[164] In other words, a common view was that the needs of European refugees were the proper object of a universal convention,[165] while the needs of non-European refugees ought to be dealt with by adjacent states.[166] While European refugees required guarantees of rights in states of asylum or resettlement,[167] it was argued that non-European refugees did not need legal protection.[168] Non-European refugees might legitimately seek material assistance from the international community via the work of the United Nations High Commissioner for Refugees (UNHCR),[169] but this in-

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ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

Convention, *supra* note 5, at art. 1(B)(1). This amendment, which was adopted on a 13-0-8 vote, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 21, U.N. Doc. A/CONF.2/SR.33 (1951), was "[p]rompted by the hope that the Convention would be retained as a unit, and not replaced by a series of bilateral or multilateral instruments." Statement of Monsignor Comte of the Holy See, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 14, U.N. Doc. A/CONF.2/SR.33 (1951).

160. *See* Statement of Mr. Brohi of Pakistan, 11 U.N. ESCOR (166th mtg.) at 21, U.N. Doc. E/AC.7/SR.166 (1950).

161. *See* Recommendation IV(E) of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, appended to the Convention, *supra* note 5.

162. Protocol, *supra* note 6.

163. Even under this new scope, those states which had already made the declaration under article 1(B)(1)(a) of the Convention to restrict its application in their jurisdiction to European refugees could, however, maintain that restriction. *See* Protocol, *supra* note 6, at art. I(3).

164. *See* Statement of Mr. Warren of the U.S., U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 29, U.N. Doc. A/CONF.2/SR.19 (1951).

165. *See supra* note 143 and accompanying text.

166. Statement of Mr. Warren of the U.S., *supra* note 164.

167. *See, e.g.*, Statement of Mr. del Drago of Italy, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 15, U.N. Doc. A/CONF.2/SR.19 (1951) ("If the Convention covered Europeans who wanted to settle in overseas countries with a western civilization, the rights and duties of the refugees and the receiving country could be defined.").

168. *See supra* note 143 and accompanying text.

169. *See* Statement of Mr. Warren of the U.S., U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 15, U.N. Doc. A/CONF.2/SR.21 (1951); *see also* Statement of Mr. van Heuven Goedhart, High Commissioner for Refugees, U.N. Conference of

direct and discretionary financial responsibility would constitute the full extent of the obligation of Western states toward non-European refugees. Thus, a two-tiered protection scheme for refugees was established, premised on the perception that binding, legal protection in the context of residence abroad was an appropriate answer for Europeans alone.

B. Institutional Policies of Containment in the Third World

The containment of non-European refugees has further been advanced by expanding the institutional competence of the UNHCR. While extensions of the UNHCR's mandate have enabled the organization to assist large groups of persons in need, primarily in Africa, Asia, and Latin America,[170] the assistance is qualitatively distinct from that given to "refugees" under the Convention.[171]

The mandate of the UNHCR, in contrast to the Convention refugee definition, has always been universal in scope.[172] The individualistic character of the refugee definition contained in the original Statute of the UNHCR, however, made it difficult for the organization to respond in a meaningful way to the needs of refugees in the less developed world.[173] Because refugees in Africa and Asia tend to move in large groups, the type of individuated, case by case application of a refugee definition contemplated by the Statute was simply not a

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Plenipotentiaries on the Status of Refugees and Stateless Persons at 15, U.N. Doc. A/CONF.2/SR.21 (1951).

170. Total UNHCR expenditures for 1989 are projected at more than $171 million in Africa, nearly $40 million in Latin America, more than $72 million in Asia and Oceania, and over $83 million in South West Asia, North Africa, and the Middle East. UNHCR, *UNHCR Activities Financed by Voluntary Funds: Report for 1987–88 and Proposed Programmes and Budget for 1989*, U.N. Doc. A/AC.96/715 (1988).

171. *See generally* G. COLES, *supra* note 34, at 15.

172. The competence of the High Commissioner shall extend to . . . [a]ny other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

Annex to the Statute of the Office of the United Nations High Commissioner for Refugees, art. 6(B), G.A. Res. 428(V) (1950).

173. The UNHCR Statute . . . contains an apparent contradiction. On the one hand, it affirms that the work of the Office shall relate, as a rule, to groups and categories of refugees. On the other hand, it proposes a definition of the refugee which is essentially individualistic, requiring a case by case examination of subjective and objective elements. The escalation in refugee crises over the last 30 years has made it necessary to be flexible in the administration of UNHCR's mandate. In consequence, there has been a significant broadening of what may be termed the concept of "refugees of concern to the international community."

G. GOODWIN-GILL, *supra* note 16, at 6.

practical possibility.[174] Logistically unable to exercise its universal mandate, the UNHCR thus sought the authority to deal with refugee situations outside Europe in a more collective fashion that would not involve a process of individualized assessment.

This institutional objective coincided with the desire of Western states to localize Third World refugee movements[175] and resulted in the establishment of a broader institutional mandate for the UNHCR.[176] A series of "good offices" resolutions which continuously adjusted the substantive mandate of the UNHCR[177] and re-emphasized its material assistance role[178] has made the UNHCR an important means of furthering the desire of Western states to stem the flow of non-European refugees to their borders.[179] The extended competence of the UNHCR has thus evolved in a manner that is consistent with the dualistic conception of refugee law established in 1951.

First, groups to which assistance has been provided have not been characterized as "refugees."[180] The references in the various enabling

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174. An eligibility procedure—however devised—is inevitably very time-consuming. When the Statute of the Office of the UNHCR and the Convention were adopted it was quite possible to recognize refugees on an individual basis. Since 1951, however, there have been occasions when new refugee problems have arisen and the number of refugees involved has been so large as to make it impossible to recognize persons on an individual basis.

Melander, *supra* note 14, at 161.

175. According to Mrs. Roosevelt of the U.S., the "main purpose of [UNHCR] protection was to prevent the person from becoming a liability to the international community." 5 U.N. GAOR (324th mtg.) at 331 (1950); *accord* Martin, *Mass Migration of Refugees—Law and Policy*, 76 AM. SOC'Y INT'L L. PROC. 18 (1982) ("After the emergency response phase, there looms the difficult question of ultimate resettlement of those displaced. Nations are not likely to accept, for these later purposes, a definition that obligates them to accept people permanently uprooted by invasion or internal strife. Some assistance and protection? Yes. A binding obligation for permanent residence? Probably not.").

176. Melander, *supra* note 14, at 161 ("[T]he High Commissioner has been authorized to assist refugees without having to decide on an individual basis whether the persons in question were mandate refugees. The High Commissioner has—to use the official terminology—been authorized to lend his good offices to persons in need of assistance.").

177. *See* G. GOODWIN-GILL, *supra* note 16, at 6–12.

178. *See, e.g.*, G. COLES, *supra* note 34, at 34. In theory, voluntary repatriation remains the preferred solution to refugee displacement. Hofmann, *supra* note 1, at 694–95. But "[U]NHCR's operational weight in the past has been primarily on care and maintenance and external settlement . . . . Only *ad hoc* and often haphazard arrangements were made for voluntary repatriation." G. Coles, *supra* note 136 at 26.

179. Si l'opinion occidentale adopte une attitude plutôt frileuse à l'égard de ses travailleurs immigrés, elle manifeste un désintérêt croissant pour le problème des réfugiés . . . les pays traditionnels d'accueil (Etats-Unis, Allemagne, France, Canada, Pays Scandinaves, Australie, etc) limitent de plus en plus, sauf geste spectaculaire et conjoncturel, les quotas d'admission de réfugiés sur leur territoire.

Bachellerie, *Immigrés et réfugiés: la responsabilité de l'occident*, 25 POLITIQUE INTERNATIONALE 279, 284–85 (1984).

180. G. GOODWIN-GILL, *supra* note 16, at 9 ("Official documentation . . . reveals a reluctance to apply the term 'refugee' to those assisted by the UNHCR. Reference is made, for example, to 'displaced persons from Indo-China outside their country of origin' . . . ."). At the 1985 meeting of the Executive Committee of the High Commissioner's Programme, "Australia, for

resolutions are rather to persons in need, persons of concern, or even persons whose situations are analogous to those of refugees. The scrupulous avoidance of the refugee label negates a presumption of refugee status which might be seen to countenance access to secure conditions of exile abroad for these new groups in a manner consistent with the assumptions that underlie the conventional refugee protection scheme.[181]

Second, there is a bias toward local or regional solutions to the displacement of persons within the extended competence of the UNHCR. Whereas the UNHCR routinely assists refugees (European and analogous groups) in securing asylum including third state resettlement,[182] non-mandate (Third World) persons of concern to UNHCR are typically assisted in ways that localize or confine their displacement.[183] Such assistance may include, for example, food and shelter,[184] as well as financing for education, counselling, legal assistance, transportation, and local resettlement.[185] The UNHCR has also embarked on a program of development-oriented assistance to Third World refugees[186] and has collaborated with the World Bank and regional

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example, confirmed that UNHCR had a protecting role for those in the broader class, but considered it 'undesirable to define those groups of persons as "refugees" and to grant them the full range of protection available to victims of individual persecution.'" Goodwin-Gill, *"Non-Refoulement" and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 912 (1986).

181. A confusing situation has developed whereby the international community is using multiple definitions for multiple purposes. A person who has fled a civil war will be defined as a "refugee" using UNHCR's extended mandate, needing protection and emergency assistance while he is in a refugee camp in a low-income country. However, if that same individual comes to one of the developed countries of Western Europe or North America, which may well be funding and assisting the emergency effort, a different definition—the "classic" Convention definition—will be used to determine that the person is an economic migrant or lacks a fear of persecution or is otherwise not entitled to protection outside of his or her original region.

Stein, *supra* note 3, at 53.

182. *See* G. COLES, *supra* note 34, at 26 ("In Western Europe, resettlement in third countries has been the main solution adopted in the large-scale influx situations which have occurred since the Second World War, and the relative reliability and speed of co-operation among Western countries to provide this solution has unquestionably facilitated admission into these countries.").

183. A major exception to this pattern is the overseas resettlement of Indochinese refugees in the later 1970's and early 1980's: "The movement in recent years of over a million Indo-Chinese refugees from Asia to Northern America and Western Europe has tended to blur the concept of regional resettlement . . . [but] the Indo-Chinese case remains a unique one . . . ." INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 64.

184. Nanda, *supra* note 91, at 461.

185. *See generally* Clark, *Human Rights and the United Nations High Commissioner for Refugees*, 10 INT'L J. LEGAL INFO. 287, 303 (1982).

186. At its 35th session, held in October 1984, the Executive Committee of the High Commissioner's Programme "stressed the key importance of development-oriented assistance to refugees and returnees in developing countries and of their full integration into the development process, as the best means of helping them to support themselves and contribute to the economic and social life of the host communities." *Executive Committee of the High Commissioner's Programme, Report of the Thirty-Fifth Session of the Executive Committee of the High Commissioner's Programme*, at para. 97(b), U.N. Doc. A/AC.96/651 (1984).

development banks to promote self-sufficiency in such areas as food production and resource management.[187]

The theoretical cornerstone of UNHCR involvement with non-mandate refugees, moreover, has always been the promotion of voluntary repatriation to their state of origin.[188] This assistance may include organizing the process of return,[189] assisting states of origin to re-absorb the refugees and facilitating the resumption of their traditional way of life.[190] The strong emphasis on the return, local resettlement, or confinement in camps of refugees in the less developed world contrasts markedly with the "exilic bias" of the Convention-based refugee law applicable to Europeans.[191] While voluntary repatriation arguably offers the possibility of a more expeditious resumption of normal life than does the often traumatic process of resettlement in a foreign state,[192] the dichotomous approach that denies the option of foreign resettlement to most non-European refugees is inconsistent with an even-handed protection system.[193]

Third, and perhaps most fundamental, UNHCR's approach to providing assistance to non-mandate refugees is controlled by Western

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187. *Executive Committee of the High Commissioner's Programme, Refugee Aid and Development*, U.N. Doc. A/AC.96/662 (1985).

188. *See* G. COLES, *supra* note 34, at 29–30 ("In cases of exceptionally large influx, experience has shown that the only possible or satisfactory solution is voluntary repatriation. The large number of the asylum-seekers may make any other solution impossible."). At a recent meeting of international experts, it was "reaffirmed that voluntary repatriation was, in principle, the best solution to a refugee problem, and that it was desirable and opportune to emphasize the importance of this solution and to develop international cooperation in effecting it . . . ." *Executive Committee of the High Commissioner's Programme, Note on Voluntary Repatriation*, U.N. Doc. EC/SCP/41 (1985).

189. *See, e.g.*, Fowler, *supra* note 33, at 135 ("After the defeat of the Pakistani army and the establishment of the new state of Bangladesh, the first officially assisted repatriation effort began in early 1972. The returning refugees boarded trains and UN-purchased vehicles or simply set forth on foot, and by March 25, all the refugees in central and state camps had been repatriated.").

190. [I]nternational action, whether at the universal or regional level, to promote voluntary repatriation requires at the outset of a refugee movement consideration of the situation within the country of origin . . . . It was not to be excluded that conditions within the country of origin could be improved significantly and beneficially as a result of timely and helpful international intercessions whether of a political or economic nature . . . . Material assistance for the reintegration of returnees provided by the international community in the country of origin was recognized as an important factor in promoting voluntary repatriation.

Executive Committee of the High Commissioner's Programme, *supra* note 187, at paras. 32 and 39.

191. G. Coles, *supra* note 136, at 26.

192. *See, e.g.*, INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 65 ("For successful resettlement, the answer lies in specific attempts to match the skills, social characteristics and potential of a group of refugees to the needs of a particular resettlement country . . . . Refugees who are 'obliged' to settle somewhere may easily resent it.").

193. Western states are, however, anxious to select the "most adaptable" non-Europeans for resettlement: "Comment ne pas être choqué par l'arrivée d'avions porteurs canadiens à l'île de Guam lors de la chute de Saigon, chargés de récupérer les réfugiés les plus instruits et laissant les 'moins bons' aux autres pays?" Bachellerie, *supra* note 179, at 287.

states. The actual operating budget of the organization is almost completely derived from the voluntary contributions of a fairly small number of developed states,[194] while funding from the United Nations covers only routine administrative expenses.[195] Moreover, the de facto control which the "power of the purse" provides these states is formalized through the supervisory function of the organization's Executive Committee. In accordance with General Assembly Resolution 1166 (XII),[196] an Executive Committee was established in 1957 to advise the High Commissioner on the exercise of his statutory functions and on the particular assistance activities which should be undertaken by his Office. Because this body is traditionally dominated by the developed states that make a significant financial contribution to UNHCR,[197] it provides a bulwark against any move to re-orient the organization's work away from the containment of Third World refugee problems.[198]

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194. In 1987, for example, a group of only 15 developed states, all with Western political and economic structures, contributed more than 99% of the total governmental revenues of the UNHCR ($372,483,950 of a total of $375,749,253). The major contributors, and their percentage of the total UNHCR budget were: U.S. (28.1%); Japan (15.3%); Federal Republic of Germany (11.4%); United Kingdom (7.6%); Denmark (6.0%); Italy (5.4%); Sweden (4.9%); Netherlands (4.3%); Norway (4.1%); Switzerland (4.0%); Canada (3.5%); Finland (1.9%); Australia (1.3%); Belgium (.8%); and France (.6%). *Executive Committee of the High Commissioner's Programme, Voluntary Funds Administered by the United Nations High Commissioner for Refugees: Accounts for the Year 1987 and Report of the Board of Auditors Thereon*, U.N. Doc. A/AC.96/707 (1988).

195. In 1989, for example, core administrative funding for UNHCR was budgeted at only four percent of total expenditures. *Executive Committee of the High Commissioner's Programme, Report of the Thirty-Ninth Session of the Executive Committee of the High Commissioner's Programme*, at 8 U.N. Doc. A/AC.96/721 (1988).

196. The Resolution provides in part that the Executive Committee shall be elected by the Economic and Social Council "on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem . . . ." U.N.G.A. Res. 1166, para. 5 (1957).

197. In 1987, for example, *all* of the major Western donors (*see supra* note 194) were members of the Executive Committee. In addition, four other Western states (Austria, Greece, the Holy See, and Turkey) were represented, bringing the total Western representation to 19 of 42 places (more than 45% of the membership of the Executive Committee). In contrast, African states had eight seats, Middle Eastern/Arabic states had only six representatives, Latin American states just five delegates, Asian states only three places, and East Bloc states but a single representative. *Executive Committee of the High Commissioner's Programme, Report of the Thirty-Ninth Session of the Executive Committee of the High Commissioner's Programme* at 2, U.N. Doc. A/AC.96/721 (1988).

198. Reservations with respect to the scope of obligations protecting the broader class of refugees were amply demonstrated in the UNHCR Executive Committee in 1984 and 1985. There was concern about the "changing character" of refugee movements, and with what some perceived to be an unwarranted attempt to expand the refugee definition . . . . Some states called for curbs on irregular movements of refugees, or emphasized the need to get at and solve the root causes of refugee flows.

G. GOODWIN-GILL, *supra* note 16, at 911.

C. *Formal, But Not Substantive Universalization*

The third way in which the dichotomous conceptualization of refugee law has been advanced is by limiting its extension in 1967 to non-European, modern day refugees to formal changes only.[199] Although a Protocol was adopted in 1967 which updated the Convention by removing the temporal and geographical limitations,[200] the Protocol failed to review the substantive content of the definitions it embraced. Specifically, even after the "universalization" effected by the 1967 Protocol, only persons whose migration is prompted by a fear of persecution in relation to civil and political rights come within the scope of Convention-based refugee protection.[201] This means that most Third World refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war, or broadly-based political and economic turmoil than by "persecution,"[202] at least as that term is understood in the European context.[203]

The adoption of the Protocol was therefore something of a Pyrrhic victory for the less developed world: while modern refugees from

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199. Protocol, *supra* note 6.

200. Protocol, *supra* note 6, at arts. I(2) and I(3) ("For the purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of Article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and . . .' and the words '. . . as a result of such events,' in Article 1(A)(2) were omitted. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save the existing declarations made by States already Parties to the Convention . . . .").

201. [T]he Convention and Protocol, and thus several domestic laws, designate as refugees only those who have fled from persecution and exclude fugitives from natural disasters and from civil and international war. This limitation on the designation of refugee owes its origin to the fact that the refugee was designated as a person who stands in need of international protection because he or she is deprived of that in his or her own country. Such reasoning and definition may well be appropriate for the purpose of determining whether an individual should receive an international travel document and should be eligible for the diplomatic protection afforded by the High Commissioner's representatives; however, it appears inappropriate for the purpose of determining whether an applicant qualifies for admission to a country of asylum and to freedom from refoulement. The compassionate claim of a fugitive from persecution may, after all, be no greater than that of a person displaced by an earthquake or a civil war.

Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 SAN DIEGO L. REV. 45, 54–55 (1977). As one author protests, "[S]i la persécution est toujours une réalité trop fréquente, elle est loin de constituer la seule raison qu'amène les individus à fuir leur pays ou à refuser sa protection." Julien-Laferriere, *Réflexions sur la notion de réfugié en 1978*, 17 ALLAHABAD WKLY. REP. BULL. 30, 30 (1978); *see infra* text accompanying note 231.

202. [I]n addition to political persecution and the ravages of war, the modern refugee flees the whole range of problems which accompany underdevelopment in the post-colonial period, including civil strife, political instability, and harsh economic conditions. Though the post-World War II refugee and the modern refugee are thus treated differently under international law, the actual position of both groups is the same. Hence, the argument continues, both groups should be accorded the same rights under international law.

Lentini, *The Definition of Refugee in International Law: Proposals for the Future*, 5 B.C. THIRD WORLD L.J. 183, 184 (1985).

203. *See generally* Grahl-Madsen, *supra* note 92, at 422.

outside Europe were formally included within the international protection scheme, very few Third World refugees can in fact lay claim to the range of rights stipulated in the Convention. The retention of a fundamentally European and increasingly outmoded refugee definition as the accepted international standard for refugee protection was at the least a tacit recognition of the priority of European and analogous claims to a guarantee of basic rights within the international community.[204]

It is difficult to argue that the drafters of the Protocol were consciously motivated by a desire to exclude refugees from less developed states. Indeed, the driving force behind the Protocol was the UNHCR's determination to harmonize the refugee definition in the Convention-based scheme with its own, already universal mandate.[205] The drafting history nonetheless reveals a determination to avoid the discussion of fundamental issues[206] of refugee protection, and particularly to steer clear of a strategy that would give rise to "political discussion" of refugee issues in the General Assembly.[207] There was clearly a risk that detailed discussion of the scope of refugee protection in the non-Western dominated General Assembly[208] could have resulted in a broadening of the conceptualization of refugee status in

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204. *See* Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 AUSTL. L.J. 148, 150 (1986).

205. As to the Convention, hardly any of the new groups of refugees can be considered as falling within its scope owing to the dateline of 1 January 1951. Some States parties to the Convention issue the travel document for which it provides in accordance with Recommendation E [of the Conference of Plenipotentiaries] . . . . The granting of the treatment for which the Convention provides to post-dateline refugees on the basis of the Recommendation only meets, however, with difficulties. Such matters as personal status, social security, public assistance etc. are normally regulated by strict law and the provisions cannot be easily extended to persons not covered by the law on the basis of a recommendation only . . . . The purpose of the Colloquium [which ultimately recommended the Protocol] would be to consider what measures, if any, could be taken to develop international law on refugees and to adapt it to the present refugee situation . . . .

Memorandum from Paul Weis of UNHCR to Mr. Goormaghtigh of the Carnegie Endowment 3–4 (Sept. 24, 1964).

206. MM. Bartos, Hambro, Monaco et Schurch, entre autres, mirent l'accent sur les dangers qu'il y aurait à toucher de façon trop fondamentale au système instauré en 1951. La conclusion d'un protocole aurait l'avantage de laisser intact le système existant . . . et de donner aux Etats la liberté d'accepter ou non les modifications . . . .

Centre européen de la Donation Carnegie, Colloque sur les aspects juridiques des problèmes relatifs aux réfugiés: Rapport general 6 (1965).

207. The Colloquium . . . considered that a revision of the Convention would be too lengthy and cumbersome to meet the need for urgency and therefore recommended the adoption of a Protocol. *Although this does not appear from the Colloquium's Report, the members of the Colloquium freely admitted that a revision of the Convention would also be undesirable as it might lead to a political discussion in the General Assembly.*

UNHCR, Draft Protocol to the 1951 Convention: Analysis of the Present Position, Internal memorandum, May 26, 1966 (emphasis added).

208. E. MCWHINNEY, UNITED NATIONS LAW MAKING: CULTURAL AND IDEOLOGICAL RELATIVISM AND INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION 56–58 (1984).

line with regional shifts in the less developed world.[209] This danger was successfully avoided by the submission to the General Assembly of a short, technical Protocol that neither reproduced nor made explicit reference to the terms of the Convention, but merely noted the extension of protection to refugees on a universal and enduring basis.

Whatever the intentions of the architects of the Protocol, its advent has proved to be of great importance in the maintenance of a dualistic approach in refugee law. As the number of Third World refugees has increased and transportation links to the developed world have improved, a small minority of these refugees have made asylum claims in Western states.[210] The refugee definition established by the Protocol has enabled authorities in developed states to avoid the provision of adequate protection to Third World asylum claimants while escaping the political embarrassment entailed by use of an overtly Eurocentric refugee policy.[211] While not drafted as a standard for refugee determination per se, the Convention-derived definition has been adopted by an increasing number of Western states as the basis upon which asylum or protection decisions are made.[212] Because the definition has the imprimatur of international law, and because it has been specifically approved by more than one hundred states,[213] it is difficult to argue the inappropriateness of this transmutation. But because the definition fails to reflect the full range of phenomena that give rise to involuntary migration, particularly in the less developed world, its application in practice as the threshold criterion for access to even minimal protection against refoulement[214] works a pernicious injustice against many genuine refugees. Most Third World refugees find themselves turned away by Western states or offered something less than durable protection.[215]

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209. *See infra* text accompanying note 270.

210. In the early 1970s a new phenomenon emerged. Refugees from the crisis areas of Africa, Asia and Latin America began to move in increasing numbers to the industrialized countries . . . . [T]he arrival of many refugees from geographically and culturally distant areas constituted an unprecedented challenge to the legal machinery and conscience of the receiving countries. The refugee problem, previously regarded as a factor in east-west relations, now had a north-south dimension added to it.

INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 33.

211. *See, e.g., id.* at 38.

212. Plender, *supra* note 201, at 47.

213. As of January 1, 1988, 100 states were parties to the Refugee Convention and 101 states had acceded to the Refugee Protocol. Marie, *supra* note 118, at 128.

214. Sexton, *supra* note 128, at 740 ("[T]he qualification of a person as a refugee under the Convention bestows upon that person the right to seek asylum in a Contracting State and the right to non-refoulement during this process.").

215. In West Germany, for example,

[j]udicial procedures to determine whether a person merits asylum have been streamlined, allowing fewer layers of appeal. A 1982 federal law provides that asylum seekers should stay in established centers or camps pending a decision on their applications. Depending

In sum, the second dominant feature of modern refugee law is its establishment of a selective approach to burden-sharing.[216] The initial goal of the drafters of the Convention was to create a rights regime that would be conducive to the sharing out of the European refugee burden among a broad constituency of states. The needs of non-European refugees, on the other hand, were to be met by a combination of on-site assistance and the promotion of voluntary return to the state of origin. The result was a two-tiered protection scheme which is consistent with the facilitation of exile abroad for European refugees and which seeks to localize and contain refugees in the less developed world.

This dualistic conceptualization of the role of refugee law has been advanced in recent years by two means. First, while the institutional competence of the UNHCR has been broadened to enable it to respond to refugee movements within the Third World, the international response to the needs of most refugees in the less developed world is largely limited to localized material and other aid in tandem with the ad hoc promotion of voluntary repatriation. Second, the formal universalization of the refugee definition effected by the 1967 Protocol has perpetuated the exclusion of non-European refugees from the international rights regime by virtue of its failure to recognize the social evolution of the phenomena which prompt involuntary migration. The tendency of some states to look to this definition as the standard for the extension of even basic protection against return exacerbates the differential treatment afforded non-European refugees. Moreover, as discussed in the next section, individual states, not the international community, control the process of refugee determination and implementation of Convention obligations. There is therefore an enhanced opportunity for states to shape their compliance with refugee law to coincide with their perceived self-interest.

IV. MINIMAL INTERNATIONAL INTERVENTION IN PROTECTION DECISIONS

In addition to its rejection of comprehensive humanitarian or human rights protection, and its commitment to a dualistic concept of bur-

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on how an individual state has implemented the law, persons may be provided certain social benefits (at lower levels than previously) only if they remain in the center, and their movement in and out of the center and the local area is strictly confined: it may be an offense to leave the area, punishable by a fine or imprisonment. Furthermore, asylum seekers' employment opportunities have been curtailed.

U.S. COMM. FOR REFUGEES, *supra* note 4, at 9–10.

216. G. COLES, *supra* note 34, at 11 ("[T]he deficiencies of the present arrangement may mean that [states of first reception] will feel the full weight of the humanitarian obligations but yet not enjoy the support which, in their view, should properly be provided by other States.").

den-sharing, the third dominant feature of modern refugee law is its establishment of a protection system over which individual states, rather than an international authority, have effective control. Since the heyday of direct international control over refugee protection prior to World War II,[217] there has been a steady decline in the legal authority of the UNHCR, the international authority responsible for refugee protection, to the point that UNHCR now has little more than an advisory role in protection decisions.[218]

Four major elements of domestic control over refugee protection may be identified. First, the Convention leaves protection decisions to states. International law neither speaks to the procedure that states are to employ in the making of determinations of refugee status nor establishes any form of direct international scrutiny of the procedures adopted. Second, the refugee definition which international law requires states to respect is sufficiently flexible to allow states to make protection decisions in a way that accords with their own national interests. Third, states are explicitly authorized to exclude refugees from even basic protection if they are adjudged undesirable or unworthy of assistance. Finally, the international refugee regime does not require states to afford asylum or durable protection to such refugees as the state chooses to recognize. Rather, states are only obliged to avoid the return of a refugee to a state where her or his life or freedom would be threatened and to treat those refugees admitted to the state's territory in conformity with the international rights regime. Taken together, these components of the modern international protection system ensure that refugee law is subject to minimal international oversight.[219]

A. State Control of Refugee Determination

While all preceding international refugee accords had been premised on the solicitation of cooperation among states with an international

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217. *See supra* text accompanying note 49.

218. The High Commissioner promotes, supervises, and proposes amendments to refugee conventions. According to Krenz, "By its nature, the High Commissioner's Office is essentially non-political. It is also non-operational, for the individual States are still considered primarily responsible for the status and welfare of the refugees they have admitted to asylum . . . . The function of the Office has remained of an advisory and supervisory character." Krenz, *supra* note 38, at 113–14.

219. Typical of the position of Western states is the view discussed by Burke: "Some scholars have suggested that the UNHCR should have a central, formalized role in determining who receives asylum . . . . This would be imprudent. Determining which aliens can enter and stay in a country is a fundamental attribute to sovereignty. It should be surrendered with great caution." Burke, *Compassion Versus Self-Interest: Who Should be Given Asylum in the United States?*, 8 FLETCHER F. 311, 325 (1984).

authority charged with refugee protection,[220] the 1951 Convention moved responsibility firmly into national hands.[221] While contracting states are obliged to cooperate with the UNHCR and to provide it with information on steps taken to implement the Convention,[222] there is no formal role for the international authority in either the design or administration of the various state protection schemes.[223] The silence of the Convention on the procedural dimension of the protection regime—and indeed on whether or not there is even to be a formal determination procedure—has meant that states have been subject to relatively little interference in their autonomous determinations of the scope of the international protection system.[224] In practice, the lack of any meaningful international scrutiny of the procedural dimensions of refugee protection has allowed political and strategic interests to override humanitarian concerns in the determination of refugee status, has facilitated the interposition of domestic economic and social considerations in deciding which persons and groups are to be assisted,[225] and has resulted in a variety of interpre-

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220. Specifically, the international coordinating agencies created prior to 1950 were authorized to make determinations of refugee status on behalf of the participating states (*see supra* text accompanying notes 49, 53, and 60–64). UNHCR, by contrast, has no jurisdiction to engage in refugee status determination.

221. [I]n the absence of a world government and of a sovereign international court of justice, that power of discretion, which was an essential safeguard for both the real refugee and for the country of refuge must, perforce, be left to the States. The only practical solution was to trust the countries which were willing to grant hospitality . . . . [T]hat power of discretion . . . was indispensable from the point of view of public order, and required by their geographical position.

Statement of Mr. Rochefort of France, 11 U.N. ESCOR Social Committee, Summary Record of the Hundred and Sixty-Sixth Meeting, at 7, U.N. Doc. E.AC.7/SR.166 (1950). The French proposal to allow states the option of granting refugee status "if they thought fit," *id.* at 9, was adopted as a working principle by the Ad Hoc Committee on a 7-0-8 vote. *Id.* at 11.

222. Convention, *supra* note 5, at arts. 35, 36. State responsibilities under the Convention are in the nature of obligations of result, not obligations of conduct or means. G. GOODWIN-GILL, *supra* note 16, at 141.

223. Garvey, *supra* note 2, at 488 ("[U]NHCR operates under a wholly recommendatory and non-binding legal mandate. In a tenuous sense, state obligation resides in the undefined duty of states 'to cooperate' with the UNHCR. But there is no expressly recognized obligation of states to address impending or ongoing refugee problems to the UNHCR or any other international institution, or to abide by any particular procedure.").

224. Hyndman, *supra* note 204, at 151 ("There is no obligation under the Convention to set up procedures for the determination of refugee status, and many countries have not done this. Where such procedures have been established they vary widely. The UNHCR does endeavour to encourage uniformity and a standard practice, but, due to the differences in the administrative structures and general circumstances of different countries, this is not easy.").

225. Plender, *supra* note 201, at 76 ("[W]ithin the next twenty-five years the demand for migrant labor in the United States or in the Western democracies is not likely to be as urgent as it was in the immediate post-war period. In these circumstances, the problem of finding asylum for the refugees is likely to become more acute."); *accord* INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 35–36 ("During the period of post-war reconstruction the developed countries had to satisfy an urgent demand for labour. In America some of this demand was met through the resettlement of displaced people from Europe . . . . These

tations of the Convention, thereby undercutting the universality of the protection mandate.[226] In the face of these trends, the UNHCR has remained largely impotent due to its lack of regulatory authority[227] and fiscal autonomy.[228] The UNHCR's Executive Committee has issued procedural recommendations to states,[229] but the suggested standards have not been fully accepted by states, nor are they terribly onerous.[230] Thus, the procedural norms of the international refugee protection system afford only a mild constraint on the actions of national authorities.

B. Politically Malleable Definitional Framework

The lack of procedural direction in the Convention is not compensated for by the supposedly common definition of a refugee which states are obliged to respect. This is so because the requirement that refugee status be assessed in relation to the likelihood of "persecution" in the putative refugee's state of origin is fundamentally subjective. The application of the definition requires an evaluation by the state of destination of the state of origin's attitude toward and treatment of the claimant, or of other persons similarly situated.[231] Not surprisingly, the process of refugee determination is influenced by the state

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migratory movements were perceived as both necessary and positive—but only while the international economy was booming and there was demand for cheap labour. In the mid 1970's, the period of rapid post-war growth came to an end.").

226. Chamberlain, *supra* note 41, at 103.

227. [T]he determination of refugee status, although mentioned in the 1951 Convention (cf. art. 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 45 (1979).

228. See *supra* text accompanying note 195.

229. These include primarily the publication of the HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, *supra* note 227, and recommendations of the Executive Committee of the High Commissioner's Programme, *e.g.*, guidelines on the treatment of manifestly unfounded or abusive applications for refugee status or asylum (Conclusion No. 30 (XXXIV), adopted in 1983, U.N. Doc. HCR/IP/2).

230. *See, e.g.*, Conclusion No. 8 (XXVIII) of the Executive Committee of the High Commissioner's Programme, which recommends seven basic features of a refugee determination process. This Conclusion does not speak to even such basic matters as the qualifications of decision-makers, or the nature of the procedure by which the refugee definition is to be applied to the facts of a particular case. U.N. Doc. HCR/IP/2.

231. "[G]ranting refugee status can be a delicate political matter. It can be seen as involving a comment upon the internal affairs of the country from which the person has fled, and to amount, in effect, to a statement that there may be reasons why people within the country fled could fear persecution . . . ." Chamberlain, *supra* note 41, at 149.

of destination's relationship with the state of origin.[232] On the one hand, a decision to extend protection may be interpreted as a tacit condemnation of that government. To say that a refugee claimant has a well-founded fear of persecution "introduces an element of censure,"[233] thus leading to an enhanced willingness to grant refugee status to persons in flight from an unfriendly state. On the other hand, it is unlikely that a state will grant refugee status to the nationals of a compatible state in other than the most patently egregious circumstances, because the threshold of tolerance will normally rise as a function of the general esteem in which the state of origin is held as well as its political importance.[234] The concept of refugee status, then, gives no absolute or objective criterion that delimits the permissible scope of state action. Rather, the definition enables states to tailor protection decisions to coincide with perceived national self-interest. Governments thus commonly recognize "the existence of persecution [only] in cases in which their own policies or their political and economic interests are not prejudiced by such recognition."[235]

The highly malleable conceptual standard has thus far proved adaptable to the evolving political priorities of states. As noted earlier,[236] Western states, which initially saw the admission of refugees to be consistent with their more general political goals, found the persecution-based definition to be quite capable of embracing virtually all emigrants from the socialist states of Europe. Moreover, making determinations that particular persons faced "persecution" in their state of origin supported efforts to ascribe inappropriate behavior to the ideological adversaries of the West.[237]

Conversely, recent refugee migrations from the less developed world are perceived to be destabilizing in cultural, racial, political, and

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232. *See, e.g.*, Grahl-Madsen, *supra* note 92, at 421 ("If there is political antipathy between the governments of the country of origin and the country of refuge, it may not be too difficult to win recognition as a refugee. Failing this political constellation, the situation becomes much tougher for the individuals concerned. The different American attitudes to 'refugees' from Cuba and 'entrants' from Haiti may be a case in point.").

233. *Id.* at 434.

234. *See, e.g.*, Garvey, *supra* note 2, at 487.

235. Tsamenyi, *supra* note 1, at 367.

236. *See supra* text accompanying note 79.

237. *See* INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 32 ("In establishing a legal and organizational framework to deal with the refugee problem, the western powers were not only guided by a humanitarian concern for Europe's refugees. For ideological reasons, they had to identify anyone who had moved from Eastern Europe as a victim of Communist rule."); *see also* G. Coles, *supra* note 13, at 14–15 ("[T]he overriding strategic concerns of the dominant group obscured the central significance, from the human rights perspective, of freedom of movement to the individual. In a widely prevalent Western view of the time, refugee movements were good, providing the receiving countries with the means of attacking an adversary as well as manpower for reconstruction and development.").

economic terms.[238] "[T]he desire to help the world's poor and oppressed clashes with the belief of most Americans that substantial immigration is undesirable and economically threatening to their interests."[239] The concern has thus shifted from the facilitation of refugee movements to the deterrence of asylum-seekers.[240] The subjectivity of the refugee definition has provided a means of legitimating this restrictionist tendency: the strong political and economic links that exist between the West and many Third World states of origin have led to a predisposition to question the likelihood that those states could reasonably be expected to engage in persecutory behavior.[241] The tacit censure that a grant of refugee status entails provides a reason—or at least a pretext—to deny relief to a refugee claimant from a compatible state. As a result, the persecution-based standard now poses a major political impediment to the recognition of large numbers of refugee claims, humanitarian or human rights concerns notwithstanding.

The control that states have over refugee protection by reason of the political subjectivity of the definition is complemented by the definitional focus on an individuated examination of fear in relation

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238. Another more pernicious factor in the refugee debate is ethnic and racial prejudice. People forced by fear of persecution to flee their homelands often differ in important ways from other types of immigrants. Their primary goal lies in finding safety, not necessarily in rejoining family members or finding a social milieu similar to that of their native lands. For this reason, refugees often are ethnically and culturally distinct from the population of places that receive them. In certain situations, refugee inflows may be greeted as a healthy step towards a pluralistic mix. In others, however, differences in appearance, customs, and language spark negative reaction from native populations.

U.S. COMM. FOR REFUGEES, *supra* note 4, at 12.

239. Burke, *supra* note 219, at 311.

240. *See* Dunstan, *Heaven's Gate*, 27 AMNESTY 14, 14 (1987) ("The doors to safety are closing against refugees across Europe: in recent years many West European governments have introduced increasingly restrictive measures aimed at preventing or deterring refugees from seeking asylum."); *see also* UNHCR, Report of the United Nations High Commissioner for Refugees to the General Assembly, 44 U.N. GAOR, U.N. Doc. E/1988/53 (1988).

> [S]ome states also continued to resort to much stricter interpretations of the notion of a refugee, as defined in the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol. Some of these states, furthermore, required that asylum-seekers meet unduly high or unrealistic standards of proof. The combined effect of such measures was that large numbers of persons were frustrated in their efforts to seek asylum from persecution and, even when fulfilling refugee criteria in the sense of the 1951 UN Refugee Convention, were denied the protection stipulated in the Convention.

Id.

241. For example, as one author notes,

> The enforced renunciation of colonial empires and the emergence of new States on the international scene were inevitably bound to deprive the dominant States of their empires . . . . To protect their "vested interests," they kept the existing structures and gave the facades a face-lift. Thus in their political and economic relationships with their former colonies, innovations of a greater or lesser falsity functioned, and still function, as a mechanism delaying the advent of complete freedom.

M. BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 77–78 (1979).

to objective conditions.[242] Western states, increasingly disinclined to admit refugees, have taken the position that only truly exceptional claimants are worthy of protection: applicants must show evidence of having been "singled out or targeted" for particularly serious maltreatment.[243] This approach disfranchises the majority of the world's refugees, whose search for protection is motivated by factors that impact on groups of persons with largely equivalent force.[244] So compelling is this implied limitation that those states (mostly in the less developed world) committed to a less constrained application of the refugee concept have generally felt obliged to create auxiliary regional and national norms that explicitly supersede the international standard.[245] For most industrialized states, however, this restrictionist signal is a convenient basis upon which to assert the illegitimacy of refugee claims grounded in broadly defined phenomena.[246]

The ease with which the refugee definition can accommodate both the encouragement and deterrence of refugee claims via the subjectivity of its central criterion creates a significant opportunity for states to interpose other priorities besides the needs of refugees. Specific protection decisions need not be dictated by the needs of refugees, but may flow from a host of extraneous political factors. Together with the lack of effective international supervision already noted, the potential for self-interested assessments of claims to refugee status is clear.

C. Screening Based on Domestic Interests

The third component of domestic control is the explicit recognition in the Convention that states may screen persons who seek recognition as refugees. Not every person who has a well-founded fear of persecution has a right to protection: persons who have acted in a manner

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242. "The standard . . . under the U.N. Convention is a narrow and individualized standard. The applicant for asylum under that definition must show not only that human rights abuses exist in the home country but also that he or she probably would be singled out or targeted to become the victim of those abuses." Martin, *supra* note 175, at 14.

243. *See id.*; *see also* U.S. COMM. FOR REFUGEES, *supra* note 4, at 8.

244. This approach, while prevalent, has not gone unopposed. *See* G. GOODWIN-GILL, *supra* note 16, at 44–45 ("Where large groups are seriously affected by a government's political, economic, and social policies or by the outbreak of uncontrolled communal violence, it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual.").

245. *See, e.g.*, G. COLES, *supra* note 34, at 14 ("In recent years, there has been a growing trend towards the adoption, in the context of general international refugee law, of a definition similar to that employed in the Organisation of African Unity Convention, which is wide enough to embrace virtually all victims of man-made disasters."); *see also infra* text accompanying note 271.

246. *See, e.g.*, Lentini, *supra* note 202, at 193.

inconsistent with their status as refugees,[247] or who have committed serious criminal acts,[248] are beyond the purview of the Convention definition of a refugee. The precise delineation of the cessation and exclusion clauses in the definition, which are stated in general, largely ambiguous terms, falls to the administering officials in each state party. "There are few areas of national sovereignty which States are less willing to surrender to international control than the entry of aliens . . . . [T]hey have insisted on defining very precisely the persons who are eligible for such status and reserving the right to make determinations of status."[249]

The reservation in the Convention of a state's right to exclude refugees was intended by the drafters of the Convention to allow for the screening out of refugees viewed as posing unacceptable risks to receiving states. France in particular argued that states would only adopt generous policies on protection if guaranteed the ability to refuse unworthy and undesirable refugee claimants.[250] While some delegates noted the potential for abuse by improperly motivated states[251] and thus the need to confine more carefully the scope of independent state action,[252] the final text of the Convention made no concessions to these criticisms. At present, then, it is open to states to withhold even the basic protection against return of refugees whom they judge to be serious criminals or persons who already benefit from adequate protection elsewhere.

D. Limited Duty

The fourth area of concern is the limited duty of states that follows from recognition of an individual as a Convention refugee. Whereas

247. Convention, *supra* note 5, at art. 1(C).

248. *Id.* art. 1(F).

249. G. COLES, *supra* note 34, at 18–19.

250. *See* Statement of Mr. Rochefort of France, 6 U.N. GAOR (29th mtg.) at 17, U.N. Doc. A/CONF.2/SR.29 (1951).

251. In reference to the exclusion of persons who "had committed any act contrary to the purposes and principles of the Charter of the United Nations" (now article 1(F)(c) of the Convention, *supra* note 5), Miss Meagher of Canada took the position that it "was an extremely vague and wide provision which might obviously lay itself open to much abuse." 11 U.N. ESCOR (165th mtg.) at 23, U.N. Doc. E/AC.7/SR.165 (1950). Similarly, Lord Macdonald of the United Kingdom argued that the exclusion of war criminals (now article 1(F)(a) of the Convention, *supra* note 5) "gives to the executive organs of government a power to take what are essentially judicial decisions. We consider that it is dangerous to entrust such a power to the executive organ of a government." 5 U.N. GAOR (325th plen. mtg.) at para. 67, U.N. Doc. A/PV.325 (1950).

252. For example, the Friend's World Committee suggested "that the Contracting States should agree to accept the decisions of the High Commissioner for Refugees or of an advisory panel attached to his Office, when questions of determination are involved, thus avoiding contradictory rulings by individual contracting states and other difficulties." Submission of the Friend's World Committee, 6 U.N. GAOR C.3 (347th mtg.) at 3, U.N. Doc. A/CONF.2/NGO.7 (1951). This suggestion was not incorporated in the Convention.

humanitarian or human rights concerns would arguably dictate the grant to refugees of some form of durable protection where safe voluntary repatriation is impossible, international refugee law requires the state of reception only to avoid the return (refoulement) of a refugee to a state where she or he may face persecution.[253] That is, there is no requirement—even where it is demonstrably impossible for the refugee to return home—to grant asylum, defined as admission to a state with permission to remain there.[254]

The absence of any explicit correlation between refugee status and a right to asylum was the price demanded by some states in return for their participation in the Convention-based system.[255] While willing to provide emergency protection against return to persecution, states insisted on having the right to decide who should be admitted to their territory, who should be allowed to remain there, and ultimately, who should be permanently resettled.[256] This position, argued as a necessary incident of sovereignty,[257] is at the root of the failure to include any duty to grant asylum in either the Convention or Protocol. The unwillingness of the community of nations to override sovereign discretion over immigration even in situations of compelling humanitarian need is similarly reflected in the permissive nature of the 'right to seek and to enjoy asylum'[258] contained in the Universal Declaration of Human Rights, in the failure to include a duty to grant

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253. The Convention provides that "[n]o Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention, *supra* note 5, at art. 33(1).

254. *See* G. GOODWIN-GILL, *supra* note 16, at 82 ("While states may be bound by the principle of non-refoulement, they as yet retain the discretion as regards both the grant of 'durable asylum' and the conditions under which it may be enjoyed or terminated.").

255. *See, e.g.*, Statement of Mr. Petren of Sweden, 6 U.N. GAOR (19th mtg.) at 13, U.N. Doc. A/CONF.2/SR.19 (1951) ("Sweden was a country of asylum, situated near the territories whence refugees fled. It had pursued a liberal policy, and would like to continue to do so, but the fact must be taken into account that its capacity for absorbing large numbers was limited . . . ."). The French representative, Mr. Rochefort, expressed concern to be able to offer differential status to asylum-seekers: "It would be a very serious matter if the receiving country was not to be permitted to carry out screening operations to weed out . . . persons to whom the French Government might consider granting asylum without conferring the status of refugee on them." 6 U.N. GAOR (29th mtg.) at 17, U.N. Doc. A/CONF.2/SR.29 (1951).

256. *See, e.g.*, Hyndman, *supra* note 204, at 153.

257. *See* Sexton, *supra* note 128, at 737–38:

> The Convention does not address the granting of asylum. The reasons for this appear to be two-fold. First, because states are the proper subjects of public international law, individuals have neither rights under nor access to it. More importantly, the right to grant asylum remains within the unfettered discretion of a state as an incident of its sovereignty; in the absence of contrary treaty obligation, a state is not bound to grant or deny political asylum to any person.

258. Universal Declaration of Human Rights, *supra* note 72, at art. 14(1), provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution."

asylum in the Declaration on Territorial Asylum,[259] and in the aborted attempt to draft a binding international convention on the subject of asylum.[260] While in practice many states do accord enduring protection to those determined to be Convention refugees, the fear of abdicating any measure of control over immigration has resulted in a jealously guarded formal distinction between refugee determination and the granting of asylum.[261]

In sum, the third major characteristic of the international refugee law is that it is effectively controlled by the authorities of the various participating national governments. This control is achieved by a combination of minimal international oversight of determination procedures, the establishment of a refugee definition that is susceptible to interpretation in accordance with divergent national interests, the explicit authorization to states to turn away persons in fear of persecution insofar as their protection creates a risk for the receiving state, and the imposition of a minimalist duty to protect that requires no commitment to the provision of enduring asylum.

V. TOWARD A CRITICAL APPRAISAL OF REFUGEE LAW

Can international refugee law be made more relevant to meeting the needs of today's refugees?

Because international refugee law currently is a means of reconciling the sovereign prerogative of states to control immigration with the reality of forced migrations of people at risk, it does not challenge the right of states to engage in behavior which induces flight, nor conversely the power of states to decide whether to admit victims of displacement. Refugee law today is less closely tied to human rights law than it is to general principles of public international law, which

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259. Indeed, the Declaration specifically acknowledges state prerogative: "It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum." 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

260. Not even this Convention would have established a clear duty to grant asylum. Article 1 of the preconference expert draft provided simply that "[e]ach Contracting State, acting in the exercise of its sovereignty, shall endeavour in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention." Plender, *supra* note 201, at 57. Moreover,

> [t]he 1977 United Nations Conference on Territorial Asylum was an abject failure, with close voting on major issues indicative of the divisions between states. One article only, that on asylum, was considered by the drafting committee, which reduced the "best endeavours" formula of the Group of Experts draft to that of "shall endeavour . . . to grant asylum."

G. GOODWIN-GILL, *supra* note 16, at 111.

261. It has been argued in the U.S., for example, that the state "[r]eserves the right to accept for resettlement only those it deems to be of special humanitarian concern. In other words, there is no inconsistency in our saying that a particular person is indeed a refugee, but not entitled to resettlement in this country merely because of it." DeVecchi, *Determining Refugee Status: Towards a Coherent Policy*, WORLD REFUGEE SURVEY 10, 10 (1983).

enable states—or at least those states which hold dominant positions in the international system—to continue to pursue their own interests within a global context.[262] Refugee law provides a consensual framework within which disruptions to regulated international migration can be addressed without threat to the consonance of the international order.

Because refugee law is designed and administered by states, the availability and quality of protection vary as a function of the extent to which the admission of refugees is perceived to be in keeping with national interests.[263] As the nature of refugee flows and conditions within countries of reception have changed over the course of nearly seven decades, refugee law has evolved from a relatively open system strongly influenced by humanitarianism to a regime that now excludes the majority of the world's involuntary migrants.[264] The rhetoric of humane concern lingers, but the modern apparatus of international refugee law is more closely tied to the safeguarding of developed states than to the vindication of claims to protection. This dramatic shift can be explained by the incompatibility of the presumed solution to the needs of refugees—secure exile[265]—with the acute preoccupation of states to avoid cultural, ethnic, political, or economic disharmony within their own borders.[266] An alternative framework within which the needs of refugees might be addressed along humanitarian and/or human rights concerns may be found in the regional context.

The first generation of refugee accords (1920–1938), consisting of pacts designed by European states for the protection of European refugees, was more regional than universal in scope.[267] To a large extent, the relative conceptual and administrative generosity of these arrangements was possible because they codified a cultural compact of long standing.[268] Rather than imposing new obligations, European states intended the early refugee conventions to regularize and coordinate a moral duty of reciprocal protection already recognized by them. In this context, the international legalization of refugee protec-

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262. G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 12 (1967).

263. *See* Goodwin-Gill, *supra* note 7, at 168–69.

264. INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at xiv.

265. This thesis is examined in depth in G. Coles, *supra* note 13.

266. See Paringaux, *1987: New Restrictions in the West*, REFUGEES, Dec. 1987, at 5:

> [W]estern countries have kept a watchful eye on their borders; asylum has been granted less generously than in the past, and old currents of xenophobia have begun to reappear in a region long considered the cradle of human rights. Preoccupied with problems of immigration, the democracies of North America and western Europe have, with certain exceptions, yielded one after the other to the temptation of stringency, of isolation and sometimes even of rejection, in some cases blemishing exemplary records of humanitarianism.

267. *See supra* text accompanying notes 25 and 42.

268. *See supra* text accompanying notes 25–26.

tion was neither revolutionary nor threatening to national authorities and was consistent with the classical role of international law in giving force to time-honored custom.[269]

The regional arrangements that exist today in Africa and Latin America demonstrate a comparable degree of generosity premised on mutuality of interest and cultural compatibility. The Organization of African Unity's (OAU's) Convention Governing the Specific Aspects of Refugee Problems in Africa[270] not only provides for a dramatic extension of the international legal definition of a refugee,[271] but includes a specific obligation on the part of states to endeavor to "receive refugees and to secure the settlement of those refugees"[272] and to cooperate with both UNHCR and the OAU in the effective protection of refugees.[273] The Cartagena Declaration,[274] adopted by the Organization of American States, also incorporates an expansive definition of refugee status[275] and legitimates the regional overview of refugee protection.[276] As in the earlier European context, these legal accords reflect norms that are profoundly a part of the social tradition of these regions. The traditional fluidity of African borders,[277] the Islamic duty of hospitality,[278] and the long-standing Latin American

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269. F.E. SMITH, INTERNATIONAL LAW 1 (1911).

270. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *concluded* Sept. 10, 1969, 1001 U.N.T.S. 14691 (entered into force June 20, 1974).

271. In addition to those persons included within the U.N. Convention definition, the OAU Convention extends protection to

> "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."

OAU Convention, *supra* note 270, art. I(2).

272. *Id.* art. II(1).

273. *Id.* arts. VII and VIII.

274. Cartagena Declaration, *supra* note 10.

275. *See id.*, Conclusion 3:

> The definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.

276. The Declaration in particular stresses the importance of both UNHCR and Inter-American Commission on Human Rights involvement in the provision of protection to refugees. *Id.*, Conclusions 14–16.

277. *See* E.-R. MBAYA, LA COMMUNAUTÉ INTERNATIONALE ET LES MOUVEMENTS DES POPULATIONS EN AFRIQUE 14 (1985) ("La vulnerabilité de certains pays d'Afrique . . . provoque aussi une vague de migrations de personnes deplacées qui franchissent littéralement les limites territoriales et s'établissent dans les pays voisins, généralement ceux du littoral, pour y reprendre leurs occupations habituelles . . . ."). This traditional openness, however, may recently have begun to erode. *See infra* note 297.

278. *See* G. ARNAOUT, L'ASILE DANS LA TRADITION ARABO-ISLAMIQUE 12 (1986) ("De cette conception de l'hospitalité découlait que toute tribu, toute ville, tout pays, devait asile et

practice of granting asylum[279] all provide the cultural basis for a shared commitment to the sheltering of involuntary migrants, in much the same way that divine right and natural law earlier inspired the rulers of Europe.[280] Moreover, many of these states both produce and receive refugees, and thus rightly perceive an orderly arrangement for the protection of involuntary migrants to be in their own best interests.[281]

A somewhat different type of cultural consensus was at the root of the second generation of international refugee accords (1938–1950).[282] The states that drafted and participated in these arrangements were Western strategic and military allies. Those to be assisted were fellow Europeans, the victims of the group's common political and military adversaries. Thus, while states not directly affected by refugee flows agreed to participate in the protection system, they did so largely out of allegiance to their strategic partners and in sympathy with persons whose ideology was consonant with their own. In the immediate post-war era refugees were moreover seen as valuable sources of manpower to contribute to reconstruction and economic growth.[283] The critical elements of cultural compatibility and mutuality of interest were thus both present and dictated a relatively generous but carefully defined openness to refugee resettlement.

In all of these situations, the granting of secure conditions of exile to refugees was seen as reconcilable with national self-interest, such that the general policy commitment to restrictionism in immigration could be relaxed. Because the involuntary movements to be accommodated were occurring within the context of a defined regional, strategic, or ideological community, and because there was an express or implied reciprocity of interest between states of reception and refugees or their states of origin, states recognized that their interests

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protection à ceux qui se trouvaient sur son territoire, quel qu'ait été le motif qui les y ait amène.").

279. *See* Y. ZARJEVSKI, A FUTURE PRESERVED: INTERNATIONAL ASSISTANCE TO REFUGEES 208 (1988):

> [I]f Latin Americans had to seek refuge abroad for political reasons, this was possible because of the traditional system of asylum as practised in countries where frequent changes of regime had periodically condemned the opposition to exile. There was sufficient protection for asylum-seekers in the many regional treaties and conventions to which Latin American states had been acceding since the end of the nineteenth century.

280. *See supra* text acccompanying note 27.

281. Of the 36 African states that provide asylum to refugees, 13 (Angola, Burundi, Cameroon, Ethiopia, Ghana, Mozambique, Rwanda, Somalia, South Africa, Sudan, Uganda, Zaire, and Zimbabwe) also produce refugee flows into other African states. Similarly, of the 20 Latin American states that shelter refugee populations, five (Chile, Cuba, El Salvador, Guatemala, and Nicaragua) are responsible for refugee movements into other states of the region. U.S. COMM. FOR REFUGEES, WORLD REFUGEE SURVEY: 1987 IN REVIEW 30–31 (1988).

282. *See supra* text accompanying note 60.

283. *See, e.g.*, INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 35; Holborn, *supra* note 132, at 333–34.

would not be adversely impacted by the admission of refugees to protection through asylum.

The construction of the modern international Convention, like its predecessors, guaranteed secure conditions of exile to European refugees.[284] Drafted in a universal forum, however, this accord addressed the plea to alleviate the large post-World War II European refugee burden to all states and characterized refugee protection as a duty of the international community as a whole. The logical corollary of this universalist perspective—the obligation of developed states to extend protection to refugees from other regions of the world—was recognized as a contingent *quid pro quo*, but was not the subject of any binding obligation in the Convention. The needs of non-European refugees were left to be addressed institutionally rather than in law, with the assumption that adjacent states would cope with the human displacement if afforded financial assistance by Western states.[285]

In addition to its Eurocentric focus and limited vision of burden-sharing, the modern Convention is also noteworthy for its codification of safeguards for state parties.[286] Because the cultural compact and sense of shared interests upon which earlier accords had been premised were no longer assured in the more volatile, universal context, the developed states that drafted the conventional regime insisted that the scheme guarantee them a substantial margin of discretion in making specific protection decisions. Thus, the conceptual threshold for access to refugee status conforms with domestic interests and is independently administered by each state with only minimal international oversight. Most important, recognition as a refugee results in no implied right to asylum. By virtue of these procedural precautions, international law cannot compel protection decisions inconsistent with national interests. This groundwork, untouched by the 1967 Protocol's formal universalization of refugee law, has enabled states to meet their basic legal obligations toward refugees with little fear of domestic dislocation.

The nature of refugee movements has, of course, changed dramatically since the drafting of the Refugee Convention. Only a small minority of today's refugees have fled developed states: most modern involuntary migrants are from Africa, Asia, and Latin America.[287] A small but perceptible minority of these refugees have been able to leave their region of origin in order to seek protection in the more

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284. *See supra* text accompanying note 132.
285. *Id.*
286. See *supra* text accompanying note 220.
287. B. Stein, *supra* note 3 at 49.

economically and politically stable Western world.[288] The developed states of destination, however, have proved less than welcoming to this new generation of asylum seekers.[289] While continuing formally to proclaim their commitment to the sheltering of all refugees, industrialized states are busily building upon the Convention's guarantee of domestic procedural control in order to construct a maze of visa controls, "direct flight" rules, screening mechanisms, and unfair determination systems intended to deter refugees from the Third World.[290]

The invocation of their procedural authority to deter refugees is directly attributable to the lack of congruity between the social context of refugeehood today and the historical tenets upon which refugee protection was premised. Both the cultural compact and sense of mutuality of interest that supported earlier arrangements have ceased to exist: Western states by and large see the admission of refugees of divergent political and social characteristics as presenting threats to their own domestic harmony[291] and can see no offsetting benefits that would justify a relaxation of restrictionist immigration standards. While developed states had been willing to codify the cultural compact to shelter involuntary migrants from within their own community, they regard the social, economic, and ethnic heterogeneity implied by universal access to asylum as inconsistent with the right of their political constituency to determine its own composition. While such

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288. *See* Rizvi, *United Nations and the Refugee Problem*, 38 PAKISTAN HORIZON 46, 54 (1985).

> Two sets of factors have caused greater migrations/refugee problems in the post-World War II period. The "push" factors force people to leave the place of their habitual residence . . . . The "pull" factors include the conditions outside one's country of habitual residence which encourage or attract a person to migrate to other places, i.e. economic opportunities; security and peace; political, social, and religious freedoms; and climatic conditions.

Id.

289. *See, e.g.*, Frelick, *The Twilight of Refuge in the West*, in U.S. COMM. FOR REFUGEES, *supra* note 281, at 25.

290. *See, e.g.*, UNHCR, *supra* note 240, at paras. 19–20; Goodwin-Gill, *supra* note 7, at 152.

291. In the United States, for example, "[t]he problem of asylum and refugee status is overshadowed by [the] intense political struggle over immigration policy, particularly the growing perception that illegal immigration of Hispanics and other minority groups will erode the political and economic stability of the nation." Brill, *The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*, 32 CLEVELAND ST. L. REV. 117, 174 (1983); *accord* Burke, *supra* note 219, at 311 ("[T]he desire to help the world's poor and oppressed clashes with the belief of most Americans that substantial immigration is undesirable and economically threatening to their interests."). In Western Europe,

> [w]ith the onset of the recession, . . . [i]mmigrants began to congregate, usually in run-down inner city areas, where they competed with existing residents for work, housing and other public services. Racist attitudes intensified, often inflamed by sections of the media and extremist political groups. Governments reacted by tightening immigration controls, often under great popular pressure.

INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 37.

attitudes are arguably ethnocentric or even racist,[292] the legal right of the state to protect the unity of its people is generally conceded.[293]

Rather than frankly asserting the prerogative to shape the nature of their population, however, developed states have sought to clothe their commitment to restrictionism in the rhetoric of humanitarian or human rights principles.[294] Why the charade? If the right of a people to control the admission of foreigners in the interest of domestic homogeneity is indeed defensible,[295] why is it not clearly asserted? If developed states are in fact concerned about the human rights or humanitarian needs of refugees in the Third World, why cannot the compromise between these commitments and their perceived obligation to their own body politic be reconstructed in a way that is meaningful rather than rhetorical?

Refugee law as currently administered allows Western states to maintain the facade of universal, humane concern without the necessity of affording genuine protection. The failure to acknowledge the disharmony of law and social reality makes it possible to avoid the discussion of basic principles which would logically follow, and which would require developed states either to enhance their contributions to refugee protection or to temper their much prized discourse of humanitarianism and human rights. Sadly, most less developed states have acquiesced in this silence, either out of fear of losing whatever money is voluntarily paid by Western states to keep refugees in their

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292. *See* Nobel, *Refugees and Racism*, 48 REFUGEES 34, 35 (1985).

293. *See generally* R. PLENDER, INTERNATIONAL MIGRATION LAW 38–70 (1972). Plender quotes Oppenheim's conclusion that "a state, although incapable of excluding all aliens from its territory without violating the *spirit* of the law of nations, is under no obligation to admit all objectionable aliens to its territory." *Id.* at 54.

294. In introducing recent restrictions on access to the Canadian refugee determination system, for example, the then Minister of Employment and Immigration announced that

> [t]his bill is rooted in our obligations under the *Convention relating to the Status of Refugees*, in our humanitarian traditions towards refugees and in Canadian law . . . . Our doors will always be open to genuine refugees who need our protection . . . . This Bill allows us to uphold and continue Canada's long standing commitment to refugees.

MINISTER OF EMPLOYMENT AND IMMIGRATION (CANADA), NEW REFUGEE DETERMINATION LEGISLATION 3–4 (May 5, 1987).

295. Michael Walzer, for example, clearly states the argument in favor of the prerogative of the citizens of a state to determine the composition of their community:

> Since human beings are highly mobile, large numbers of men and women regularly attempt to change their residence and their membership, moving from unfavored to favored environments. Affluent and free countries are, like elite universities, besieged by applicants. They have to decide on their own size and character. More precisely, as citizens of such a country, we have to decide: Whom should we admit? Ought we to have open admissions? Can we choose among applicants? What are the appropriate criteria for distributing membership? The plural pronouns that I have used in asking these questions suggest the conventional answer to them: we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of community we want to have.

M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 32 (1983).

regions of origin,[296] or out of a desire to avoid scrutiny of their own, often-checkered protection efforts.[297] The losers in this scenario are the refugees who cannot return home, are afforded only palliative relief within their own region, and are increasingly denied the right to cross cultural frontiers in search of protection abroad. The discourse of altruism that characterizes most discussions of refugee law as currently established is therefore simply misplaced. To reflect a commitment to attaining a humane and dignified response to the needs of involuntary migrants, the time is clearly right to engage in a fundamental reassessment of strategy.

Refugee law is theoretically misconceived as a response to involuntary cross-cultural migration in a world of nation-states[298] because it is anchored in the assumption of an age gone by that exile is the appropriate solution to the failure of national protection. In the context of a world governed by autonomous nation-states determined to advance their own interests by control over immigration, a universal system for the protection of refugees that is premised on the right to exile must surely fail.[299] This does not mean that in some circumstances exile may not be the only tenable answer—at least for some period of time—to the needs of involuntary migrants. There will clearly exist situations of deeply rooted and serious risk that will inspire humane states to admit involuntary migrants to their protection. To a great extent, though, exile will have to focus on states that are culturally, ethnically, politically, or otherwise affiliated to the refugee population, as only they are likely to perceive the admission of involuntary migrants to be reconcilable to their own national interests.[300] The locus of more generalized international concern might then shift to the codification of effective and binding commitments to burden-sharing by states which carry a less than proportional share of

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296. *See* G. Coles, *supra* note 136, at 12.

297. *See* UNHCR, *Africa: Host States Under Pressure*, 48 REFUGEES 18, 19 (1987):

> While the majority of African states have continued to pursue liberal asylum policies, refugee protection problems have arisen in several parts of the continent. In [1987], UNHCR has received disturbing reports of armed attacks on refugee settlements, the forcible conscription of refugees into military forces, the involuntary return of refugees to their country of origin, and failure to respect the nonpolitical character of refugee settlements.

298. The twentieth century introduced new social forces that critically narrowed . . . historical avenues of escape in the course of a single generation: a new racism made conversion impossible and a universal network of immigration restrictions rendered physical flight extremely difficult. Hence, complete control of the globe by sovereign nation states has made possible the expulsion of men from civilization.

J. STOESSINGER, THE REFUGEE AND THE WORLD COMMUNITY 3 (1956).

299. *See, e.g.*, Garvey, *supra* note 2, at 487 ("Refugee law . . . reaches a dead-end as human rights law because it collides with the principle of national sovereignty.").

300. *See generally* Fonteyne, *Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees*, 8 AUSTL. Y.B. INT'L L. 162, 186–87 (1983).

the front-line protection obligation, and most important, to the establishment of an international system to facilitate the eradication of the conditions that prevent refugees from returning home.[301] In this way, states would come to see exile as an interim condition or, at worst, as a remedy of last resort.

Specifically, the approach I suggest is one that plays to the perceived self-interests of states of potential resettlement, of first refuge, and of origin. The traditional Western states of resettlement are primarily motivated to deter the arrival of culturally, racially, and economically dissimilar refugees at their borders. Even though the use of legal and administrative measures to stem the flow of involuntary migrants can achieve some degree of control, and notwithstanding the ability of states ultimately to justify the refusal of protection on the basis of international legal standards, the industrialized nations of the West would likely commit themselves to funding a system that would insulate them from the flow of asylum seekers from other regions. Specifically, developed states might be asked to commit themselves in law to the creation and ongoing maintenance of an assistance and development fund for less developed states, significantly larger than their current voluntary contributions to UNHCR,[302] to be administered not as at present by those same states,[303] but rather by a truly international and geopolitically representative authority. In exchange, refugees would not have the liberty to seek asylum in the state of their choice but would rather be afforded protection within a culturally, racially, politically, or otherwise affiliated state. In response to the claims of persons who arrive at their borders from a nonaffiliated country, states would have the legal duty only to entrust such persons to the international authority, subject to an obligation to afford temporary or long-term resettlement to internationally identified refugees for whom appropriate shelter is not available in a related state.

By and large, the concern of less developed states of first refuge which are in some sense affiliated with the refugee populations is the heavy economic toll and resultant social dislocation associated with the reception of refugee movements. If these states were to be guaranteed a sufficient level of financial and material assistance to both meet the needs of the refugees and enhance the standard of living of the host population, and if the states of reception were to administer that assistance subject only to international verification of reasonable flow-through to the refugee populations, these states would undoubt-

301. Garvey points out that "[t]he problem becomes more manageable the more it is treated as a problem of relations and obligations among states . . . . The essential need . . . is to articulate inter-state obligation as the basic foundation for international refugee protection." Garvey, *supra* note 2, at 487–96.

302. *See Executive Committee of the High Commissioner's Programme*, *supra* note 194.

303. *See Executive Committee of the High Commissioner's Programme*, *supra* note 195.

edly cooperate willingly with the international authority in offering temporary asylum and, in some cases, long-term local settlement to involuntary migrants.[304]

Finally, the international authority might also employ the assistance and development fund to create secure conditions of return for refugees to their states of origin. Many, if not most, refugee movements can be traced to economic difficulties, either directly, as in the case of famine, or indirectly, as when a particular refugee group belonging to a minority is made the scapegoat of a lack of economic opportunity. Where the authority can assist the state of origin in improving conditions of life for its citizenry by access to the fund, and the state willingly accepts international oversight of its efforts and sharing of benefits with the formerly disfranchised group, voluntary repatriation may be facilitated under this burden-sharing scheme.

A move of this sort would end the exilic bias of modern refugee law and bring the practice of states more closely into line with their pronounced commitments to humanitarianism and human rights. While such a regime could only be implemented at the expense of the refugee's freedom to choose a place of exile,[305] the practice of states increasingly exacts that cost in any event,[306] and without the concomitant benefit of a legally binding commitment to burden-sharing.

To some this proposal to dispense with a formal legal obligation to provide exile on a universal basis, to emphasize regional and interest-driven alternatives, to codify humane concern through the less threatening vehicle of burden-sharing, and ultimately to devote energies to facilitating return rather than asylum will appear realistic, while to others it will smack of defeat. In a world of nation-states, in which law follows rather than dictates practice,[307] however, the transmutation of a protection system that functions reasonably well in the context of collegial states cannot, at least not yet, succeed at the global level.

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304. *See* INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, *supra* note 19, at 44–45:

> In the developing world, recent state practice demonstrates that governments are prepared to give at least temporary refuge to large numbers of distressed people, providing that the burden of caring for them and of seeking permanent solutions to their plight is shared by the international community. It was this principle of "burden-sharing" that persuaded several South East Asian states which had initially been reluctant to admit Indo-Chinese boat refugees to change their policy.

See also Rizvi, *Causes of the Refugee Problem and the International Response*, in A. Nash ed., *supra* note 3, at 107–08 ("The rigour of individual scrutiny of asylum-seekers in the developed countries stands in sharp contrast to the relative ease with which large numbers are treated as refugees in the developing countries.").

305. This restriction would provide the *quid pro quo* for dramatically increased contributions to refugee relief by industrialized states, sufficient to sustain assistance efforts in the states of refuge.

306. *See supra* note 290.

307. *See* Ferguson, *Refugees: A New Dimension in International Human Rights*, 70 AM. SOC'Y INT'L L. PROC. 58, 74 (1976) ("The refugee problem entails facing the ultimate question of the nature of the nation-state, and whether the nation-state is consistent with the types of solutions that must be found for the resolution of the problem.").