The Curse of the Nation-State: Refugees, Migration, and Security in International Law

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Accessibility
THE CURSE OF THE NATION-STATE:
REFUGEES, MIGRATION, AND SECURITY IN
INTERNATIONAL LAW

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ABSTRACT:

How does international law protect migrants? For the most part, it does not. Of the millions of people who flee persecution, conflict, and poverty each year, international law protects only refugees: those who flee persecution on the basis of religion, race, nationality, political opinion, or membership in a particular social group. The 1951 Convention Relating to the Status of Refugees provides critical protections for minorities that must never be diluted. However, it is insufficient to protect the swarms of migrants landing on the shores of Europe and elsewhere, or to guide states on how to protect them while guarding their own security. This article argues that states have always revised international law regarding displaced people to protect their own security interests and changing circumstances of displacement. The time is thus ripe for the creation of an additional instrument of international law to protect the 35 million displaced people who do not meet the definition of “refugee.” To support this argument, this article presents a comprehensive history of refugees in international law, combining primary sources and original interview data to trace how states have used refugee law to protect minority rights, even as state security interests have changed refugee protection over time. In doing so, the article makes two theoretical claims that contribute to growing scholarly interest in the history of human rights law. First, the article argues that refugee law is paradigmatic human rights law, although it is often excluded from the human rights canon. Second, the article claims that refugee law predates the modern human rights regime, challenges its

foundations, and extends its claims to universality.

“Since the Peace Treaties of 1919 and 1920 the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state.” – Hannah Arendt

INTRODUCTION

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

But what is a refugee? This question remains highly contested. Doctrinally, international refugee law protects only individuals fleeing persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion. No international law is designed to protect the majority of displaced people, who do not meet this definition. As of mid-2014, 13 million people qualified as refugees under international refugee law, while the Office of the United Nations High Commissioner for Refugees (UNHCR) identified 46.3 million people as “persons of concern.” An average of 32,000 people per day fled their homes due to violence in 2013, and their harrowing circumstances may or may not qualify them for refugee status. The reasons for their flight include persecution, generalized violence, economic migration when violence renders their business pursuits unsustainable, poverty, climate-

3 UNHCR Global Trends 2013. See also UNHCR report says global forced displacement at 18-year high, UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (June 19, 2013), http://www.unhcr.org/51e071816.html.
4 UNHCR Global Trends, 2013.
change induced flight from famine or rising seawaters that threaten to wipe entire states off the map, and other horrors still. Solutions to the plight of displaced people are complex and heart wrenching, as states struggle to balance their sovereign right to expel aliens from their territory with the reality of dire humanitarian need on their doorsteps. National security concerns, real or imagined, often trump human rights. After all, refugees are people whom states are required to help. Others may legally be returned to hell.

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

This historical account also challenges current scholarly debates about human rights. Most historical and social science literature on human rights regards the great “constitutional moment” in the immediate aftermath of World War II, as the birth of international human rights law.6 Other scholars situate this moment later, when transnational human rights activism became more visible in the 1970s.7 This article reveals that the roots of human rights law—in the sense of universal, liberal rights that should be enjoyed by people regardless of where they live—are much deeper.8

6 The term “international constitutional moment” is borrowed from William W. Burke-White & Anne-Marie Slaughter, An International Constitutional Moment, 43 HARV. INT’L L.J. 1 (2004). Although Slaughter and Burke-White primarily focus on humanitarian law, the concept has been applied to the birth of international human rights law as well.; see also ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD (2007); B. A SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS,(2009) (tracing the dawn of human rights to the same historical moment in the wake of WWII).
7 E.g., SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).
8 As Moyn suggests, the definition of what constitutes human rights has changed over time. Id. My aim here is to trace the roots of human rights in the liberal, cosmopolitan
Protection of refugees under international law is at least as old as the modern Westphalian nation-state, and the concept of protecting those fleeing persecution has roots in all of the world’s major religious legal traditions. International refugee law was among the first major human rights projects of the fledgling United Nations. The 1951 Convention Relating to the Status of Refugees (the “1951 Convention”) developed in the same historical moment as the Universal Declaration of Human Rights and the Genocide Convention, and for similar reasons, as the recovering world sought to ban the atrocities perpetrated by the Nazis. While scholars of international law and international relations have paid far less attention to the history of the 1951 Convention than that of other human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESCR), the 1951 Convention far preceded them, entrenched and enhanced prior state practice, and was the first human rights instrument to legalize many of the same rights found in these later documents. My account thus adds to current scholarly debates and our evolving understanding of the origins and development of human rights in international law.

The article will proceed in three parts. Part I will explain why many previous scholarly accounts of the development of international human rights law have largely ignored international refugee law, and why it is critical to correct this theoretical gap. Part II will trace the history of the international refugee regime. This account aims to add refugee law to other major accounts of the origins of international human rights law. Because refugee rights encapsulate the international community’s commitment to minority rights, no understanding of the history of international human rights in which they are now commonly understood, while acknowledging that the concepts of human rights and refugee status may have had different significance for states and individuals at other points in history.

Discussion of the roots of the concept of asylum in both the Hebrew Bible and in Ancient Greece can be found in . On the Islamic roots of asylum, see e.g., AHMED ABOU-EL-Wafa, THE RIGHT TO ASYLUM BETWEEN ISLAMIC SHARI’AH AND INTERNATIONAL REFUGEE LAW: A COMPARATIVE STUDY (2009). In a four-page piece, Louis Henkin called for the integration of refugee law and human rights law, but had little space to build an argument as to why. Louis Henkin, Refugees and their Human Rights, 18 FORDHAM INT’L L.J. 1079, 1079-81(1994) (noting “It is time to bring the international law of refugees and the international law of human rights together.”) James Hathaway and Guy Goodwin-Gill have made earlier calls to rethink refugee law as human rights law, and I aim to build on their accounts with additional theory and new historical and contemporary data. See generally James C. Hathaway, Reconceiving Refugee Law as Human Rights Protection, 4 J. REFUG. STUD. 113–131 (1991); GUY GOODWIN-GILL AND JANE MCAW, THE REFUGEE IN INTERNATIONAL LAW, 3d Ed. (2007).
rights law can be complete without this account. I will conclude with some implications for what this analysis implies for changes to international law, and our understanding of international human rights law overall.

I. REFUGEE RIGHTS AS HUMAN RIGHTS

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

All of these versions, while cataloguing remarkable achievements of individuals and states, are incomplete. All three versions largely dismiss the historical development of international human rights and transnational activism for them prior to World War II, although nations had begun to give serious thought to the basic rights to which all people are entitled, regardless of nation-state borders. The Hitler and Roosevelt versions, in their triumphalism of individual rights, do not give sufficient consideration to the state interests that shaped the development of the international human rights regime.\(^\text{15}\) As Mazower explains, individuals such as Roosevelt and Lemkin were only able to succeed because states let them. Moreover, he notes, the “constitutional moment” was not initially experienced as such, since the full extent of the Nazi horrors had not yet been revealed. As he explains, “we now know that the Holocaust as such was much less central to perceptions of what the war had been about in 1945.”


\(^{12}\) See BORGWARDT, supra note 6.

\(^{13}\) SIMMONS, supra note 6.

\(^{14}\) See generally MOYN, supra note 7.

\(^{15}\) See Mazower, supra note 11, at 381.
Finally, all three of these versions largely ignore international refugee law in their analyses. Scholars have largely analyzed international refugee law as doctrinally distinct from international human rights law. Scholars of international law and international relations – lawyers, political scientists, and historians alike – largely ignore international refugee law in their accounts. Major legal casebooks on international human rights law give short shrift to international refugee law, if they cover it at all. Meanwhile, scholars of refugees often do not concern themselves with broader issues of human rights. Scholarship from the field of refugee studies, such as excellent work by Alexander Betts and James Milner, largely concern themselves with refugee policy in practice and the operation of the Office of the United Nations High Commissioner for Refugees (UNHCR). Louis Henkin and James Hathaway, arguably the most important living scholar of refugees in the American legal academy, have both called for the integration of the refugee and human rights regimes, but stop short of providing a full theoretical account of how and why to do so. Overall, refugee law remains misunderstood as a key element of international human rights law, although its framers were deeply concerned

16 See, e.g., Henkin, supra note 10, at 1079-81 (recognizing the usual doctrinal separation between the two regimes).


with protecting human rights.

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

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

International refugee law, by contrast, implicates state sovereignty in an important way that other international human rights treaties do not. At the core of international refugee law lies the jus cogens norm of non-refoulement, from which no state can derogate. Non-refoulement effectively binds states to keep within their borders anyone who might be endangered if sent back to their country of origin. To be in compliance with international

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22 United Nations Secretary-General, Secretary-General’s 2009 Report on Implementing the Responsibility to Protect, A/63/677.

23 For an enthusiastic take on the global spread of human rights through law, see generally KATHRYN SIKKINK, THE JUSTICE CASCADE (2011) (discussing how “the justice norm” of prosecuting leaders for human rights abuses has spread globally).

refugee law, then, signatory states must not summarily return anyone who meets the Convention definition of refugee to his country of origin. International refugee law conflicts with the basic right of a sovereign state to expel aliens from within their borders, and demands that states accord certain rights to non-citizens. Compliance with the 1951 Convention has thus created economic burdens and security issues for signatory states. The U.S., Europe, and Australia, for example, have built a massive system of detention centers to house asylum-seekers who arrive within their borders until they can be processed to determine whether they are refugees.

In countries with less secure borders, particularly in the Global South, refugees have posed domestic security threats to their host countries as well as international security risks. Without social and legal protections in their host countries, and with their previous social order destroyed, refugees have formed in-group networks for welfare provision or to compete for resources within their new environment. These networks provide an alternate source of political authority to the state, and potentially a threatening one in weak states. Refugees have used camps as a locus to mobilize co-ethnics or co-group members against their countries of origin their new host states. In some circumstances, host countries have used refugees to destabilize their countries of origin, as occurred in the Great Lakes Region of Africa in the 1990s. Refugee communities may host rebel groups, as Syrian exiles have in Turkey since the Syrian civil war. Host states may be unable to contain militant refugees, some of who may be receiving protection and assistance inadvertently provided by international humanitarian agencies. For example, in refugee camps in Burundi and Tanzania in the 1990s, the UN Refugee Agency inadvertently provided assistance to Hutu rebels, who later returned to Rwanda to commit genocide. International refugee law demands that states put themselves at risk in order to accept persecuted people, even if they are a potential security threat. International human rights law places no such burden on a state’s domestic security; indeed, most believe that a state’s compliance with international human rights law will only improve domestic complacency.

International refugee law also serves a political function for states that human rights law does not. As Matthew Price has argued, countries’

27 See generally LISCHER, supra note 29.
ability to grant asylum, as expressed in international refugee law, plays a critical expressive function in international politics. A state’s ability to determine a citizen of another state to be a “refugee” enables one state to sanction another within the international system. Classifying a citizen of another state as a “refugee” enables a state to express judgment about the morality of the state of origin or its abuse of authority in a particular circumstance. In 2013, the case of Edward Snowden illustrated this function. By offering Snowden temporary asylum, Russia and Ecuador played a political card against the U.S., expressing disdain about its invasive data-gathering policies. Human rights law, too, serves an expressive function, as states have used the language of law to condemn human rights abuses abroad. However, the expressive function of refugee law is accompanied by a more powerful expressive action. By physically accepting a refugee from another state, a state goes beyond rhetoric to intervention into another state’s affairs. A host state may also be able to use that refugee strategically, to speak out and rally others against his country of origin, or to gain intelligence on rights abuses or operations there. This expressive function served an especially important purpose during the Cold War, when the U.S. and its allies granted refugee status in large numbers to defectors from the Soviet Union and Eastern Europe.

On a philosophical level, international refugee law poses a challenge to the fundamental assumptions underlying human rights law. Human rights law posits that sovereign states are the guarantors of human rights; and thus, supposes that human rights are bounded by membership in a particular political community or tied to a particular territory. As Giorgio Agamben explains, politics itself is a constant process of inclusion and exclusion; of determining whom the sovereign will protect and whom it will not. A refugee, then, is the exemplar par excellence of this political process. Refugee status begins when a sovereign decides not to or fails to protect an individual’s human rights to the point that the individual is compelled to disassociate himself completely from the sovereign. International refugee law presents a challenge to human rights law—and to the very notion of sovereignty—by suggesting that humans have rights independent of a sovereign. International refugee law is an acknowledgment that rights exist outside the state, and thus a threat to the concept of the benefits of sovereignty: a refugee may have more human rights outside of an oppressive state than within it. International refugee law both implies that

29 See generally GIORGIO AGAMBEN, HOMO SACER (1998); see also Prem Kumar Rajaram and Carl Grundy-Warr, The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand, 42 INT’L MIGRATION 1 (2004), 33–64, at 34.
human rights exist outside the sovereign and that when states cannot provide those human rights to their own citizens, other states are bound to provide a substitute, thereby infringing on their own sovereignty. This leads to a dilemma that may explain a doctrinal divide: if the human rights regime is based on the premise of a sovereign who can guarantee those rights, then rights that exist without a sovereign to guarantee them must be something outside of that human rights regime.

B. Why Refugee Law Should Be Considered Human Rights Law

Thus, for important doctrinal reasons, scholars have largely viewed international refugee law as doctrinally separate from human rights law. Yet, an understanding of refugee law is critical for our understanding of international human rights law. The concerns of international refugee law speak to the primary interests of anyone who cares about human rights. In an era when sovereignty being questioned by scholars and states and challenged by non-state actors, it is worth considering what human rights the international community considers to be beyond the pale of sovereignty. Refugee status begins when a sovereign state fails, by choice or otherwise, to protect the human rights of its citizens. If we believe that rights exist beyond and outside of the state, anyone who cares about human rights must care about refugee rights.

To the extent that human rights law and liberal democracy are linked—and most believe that they are—refugee law is even more important. The protection of minorities has long been a sine qua non of liberal democracy. In Michael Walzer’s words, individual assimilation and group recognition, by liberating either individuals or groups from persecution, are “the central projects of modern democratic politics.” If liberal democracy is the normative model for states in the international community, then the UDHR, ICCPR, and ICESCR comprise the world’s model bill of rights. All of these instruments demand that sovereign states provide rights to their citizens. Refugee law, then, must complement this bill of rights to ensure protection of minorities and dissidents who exist outside of sovereign protection. Otherwise, they would become, to use Hannah Arendt’s term, “rightless.”

Arendt argues that refugees, minorities, and stateless people were rightless after World War I because they were not members of any polity that could grant them rights, and thus

30 See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
31 Id., at 84.
32 HANNAH ARENDT, ON THE ORIGINS OF TOTALITARIANISM, at 268.
put the lie to the idea of the universality of the Rights of Man. International refugee law, then, came after World War II to remedy this rightlessness. International refugee law demands that states respect the human rights of such individuals and affirm their own commitment to the goals of human rights law. As the international community’s normative commitment to democracy has increased, and the plight of minorities has continued to worsen, minority rights must continue to be a paramount concern. An international legal system that gives short shrift to refugee rights is not truly concerned about human rights. If human rights are inalienable, they cannot be dependent on a sovereign, and ensuring rights for those whom the sovereign will not protect is of crucial importance.

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

II. THE HISTORICAL DEVELOPMENT OF INTERNATIONAL REFUGEE LAW

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

The development of international refugee law reflects the international community’s turn from protection of group rights to protection

33 U.N. Charter Arts. 3-6; EC Membership requirements.
of individual human rights. Early definitions of the refugee in international
law were created in response to the perceived needs of states to provide
protection for groups of refugees fleeing from specific states whose policies
warranted international condemnation. As ad hoc treaties protecting
different groups of people caused inconsistencies in implementation, and
states became overwhelmed with increasing flows of refugees, states saw
the need to restrict the definition of refugee. When the interwar Minority
Rights Treaties failed and the post-World War II rights dialogue shifted
from protection of group rights to individual rights, refugee law followed
suit, reflecting a new concept of individual persecution compatible with the
needs of states and individuals alike.34 The historical record reveals why
international refugee law may have been satisfactory for the needs of states
and individuals at the time it was developed, but is deeply flawed in the
post-Cold War, post-9/11 context.

A. Pre-Westphalian Freedom from Persecution

Among the first great international legal projects was the protection
of minorities and persecuted people. Because human rights scholars have
focused on human rights law’s development in the wake of World War II, it
is often forgotten that the international community endeavored to protect
the rights of minorities and other persecuted people long before.35 The
concepts of refuge and refugees predate the modern nation-state. The term
has always referred to fleeing people. In the course of history, it has often
referred to those fleeing religious persecution, and refuge has often been
granted on religious grounds.

The concept of asylum has roots in most of the world’s major
religions, although those to whom it would be granted varied according to
cultural practices.36 In the Hebrew Bible, cities where manslaughterers
could flee persecution became known as “cities of refuge.”37 In the history

34 While the Minority Rights Treaties were concerned with minority rights in the
interwar sense of preserving the peace in Europe by ensuring basic human rights for ethnic
minorities and stateless people, there is no doubt that they were concerned with providing
international protection for minorities within Europe. While acknowledging the historical
difference in usage of the term “minority,” this article treats the Minority Rights Treaties as
a stepping-stone toward future legalization of international protection for members of
minority groups in the modern, liberal-democratic sense.
35 See Slaughter & Burke-White, supra note 6.
36 See Ahmed Abou-El-Wafa, The Right to Asylum between Islamic Shari’ah and
37 On cities of refuge, see Deuteronomy 3:23-7:11. These biblical cities of refuge (‘ir
miklat) are often cited as the roots of the concepts of refuge and asylum. See, e.g., Price at 26.
of state warfare, the concept of asylum dates at least as far back as the Peloponnesian War, when Athenians and Spartans alike granted refuge in their own religious temples to those fleeing persecution.\textsuperscript{38} The English term “refuge” dates back to 1350-1400. Derived from Middle English, Middle French, and Latin, it is related to the word refuge(ere), which meant “to turn and flee, or run away.”\textsuperscript{39} The French “réfugié” was first used in 1573 to refer to Calvinists fleeing what is now Belgium, then under Spanish Catholic rule.\textsuperscript{40} The English term “refugee” dates from 1675-85, derived from the French, reflecting Protestant flight leading up to the 1685 revocation of the Edict of Nantes.\textsuperscript{41}

By the time the term had come into use, religious minorities were routinely under assault in Europe. Rulers justified expulsion projects on religious grounds and goal of building national homogeneity. To choose but one prominent example, Spain expelled Jews from its territories in 1492, followed by Protestants from 1577 through the 1630s, and Moors in 1609. After trying to forcibly convert their Jewish population, the Aragons eventually decided that the political necessity of forming a modern nation justified the cost of expelling an important economic class and at least 2 percent of their population.\textsuperscript{42} Figures of those expelled vary, but range from tens of thousands to 200,000.\textsuperscript{43} After some fled to Portugal and quickly met expulsion there, Jews and converted Jews dispersed throughout Southern Europe, the enemy Netherlands, and the Ottoman Empire. Only the Ottomans welcomed the Jews with open arms after a proclamation from Sultan Bayezid II gave orders to do so.\textsuperscript{44} According to historian Bernard Lewis, Jews were welcome because they were an “economically active and politically reliable element.”\textsuperscript{45}

Despite having large numbers of persecuted minorities, European states did not find it necessary to create formal international law that

\textsuperscript{38} See Thucydides, History of the Peloponnesian War.
\textsuperscript{39} Random House Dictionary of the English Language.
\textsuperscript{40} Aristide Zolberg, The Roots of American Refugee Policy, 55 Social Research 649-678 (1988), at 651.
\textsuperscript{41} Random House Dictionary of the English Language; See also Id; Emma Haddad, The Refugee in International Society: Between Sovereigns (2008) at 55.
\textsuperscript{42} Egger estimates tens of thousands. Zolberg estimates that 120,000-150,000 Jews were expelled, which would amount to 2% of the Spanish populationFranco estimates the number at 200,000. See Egger at 82; Zolberg, at 31; Moise Franco, Essai sur l'histoire des Israelites de l'empire Ottoman depuis les origines jusqu'a nos jours (Paris, 1897; repr. Hildesheim, 1973), pp. 37-8.
\textsuperscript{44} Egger, at 82; Bernard Lewis, Cultures in Conflict (1995), at 38.
\textsuperscript{45} Lewis, Id., at 43-44.
specifically protected refugees in the fifteenth through nineteenth
centuries. Multilateral treaties protecting human rights or individual rights,
in general, were uncommon in this period. European states that produced
and accepted refugees were occupied with territorial conquest and
consolidation of states and empires. States responded to refugees on an ad
hoc basis, and enacted few restrictions to entry. The prohibitive cost of
transport meant that refugees were largely wealthy, and states welcomed
them as contributors to their economies. Refugees, by and large, entered as
dividuals and not en masse, and caused few problems for state security.

B. Pre-WW I Legal Protections for Minorities

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

*jus emigrandi* soon had its first test. In 1685, 200,000 Protestants
fled France after King Louis XIV revoked the Edict of Nantes, which had
protected Protestants from persecution since 1598, when many were fleeing
the Inquisition. Prussia, in particular, welcomed these Huguenots due to
religious affinity. Their relatively wealthy status could not have hurt their
cause. This was, perhaps, the first modern refugee movement: it was a mass
movement in an era of nation-states based on religious persecution in a time
of relative peace.

As early as 1789, refugee flows were playing an important role in

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47 On the limits of the Westphalian State, see Stephen Krasner, *Compromising
38 Phil Orchard, *A Right to Flee: Refugees, States, and the Construction of
49 Laura Barnett, *Global Governance and the Evolution of the International Refugee
50 Id. at 240.
51 Zolberg, *supra* note 40.
international politics and causing international security concerns. State building and nationalism were twin goals of the era. States used mass population displacements as a tool for creating national and state identity. Large numbers of persecuted dissidents fled the French Revolution. Refugees helped to shift the balance of power in Europe as they fled to Austria, Prussia, Russia, and England. These states were willing to offer refuge to cast aspersion on the new France and its hegemonic goals. The building of unified nation-states in 1848 then led to the sometimes-deliberate expulsion of thousands of refugees from Italy, Germany, and France. For example, 80,000 Germans were expelled from France because of the wars of German unification. 130,000 people who “considered themselves French left Alsace-Lorraine under the Treaty of Frankfurt in 1871.” Despite these large numbers, most population flows were much smaller than they are today. Host states continued to welcome those refugees who were skilled and wealthy.

By the Revolutions of 1848, it became clear that some dissidents posed security threats, and entry restrictions began to develop. A set of British “Alien Acts” in 1793, 1796, and 1844 created limits and regulations on who could enter the country; the 1905 Alien Act differentiated between refugees (the few, persecuted individuals) and immigrants (the poor and many). England and Switzerland continued to accept large numbers of refugees, developing reputations as hotbeds for revolutionary exiles and causing political tensions with France and Austria. The need for an international system to protect both persecuted individuals and international security was becoming necessary.

While international law to protect persecuted people did not yet exist, states were beginning to lay its groundwork by the nineteenth century. A patchwork body of international legal protections for aliens began to develop, which can be viewed as the precursor to modern refugee law. Encompassed in treaties of “friendship, commerce, and navigation,” certain human rights, phrased then as “human dignities,” were granted to aliens living in trading states. The treaties were meant to ensure that aliens did not face discrimination when they engaged in legal commercial activity and

51 HADDAD, supra note 41, at 56
54 HADDAD, supra note 41, at 55
56 HADDAD, supra note 41, at 55
57 Id.
58 JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 76 (2005); also see A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS (1949).
received access to judicial systems. The rights included recognition of juridical personality, respect for physical integrity, and personal and religious freedom, but not political rights. These rights were widely recognized as general principles of international law. States would enforce these rights by lodging a claim in support of their own nationals, so such law did not directly benefit refugees. However, the development of these general principles of law represented a breakthrough in international law because the treaties granted rights to citizens outside of the borders of their states, implicitly acknowledged their intrinsic vulnerability, and recognized that international protections for them were necessary.

C. Interwar Minority Protection Efforts

After World War I, the issue of minority and refugee protections became urgent. With the collapse of the great empires, the homogeneity of nation-states became a political goal once more, and the existence of minority groups resurfaced as a dilemma. The European powers feared that the large numbers of foreign nationals displaced within Europe threatened to cause another international conflict. At the Versailles peace conference, all successor states to the Ottoman and Hapsburg empires were forced to sign Minority Rights Treaties in order to receive state recognition by the international community. The League of Nations was charged with enforcement of the treaties. The goal of these Minority Rights Treaties was to protect Eastern European minorities, particularly Jews, from persecution in the states where they lived. The treaties guaranteed religious, linguistic, racial, and national minorities rights equal with the nationals of the states where they resided, access to public employment, language rights, public funding, and also the right to maintain their language and cultural institutions. The major powers hoped that granting these rights to minorities would help to avert another major international conflict. From a legal perspective, the Treaties represented recognition that millions of people were not protected by the ordinary laws of their states, and needed an international guarantor to ensure their basic rights.

Early instruments of international law were developing on an ad hoc

59 Hathaway, supra note 58, at 76-77.
60 Id. at 79.
61 Id.
62 On Minority Rights Treaties, see Nathaniel Berman, “But the Alternative Is Despair”: European Nationalism and the Modernist Renewal of International Law, 106 Harv. L. Rev. 1792, 1792-1903 (1993). For discussion of these treaties in their historical context, see also Mazower, supra note 11.
63 Hathaway, supra note 58, at 81.
64 See Arendt at 275.
basis to protect dissidents and minorities. After the Russian Revolution, more than 1 million people flooded into Europe between 1917 and 1921. Some fled from famine and overall destruction of their communities, while others were persecuted by the Bolshevik regime. Many of these Russians had their citizenship revoked, creating one of Europe’s first major crises of statelessness.

The nascent League of Nations responded with the first multilateral international agreement designed to protect refugees. The post of High Commissioner for Russian Refugees was created in 1921 and given to Dr. Fridtjof Nansen. The position became personally identified with Nansen, a charismatic Norwegian statesman and Polar explorer of continental renown. His efforts succeeded in culminating The Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees, which was recognized by 54 states. As its name suggests, the agreement was largely concerned with providing identity papers and travel documents to stateless Russians, which became known as “Nansen Passports.” Greeks and Turks fleeing the vicious Greek-Turkish war added to these refugee numbers and were issued Nansen Passports as well. Nansen earned the 1922 Nobel Peace Prize for his efforts.

1. The Creation of Refugees as a Tool For State-Building

States viewed refugee flows as both a problem to be resolved and a solution to some of Europe’s ailments. States used population transfer and

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65 Hathaway, supra note 46, 350. As with most mass population movements, the number of people who fled Russia is contested. Hathaway puts the number at 1.5 million.
66 Id. at 350-51.
67 Id. at 351. Arendt referred to the minorities and the stateless as “cousins-germane” who were left “rightless” after World War I. See HANNAH ARENDT, ON THE ORIGINS OF TOTALITARIANISM, 267-68. At that time, minorities and stateless alike were deprived of many of the benefits of citizenship. Many minorities were stateless, having had their citizenship revoked, and states refused to let many of them in. Many minorities and stateless could also be classified as refugees due to persecution. As discussed below, because of the overlap between these categories, the U.N. initially created a committee to draft international law on refugees and statelessness together. Eventually, two separate conventions were developed: the 1951 Convention Relating the Status of Refugees, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The latter focuses on preventing statelessness by requiring states to grant citizenship at birth, preventing them from withdrawing it, and preventing people from losing it in the event of territorial transfer. See 1961 Convention on the Reduction of Statelessness.
68 Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922, 355 L.N.T.S. 238.
exchange to create a better fit between nation and state.\textsuperscript{70} As nationalism rose, states viewed population transfers as a means of state-building, a solution to refugee crises, and a way to prevent future interethnic conflict. Even as such programs ostensibly aimed to protect minorities from violence, they often translated to brutal expulsions of people from their homes. Population transfers were particularly used in post-Ottoman states, where people and minorities had previously been transferred within the Empire.\textsuperscript{71} The benign-sounding term “population exchange” was first used to refer to a small-scale transfer between Bulgaria and Turkey in 1913.\textsuperscript{72} Another transfer occurred between Greece and Bulgaria in 1919 when 50,000 people were moved from Bulgaria to Greece and about 100,000 did the opposite.\textsuperscript{73}

The best-known mass expulsion is the Greek-Turkish Population Exchange. The 1923 Convention Concerning the Exchange of Greek and Turkish Populations\textsuperscript{74} was signed as part of the proceedings for the Treaty of Lausanne, which ended the Greek-Turkish War.\textsuperscript{75} It provided for “a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Muslim religion established in Greek territory.”\textsuperscript{76} The plan was controversial from the outset. At Lausanne, no individual would take responsibility for the idea of the population transfer. Although the leaders of Turkey and Greece agreed that the populations could not live together,\textsuperscript{77} they argued over the human cost. Nansen, who eventually implemented the Exchange on behalf of the League of Nations, argued that he was following orders from the great powers—Britain, France, Italy, and Japan—to protect religious minorities.\textsuperscript{78} All of the drafters knew the exchange would cause massive

\textsuperscript{70} HADDAD, supra note 41, at 120.
\textsuperscript{71} ÖZSU, UMUT. FORMALIZING DISPLACEMENT: INTERNATIONAL LAW AND POPULATION TRANSFERS, at 52-55.
\textsuperscript{72} BRUCE CLARK, TWICE A STRANGER: THE MASS EXPULSIONS THAT FORGED MODERN GREECE AND TURKEY (2006) at 53.
\textsuperscript{73} Yossi Katz, Transfer of Population as a Solution to International Disputes: Population Exchanges between Greece and Turkey as a Model for Plans to solve the Jewish-Arab Dispute in Palestine During the 1930s. 11 POL. GEOGRAPHY 1, 57-22 (1992), at 5; see also MARK MAZOWER, DARK CONTINENT: EUROPE’S TWENTIETH CENTURY, at 51.
\textsuperscript{74} Convention Concerning the Exchange of Greek and Turkish Populations, Jan. 30, 1923, 32 L.N.T.S. 75.
\textsuperscript{75} HARRIS MYLONAS, THE POLITICS OF NATION-BUILDING: MAKING CO-NATIONALS, REFUGEES, AND MINORITIES (2012), at 106.
\textsuperscript{76} Convention Concerning the Exchange of Greek and Turkish Populations, Jan. 30, 1923; See Egger at 371.
\textsuperscript{77} Egger, at 71.
\textsuperscript{78} Clark, at 44
human suffering, but believed it was in the long-term geopolitical interests of both states.\footnote{Id.}

The Exchange itself was better defined as a cruel forced expulsion. Nearly 2 million Greeks and Turks were ousted into each other’s territory, most becoming refugees.\footnote{For a recent discussion of the population exchange, see HARRIS MYLONAS, THE POLITICS OF NATION-BUILDING: MAKING CO-NATIONALS, REFUGEES, AND MINORITIES (2013).} Vast suffering was undeniable, even if some localities succeeded in integrating their populations. The international community effectively condoned the creation of mass refugee flows of Greeks and Turks, perversely, to protect these minorities from persecution. Such action was ostensibly justified in the name of national homogeneity and preventing another world war.

2. Continued League of Nations Attempts to Regulate Refugees

At the League’s request and upon Nansen’s own initiative, his office’s mandate expanded quickly to encompass other groups of refugees. In 1924, after the mass expulsion of Armenians from Turkey, 38 League states signed a treaty to grant Armenian refugees similar legal protections to those of Russian refugees.\footnote{Plan for the Issue of a Certificate of Identity to Armenian Refugees, May 31, 1924, 5 O.J.L.N. 969–970.} Implementation problems quickly arose, due to considerable disagreement over definition of the terms “Russian refugees” and “Armenian refugees,” which had been left vague.\footnote{An intergovernmental conference was held in 1926 to define the terms, resulting in the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 48 L.N.T.S. 2004. This document required that Russian and Armenian refugees prove that they lacked the “protection” of their states of origin and had not acquired any other nationality. Only 28 states signed onto this new definition, and a successor treaty in 1928 left the terms again undefined. See Arrangement relating to the Legal Status of Russian and Armenian Refugees, June 30, 1928, 55 L.N.T.S. 2005. (Elsewhere cited as 89 LNTS No. 3663.)} By 1926, the League extended Nansen’s mandate to encompass seven additional categories of refugees and stateless people in need of travel documents, primarily religious minorities.\footnote{These included 150 Assyrians fleeing France, 19,000 Assyro-Chaldeans fleeing the Middle East, and 150 Turkish dissidents living in Greece and the Middle East who were unable to return to their homelands after WWI, including 16,000 Jews to whom Romania refused to grant citizenship. The League rejected these proposals.} In 1928, these protections were further expanded to include Kurds. Nansen proposed to extend his mandate still further, to more than 125,000 people left displaced, stateless, or unable to return to their homelands after WWI, including 16,000 Jews to whom Romania refused to grant citizenship. The League rejected these proposals...
as too expansive. During this time, the League also drew a distinction between stateless people, displaced people, and refugees. In doing so, the League signaled a willingness to protect only those who had fled their countries of origin, while tabling the problem of stateless and displaced people, especially Jews, to whom no country wished to grant citizenship.

Thus, in the interwar period, the protection of persecuted minorities and refugees, which were inextricable categories, increased in importance to the international community. The League’s commitment to protecting dissidents from Russia and minorities from the former Ottoman Empire was strong. The League saw creating refugee flows and forced population displacement as part of a broader strategy to achieve homogeneity between nation and state, which was then viewed as the best way to protect human rights. But human suffering from the expulsions created a tremendous dark side to the lofty goals of peace and rights for all.

D. Responses to the Nazi Rise

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

None but the members of the nation may be citizens of the State. None but those of German blood, whatever their creed, may be members of the nation. No Jew, therefore, may be a member of the nation.85

Nazi policies quickly turned the ideals of the Minority Rights Treaties on their head. Germans comprised the largest minority group in Europe in the 1930s, a fact that is often forgotten.86 Nazis began to use the existence of large German minorities in neighboring countries to justify territorial annexation to “protect” them.87 Besides systematic policies designed to harass and extinguish non-Aryans, the Nazis also enacted brutal policies against political opponents. Tens of thousands began to flee from Germany each year.88

1. Early Refugee Protection Efforts During WWII

84 Id. at 354-55.
86 Mazower, supra note 11.
87 Id.
88 Hathaway, supra note 46, at 362-63.
Faced with increasing numbers of refugees, the League of Nations recognized the need for stronger refugee protections, but floundered when creating them. After Nansen’s sudden death in 1930, the League did not immediately replace him. The League replaced the High Commissioner position with an International Office for Refugees, and convened an International Governmental Conference to draft the first International Refugee Convention in 1933.89 The document, signed only by a few states, entrenched the deliberately imprecise 1926 and 1928 categories of refugee, and was largely restricted to providing refugees with travel and identity documents.90 Still, this early international refugee law was concerned with protecting particular ethnic and national groups, especially religious minorities, who were persecuted and fled their countries of origin and unable to return.

The Office of the High Commissioner quickly became consumed with protecting refugees from the Reich. In 1933, American James McDonald was appointed High Commissioner for Refugees coming from Germany (Jewish and Other).91 MacDonald resigned in 1935 in the face of widespread opposition by European states to his attempts to resettle Jewish refugees, stating that he was “virtually powerless” given the League’s refusal to intervene in Germany to stop their flight. His successor, Sir Neill Malcolm, arranged four narrow international agreements in response to Nazi territorial advances and persecution of minority groups.92 Even as the Nazi terror worsened, states were unwilling to admit Jewish refugees. As such, they increasingly sought to keep the definition of protected persons under these agreements very narrow. Echoing earlier territorial definitions in the Russian and Armenian refugee agreements, some treaties were confined to refugees from newly captured Nazi territory, such as the Saar and the Sudetenland. State signatories were adamant that German refugees and stateless people had to be outside German territory and to prove that they could not receive the protection of the German

89 Convention relating to the International Status of Refugees, CLIX L.N.T.S. 3663 (1933).
90 Hathaway, supra note 46, at 357.
92 Plan for the Issue of a Certificate of Identity to Refugees from the Saar, XVI(2) L.N.T.S. 134 (1935); Provisional Arrangement concerning the Status of Refugees coming from Germany, XVII(2) L.N.T.S. 129 (1936); Convention Concerning the Status of Refugees Coming from Germany, CXCII L.N.T.S. 4461 (1938); Council Resolution on Refugees from the Sudetenland, 17 January 1939; Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees coming from Germany, XX(2) L.N.T.S. 73 (1939).
government. Economic migrants were excluded, as were those moving for personal convenience. In May 1938, following the Anschluss, the League of Nations extended the High Commissioner’s mandate to include minority groups and dissidents fleeing Austria. The High Commissioner succeeded in creating a new 1938 Convention Concerning the Status of Refugees Coming from Germany, to protect those with a bona fide fear of persecution. However, this document was ratified by only 8 states.

2. Refugee Protection Efforts Beyond Europe

The plight of refugees – and the League of Nations’ failure to protect them – began to attract attention outside Europe. By 1938, 150,000 German Jews, or 1 in 4, had fled the country. The Anschluss in 1938 brought another 185,000 Jews under German control. The U.S., which was not a member of the League of Nations, called its own conference at Evian in 1938 with the stated goal of coordinating support for Jews who had fled or wished to flee Germany. Franklin Roosevelt, under intense pressure to assist refugees, wished to use the conference to deflect domestic and international criticism.

In terms of human rights, the Evian conference was a failure. 32 countries attended, along with a representative from the High Commissioner’s office, non-governmental groups, and NGOs representing Jewish organizations from nearly every country in Europe. Roosevelt refused to send the Secretary of State or another high-level official to the conference, reflecting his ambivalence toward the issue. At the conference, the U.S. representative announced that it would make its quota of 19,000 German and Austrian refugees available to Jews, but claimed that it was not in position to take more Jews due to economic pressure and unemployment as the country recovered from the Great Depression. Other countries gave similar excuses. Only the Dominican Republic agreed to take 100,000 Jewish refugees in exchange for substantial sums of money.

Emboldened by other countries’ unwillingness to accept Jewish refugees at the conference, Germany launched the “Final Solution” to exterminate the Jews entirely. Perversely, the High Commissioner’s office received the Nobel Peace Prize again in 1938 for its efforts to assist German refugees.

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93 Hathaway, supra note 46 at 363-66.
94 Id. at 366. 15,000 German-speaking refugees forced to leave the Sudetenland but who could not repatriate to Germany were also assisted by the High Commissioner.
95 Labman, supra note 91, at 7.
96 Evian Conference, Second Meeting (Public), (1938).
The one success of Evian was the creation of the Intergovernmental Committee on Refugees to aid Jewish resettlement from Germany. The Committee became the first international body to recognize that people still living in their countries of origin might qualify as refugees because they would be forced to immigrate. Its original mandate included racial, religious, and ethnic minorities and political dissidents still living in Germany and Austria as well as those who had already left but had not yet received permanent legal protections elsewhere. In 1943, the mandate was expanded to include people “who, as a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion, or political beliefs.” It was updated again in 1946 to include people who were “unwilling or unable to return to their country of nationality or of former habitual residence.” This language foreshadowed the definition of refugee that would eventually be entrenched in the 1951 Convention.

Thus, the interwar years and World War II itself saw an increasing number of international agreements to protect refugees, but a large failure in refugee protection. Narrow international agreements to protect refugees developed on an ad hoc basis, in response to particular political events, and primarily on the basis of group protections. As the system of Minority Rights Treaties collapsed, concern with protecting religious and ethnic minorities and victims of political persecution remained at the core of each successive legal instrument. However, these instruments flatly failed to protect the Jews from genocide.

E. Post-World War II Attempts at Protection

After World War II, as word of Nazi atrocities spread to a horrified world, minority groups were found scattered across Europe. Jews and others “liberated” from concentration camps were often forced to remain there, for lack of anywhere else to turn. Without access to whatever remained of their property and resources, many were forced to wear either their old concentration camp uniforms or SS garb taken from defeated soldiers. As one observer put it, it was unclear which of the two wardrobe choices they

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99 Hathaway, supra note 46, at 371.
100 Id. at 371.
101 Id. at 371. This expansion allowed for refugees from the Sudetenland and Spanish Republicans to be included in the Committee’s mandate.
hated more.\textsuperscript{103} Hundreds of thousands fled to Palestine, remaining stateless until the founding of Israel in 1948. Millions more Jews and non-Jews were stranded amid the ruins of Europe, struggling to recoup their basic human dignity.

The League of Nations’ failure to prevent the Second World War quickly discredited the organization and its related offices. The international community, recognizing the great need to provide legal protections to displaced people within Europe, created a new organization to succeed the High Commissioner’s office. The United Nations Relief and Rehabilitation Administration (UNRRA) was established in 1943, even before the War ended, and before formal establishment of the U.N. itself. UNRRA had the narrow mandate of repatriating displaced people to their home countries, while refugees who were unable to return home, were referred to the Intergovernmental Committee.\textsuperscript{104} As the Cold War began, many Eastern Europeans refused to return home, and UNRRA refused to force them. Thousands, if not millions, remained trapped in camps.\textsuperscript{105}

1. The International Refugee Organization

It was imperative for the fledgling United Nations to make displaced people an early priority. No organization with a mandate to preserve international peace and security and encourage respect for human rights could do otherwise and maintain legitimacy.\textsuperscript{106} As Harry Truman said in 1952, at stake was the “very outcome of the Cold War, in which the character, scope and sincerity of the free world’s treatment of refugees and…overpopulation may be crucial factors.”\textsuperscript{107}

Faced with unprecedented population displacement, the international community needed to redefine the term “refugee” for the new world order. In 1946, the U.N. General Assembly resolved to replace the prior refugee agreements with a more comprehensive document.\textsuperscript{108} In the interim, among the U.N.’s early acts was to establish the International Refugee Organization as a temporary agency in April 1946. By 1947, the IRO had assumed the responsibilities of the Intergovernmental Committee and UNRRA, making its definition the only international legal definition of

\textsuperscript{103} Cite.
\textsuperscript{104} Hathaway, supra note 46, at 372.
\textsuperscript{105} CORINNE LEWIS, UNHCR AND INTERNATIONAL REFUGEE LAW: FROM TREATIES TO INNOVATION 8 (2012).
\textsuperscript{106} U.N. Charter arts. 1, 76.
\textsuperscript{107} Gerard Daniel Cohen, IN WAR’S WAKE (2012) at __.
“refugee.”\textsuperscript{109}

The staff of the IRO also tackled its mission with the zeal that comes with the desire to serve a higher purpose. Paul Weis, among other IRO spokesmen, believed that their mission lay beyond protecting refugees and instead would “enforce a new standard of international conduct” linked to the emerging human rights regime.\textsuperscript{110} Indeed, the IRO’s advocacy succeeded in including individual rights for refugees and stateless persons in the 1948 Universal Declaration of Human Rights and other international instruments.\textsuperscript{111} The IROs humanitarian relief work also influenced how refugee assistance would be perceived in the future. By 1945, the DP camps had evolved into “an alternative welfare state for the stateless.”\textsuperscript{112} UNRRA and IRO assistance evolved to include “food, clothes, housing . . . child welfare, healthcare, recreational and artistic activities, sport, education, language, and vocational training, as well as employment counseling.”\textsuperscript{113} Although many today would view this activity as humanitarian assistance, IRO staff viewed it as part of their human rights-based mission, important to restoring the dignity of the refugee before they could restore his citizenship.

With the creation of the IRO, the U.N. decided to handle the refugee problem holistically, and to define refugee in the most detailed terms yet.\textsuperscript{114} The IRO was charged with assisting any person:

who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.\textsuperscript{115}

The IRO would assist four additional groups of people: 1) those considered refugees before World War II for reasons of race, religion, nationality or political opinion, 2) victims of the Nazis or their allies, 3) victims of the Spanish Falangists, and 4) Jews, foreigners, or stateless persons who had resided in Germany or Austria, were victims of Nazi persecution, and who

\textsuperscript{109} Hathaway, supra note 46, at 376.
\textsuperscript{111} See Cohen, supra note 107, at 96-99.
\textsuperscript{112} Cohen, supra note 107, at 66.
\textsuperscript{113} Id.
\textsuperscript{115} I.R.O. CONST., Annex 1.
had been detained in or returned to one of those countries and not yet resettled. Excepting those in groups 2 and 4, people would only become of concern to the organization if they could be repatriated or had “valid objections” to returning to their countries of nationality or former habitual residence.\textsuperscript{116} The chief ground for having a valid objection was persecution or fear of it, thus ensconcing the link between persecution and refugee status in international law.\textsuperscript{117}

The IRO soon became known as “the largest travel agency” and “mass transportation system in the world.”\textsuperscript{118} After sorting out imposters, the IRO would assist “genuine” refugees and displaced persons “to return to their countries of nationality or former habitual residence, or to find new homes elsewhere.”\textsuperscript{119} The Organization would also provide “legal and political protection” for refugees, terms that were left intentionally vague.\textsuperscript{120} The IRO established international agreements to secure travel documents and legal protections for refugees.\textsuperscript{121} The IRO eventually had an annual budget four times that of the United Nations, 40\% of which was provided by the U.S.\textsuperscript{122} It resettled nearly 1 million refugees between 1947 and 1951.\textsuperscript{123}

2. Power Politics Intervene

Power politics quickly affected the IRO’s operations. While the entire international community agreed that minorities should be protected, the idea that political dissidents should be protected as refugees was sharply contested. At the behest of the Western bloc, the IRO went further than previous definitions of “refugee” by extending protection to political dissidents. Both the Soviet bloc and France strenuously objected to this expansion of the term.\textsuperscript{124} The French delegate vehemently argued that political refugees should be the responsibility of those countries that chose to grant them asylum.\textsuperscript{125} When the Western bloc prevailed in including political dissidents, the Soviets refused to participate in the IRO from its outset.

\textsuperscript{116} *Id.*, Annex 1, Section C.
\textsuperscript{117} *Id.*
\textsuperscript{118} Cohen, *supra* note __, at __.
\textsuperscript{119} I.R.O. CONST. PREAMBLE, ¶ 3.
\textsuperscript{120} Weiss, *supra* note 114, at 211.
\textsuperscript{121} LEWIS, *supra* note 105, at 10.
\textsuperscript{123} Labman, *supra* note 91 at 9. Of these, 239,000 were resettled in the U.S., 182,000 in Australia, 132,000 in Israel, 123,000 in Canada, and 170,000 in Europe.
\textsuperscript{124} *Id.* at 378.
\textsuperscript{125} *Id.* at 378.
The Soviets quickly moved to stall the IRO. The developing Cold War meant that the Eastern Bloc was unwilling to allow an organization largely funded by the West to operate freely. The IRO could only operate in those areas controlled by Western armies. In light of the developing Eastern Bloc, many refugees from the Soviet Union and Eastern Europe refused to return, and the West hardly encouraged them to do so. In contentious debates in the General Assembly and elsewhere, the Soviets accused the West of forcibly preventing displaced Easterners from returning home and using them for forced labor. While the U.S. argued for expansion of the term “refugee” on the basis that individuals had the right to seek “personal freedom” through migration, the Eastern bloc argued that it was wrong to “indirectly saddle democratic governments with liability for the maintenance of their emigrated enemies.” The Soviets called for forced repatriation rather than supporting those who chose to remain in camps. The Soviets also called out Western hypocrisy, noting that Africans fleeing wars of independence from their colonial masters represented “true” refugees, while the IRO remained focused on serving Western and European interests.

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

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126 See LEWIS, supra note 105, 12.
129 Cohen, supra note __, at __.
130 When the 1951 Convention was drafted, Arab governments also lobbied for Palestinians to be excluded, fearing that their inclusion would deflect international attention from solving the Palestinian problem. Irial Glynn, The Genesis and Development of Article I of the 1951 Refugee Convention, J. REFUG. STUD. 134, 140 (2011); ALEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW (1998).
Because they were protected by other U.N. agencies, Palestinians and Koreans were excluded from the definition of “refugee” that was eventually adopted in the 1951 Convention. The millions displaced by independence movements in South Asia in 1947 were left completely unprotected by international law. Loescher and Glynn have noted that Western interests shaped who received protection and who did not. Both the Palestinians and Koreans were given Agencies that “contributed to the U.S. goal of stabilizing areas deemed under threat of Communism,” and the Palestinian agency supported U.S. goals in protecting its nascent Israeli ally. Meanwhile Indians and Pakistanis displaced in 1947 were not covered by another U.N. Agency or the 1951 Convention since they were outside the scope of U.S. and Western interests.

F. Legalization of Human Rights and Refugee Rights

While U.N. Agencies worked to protect refugees, the U.N. General Assembly was otherwise occupied with the Convention on the Prevention and Punishment of the Crime of Genocide. The Genocide Convention was adopted by the U.N. General Assembly on December 9, 1948, and entered into force on January 12, 1951. The Genocide Convention represented the culmination of years of tireless campaigning by lawyer Raphael Lemkin, who relentlessly visited states to ensure support for it outside of ordinary General Assembly channels. Jacob Robinson and Louis Henkin, who were concurrently involved in drafting the 1951 Convention, assisted Lemkin in his efforts. The Genocide Convention prohibited systematic state actions “committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”

Although scholarly debate exists as to whether the Genocide Convention was designed as a human rights instrument or an instrument of criminal law, it undoubtedly represented a critical step toward creating

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Footnotes:


132 Lemkin’s battle is discussed at length in SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002). More recent work by historians has suggested that the Genocide Convention as a project relating to international criminalization of genocide than a project of international human rights law. However, this work suggests that Lemkin was primarily concerned with human rights projects such as the UDHR interfering with his efforts to establish the Genocide Convention. Moreover, others whom he recruited to his cause saw the Genocide Convention as a companion to other human rights efforts. See, e.g., Mira Siegelberg, Unofficial Men, Efficient Civil Servants, Raphael Lemkin In the History of International Law, 15 J. GENOCIDE RESEARCH 3, 297-316 (2013).

133 Genocide Convention, supra note 131, Art. 2.
binding international law to protect minority rights. Naming and defining the crime made the term available and accessible to politicians, government officials, journalists, and activists who could use it to shame perpetrators, and eventually, to prosecute them. It was against the backdrop of Lemkin’s work that the U.N. began to proscribe other categories of human rights violations, including the expulsion of persecuted people based on the very same group categories. It is no coincidence that international refugee law ranked high on the agenda of a fledgling U.N. determined to rectify the mistakes of the League of Nations and prevent another world war.

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

The problem of statelessness on so large a scale had the effect of confronting the nations of the world with an inescapable and perplexing question: whether or not there really exist such ‘human rights’ independent of all specific political status and deriving solely from the fact of being human?

For many intellectuals, elites and policymakers, the problem of refugees, stateless, and displaced people constituted the human rights issue par excellence that would challenge and shape the entire emerging human rights regime. The right to seek and enjoy asylum was included in the declaratory Universal Declaration of Human Rights, for the first time conceptualizing asylum as an individual right that was multilaterally recognized, even if not

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134 See generally Mira Siegelberg, supra note 132 (questioning whether the Genocide Convention was conceived as a human rights instrument).
135 GERARD DANIEL COHEN, IN WAR’S WAKE (2012), at 83.
136 Id., at 83.
138 Id. at ___. Arendt’s own conception of exactly how the rights of refugees, stateless, and displaced people related to human rights was quite complex and skeptical. She placed little faith in the politics of human rights to improve the plight of these groups, even as she viewed their situation as a human rights issue. See, e.g., Cohen, supra note 137, at 85.
legally binding.\textsuperscript{139} Indeed, the Refugee Convention and the Genocide Convention were the first two documents to give binding legal force to the rights that were merely declared in the Universal Declaration of Human Rights. International lawyers celebrated the passage of the Refugee Convention as a watershed moment for the recognition of individuals—and individual rights—as a subject of international law.\textsuperscript{140}

1. A Permanent Problem

Up until this time, the U.N. had considered refugee issues to be temporary. Accordingly, its refugee assistance organizations had mandates designed to last only a few years. But by the early 1950s, 2-3 million refugees had already been assisted by international organizations, with no end in sight.\textsuperscript{141} Despite the continuing clarification of the refugee definition and consolidation of previous refugee regimes within the IRO, the organization was unable to solve the refugee problem as the international community had hoped. The IRO itself estimated that by the time its mandate expired in June 1950, 292,000 displaced persons in Europe would remain whom they had been mandated to protect.

Refugees became an issue of international concern, particularly in the U.S. By 1950, the New York Times was frequently running featured articles about the plight of the European displaced.\textsuperscript{142} The newspaper estimated that 10 million were displaced in Europe by 1950, due to the war and subsequent fighting and persecution.\textsuperscript{143} Meanwhile, millions more had been displaced outside of Europe, by the Korean War, the bloody birth of Pakistan and Bangladesh, and conflicts elsewhere.\textsuperscript{144} In July 1950, The New York Times editorial page beseeched the world to act:

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

\textsuperscript{139} Universal Declaration of Human Rights, Article 14.
\textsuperscript{140} Cohen, supra note 135, at 94-95.
\textsuperscript{141} Weiss, \textit{supra} note 114, at 208.
\textsuperscript{143} \textit{The New York Times} estimated the number at 8 to 10 million as of 1950. \textit{U.N. Assembly to Get Draft on Refugee Aid}, \textit{N.Y. Times}, Aug. 01, 1950.
\textsuperscript{144} On Bangladesh, see GARY J. BASS, \textit{THE BLOOD TELEGRAM} (2013).
cases, without hope . . . the refugee problem cannot simply be ignored. In political, economic, and above all, in human terms, it still demands the attention of the civilized world.  

The need for a permanent, binding instrument to protect refugees had become clear. In 1949, ECOSOC authorized the creation of an Ad Hoc Committee on Statelessness and Related Problems with the primary task of drafting a convention to provide more permanent protection to refugees and displaced people.  That same year, the U.N. Economic and Social Council (EcoSoc) also asked the Secretary General to plan for a new organization to assist refugees, and to define its new, broader mandate. Modern international refugee law was born.

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

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

Weis worked for the World Jewish Congress during the war, and in 1947, became a legal adviser to the International Refugee Organization. He received his doctorate in international law from the London School of Economics in 1954. He later joined UNHCR as a legal adviser, a position he retained until his retirement in 1967, after which he continued to advise the organization until his death. He was the chief architect of the 1961

146 E.S.C. Res. 248/B (XI) (Aug. 8, 1949); see also Zimmermann et al., supra note 24, at 308.
147 Lewis, supra note 105, at 12.
148 Glynn, supra note 130, at 135.
149 Introduction, Weis Archive, Refugee Studies Centre, Oxford University, at 1.
150 Id. at 2.
151 Introduction, Weis Archive, supra note 149, at 2.
Convention on Statelessness and Related Problems, and he authored seminal documents on the protection of refugees and stateless people well until his later years.\footnote{See, e.g., Paul Weis, Development of Refugee Law, 3 Mich. Y.B. Int’l L. 27 (1982).} Weis’s writings, and his commentary on the \textit{travaux preparatoires} of the 1951 Convention, form much of what we know about the framing of international refugee law.

Besides Weis, many other delegates to the Ad Hoc Committee had long careers devoted to human rights, and knew each other from their prior work. The other two drafters from the IRO office were Gustave Kullman and Jacques Rubenstein. Kullman, a Swiss legal expert, served as Deputy High Commissioner for Refugees in the League of Nations during World War II.\footnote{Glynn, \textit{supra} note 130, at 135-6.} After Rubenstein escaped the Bolshevik Revolution, he assisted in penning the 1928 Arrangement on Russian Refugees and the 1933 Refugee Convention, and lobbying internationally for both of them.\footnote{\textit{Id.} at 135.} The UK Representative, Samuel Hoare, had been Deputy High Commissioner under Nansen.\footnote{\textit{Id.} at 7-8.} Jacob Robinson, the Israeli Representative and his brother Nehemiah Robinson, the Representative from the World Jewish Congress, had been Weis’s mentors at the WJC.\footnote{Gilad Ben-Nun, \textit{The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention}, 27 J. Refug. Stud. 101–125 (2014), at 7.} Jacob Robinson served as Senior Legal Adviser to the prosecution team at Nuremberg, under U.S. Chief Counsel (and later Supreme Court Justice) Robert Jackson.\footnote{\textit{Id.} at 5.} Later, he worked for the U.N. on the drafting of the Human Rights Commission’s Legal Framework and Genocide Convention.\footnote{\textit{Id.} at 6.} Louis Henkin served as the U.S. delegate from his post in the State Department’s U.N. Division. Henkin and Robinson, too, had been working on draft Conventions for more than two years before the time of the first meeting of the Ad Hoc Committee.

Concerns for protecting human rights motivated the drafters of the 1951 Convention in both the IRO and the Ad Hoc Committee on Statelessness and Related Problems. In Weis’s words, the goal of the drafters was to “place refugees on equal footing with the citizens of the countries of refuge, in conformity with the principle of non-discrimination set forth in the Universal Declaration of Human Rights.”\footnote{Paul Weis, \textit{The Refugee Convention—Travaux Préparatoires Analyzed with a Commentary} (2004), at 15.} To this end, the drafters included a specific reference to Article 14 of the UDHR, the right
to seek and enjoy asylum in other countries, in the Convention’s preamble. Weis acknowledged, however, that this was an unattainable goal in many ways. He noted that even in countries with “very liberal reception policies,” it was clearly not possible to give refugees the same treatment as nationals, and no country would truly act in this way.\textsuperscript{160}

The human rights lawyers were faced with a challenge. Their goal was to create a draft that would appeal to as many states as possible and that would include all categories that might eventually fall under the High Commissioner’s mandate. The IRO draft convention included a right to asylum, as did the Universal Declaration of Human Rights, in addition to refugee protections. Despite its creation of a potentially far-reaching international legal right, Kullman believed that the draft was “‘realistic’ in the sense that it aims at not going beyond what can reasonably be demanded of a liberal democratic state.”\textsuperscript{161}

1. Politics and Human Rights Collide

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

The U.S. and Russia clashed over the issue of whether stateless people should be included in the Convention. The Ad Hoc committee largely agreed that the rights of refugees and stateless people should be severed into two different international legal documents. While the United Kingdom and Belgium supported an inclusive document, the United States strenuously argued that the rights of refugees were more urgent and pressing than the rights of stateless people.\textsuperscript{162} The U.S., through Henkin, argued that refugees presented a bigger, more urgent, and distinct problem of humanitarian needs.\textsuperscript{163}

\textsuperscript{160} Id. at 15.
\textsuperscript{161} Glynn, \textit{supra} note 130, at 136.
The Soviet Union, which wished to quell protests from those whose citizenship it had revoked following the Bolshevik revolution, balked at this characterization. The Soviets, by contrast, were against protecting refugees, fearing that the Convention would be used against them politically by the Western bloc. Soviets characterized refugees as “traitors who are refusing to return home to serve their country together with their fellow citizens.”\(^{164}\)

After France supported the U.S. position, the matter of statelessness was tabled pending discussion of a second convention.\(^{165}\) In protest, the Soviet and Polish delegations eventually resigned from the Ad Hoc committee and refused to participate in the drafting or sign the Convention.\(^{166}\) The official reason for their withdrawal was that they did not consider Taiwan to be a legitimate U.N. member, but it is widely recognized that the Soviets likely opposed the creation of a new international convention to protect refugees, much as they were opposed to the IRO before it.\(^{167}\) Although the committee concluded its work on February 15, 1950, Robinson doubted that the Convention would ever be accepted by states.\(^{168}\)

2. Defining Refugees

The delegates to the Ad Hoc Committee viewed broad international commitment as critical to solving refugee issues.\(^{169}\) To assure the broadest possible support for the Convention, EcoSoc called for a Conference of Plenipotentiaries to further debate the terms of the Convention and ratify it. Since 1922, each successive international legal instrument developed for refugee protection had fewer states parties than the preceding one.\(^{170}\) The U.N. did not want to create an overbroad Convention that states would be unlikely to sign.\(^{171}\) Western countries, led by the U.S., wanted the definition of refugee to be broad enough to cover any dissidents leaving the Eastern


\(^{165}\) The Convention Relating to the Status of Stateless Persons, 360 U.N.T.S. 117, was eventually passed on September 28, 1954 and entered into force on June 6, 1960.

\(^{166}\) Kristen Walker, Defending the 1951 Convention Definition of Refugee, 17 GEO. IMMigr. L.J. 583 (2002), at 591.

\(^{167}\) ZIMMERMANN ET AL., supra note 24, at 54.

\(^{168}\) Bin-Nun, supra note XX.

\(^{169}\) LEWIS, supra note 105, at 18; Walker, supra note 127, at 594-95 (citing statement of President of the Ad Hoc Committee).

\(^{170}\) LEWIS, supra note 105, at 17.

\(^{171}\) Walker, supra note 127, at 593.
However, they wanted the definition to be precise enough that Soviets could not use it to their political advantage, and so left socio-economic rights outside of the definition. In the end, key terms within the definition were left intentionally vague to allow signatory states wiggle room in their domestic interpretation of the Convention. Much dialogue during the drafting process focused on how to determine who was a “bona fide” refugee, but all determination procedures were ultimately left out of the text of the Convention itself.

The definition of “refugee” within the Convention was hotly contested, and took the bulk of the drafters’ time. According to Weis, deliberation on the definition of the term “refugee” reflected governments’ desire to clearly define internationally protected refugees versus other people who were not in need of, or not deserving of, international protection. Surprisingly, there was little debate over the core of the definition: the protection of people persecuted on the basis of race, religion, nationality, or political opinion. This definition of refugee was, by this point, already well-defined in previous international legal instruments and the IRO Convention. The international community’s concern with protecting the rights of minorities, included in the Universal Declaration of Human Rights, further bolstered the ideal of protection of minority rights entrenched by the 1951 Convention. The Convention itself referenced the UDHR as a source.

States’ concerns with balancing their commitments to human rights with national security concerns dominated discussion at the conference. Delegates, citing state commitments and the values embodied in the Universal Declaration, expressed human rights aims. France and the UK, in particular, expressed lofty goals of broadly defining “refugee” early in the debates. While acknowledging its own concern with masses of refugees, France initially proposed broad language that would extend refugee protection to anyone seeking asylum, for whatever reason, and anyone fearing persecution, whether inside or outside his country of nationality.

However, France and Britain were tempered by realist concerns of being overwhelmed by large numbers of refugees. Most states, led by the

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172 Id. at 591; see also ZIMMERMANN ET AL., supra note 24, at 472.
174 ZIMMERMANN ET AL., supra note 24, at 50.
175 Id., 50-51.
176 Weiss, supra note 114, at 199.
177 Weiss, supra note 152, at XX.
178 Glynn, supra note 130, at 137 (citing Weis correspondence which states that the UK initially wanted a definition that “included all unprotected persons.”).
179 ZIMMERMANN ET AL., supra note 24, at 309.
UK, were concerned with overcommitting themselves to unforeseen numbers of refugees, and thus preferred to narrow the definition of “refugee” from those protected by previous instruments. France and the UK were especially concerned about being overrun by refugee claims from their colonial interests, many of whom were contemporaneously engaged in struggles for self-determination.\footnote{Walker, supra note 127, at 592; ZIMMERMANN ET AL., supra note 24, at 61.} The UK was generally known for objecting within the U.N. to construe human rights treaties narrowly, fearing that their current and former colonial subjects would use such treaties against them.\footnote{Id.} Accordingly, throughout the drafting process, the UK remained committed to human rights as an ideal while in practice attempting to narrow its obligations as much as possible.\footnote{On UK and U.S. foreign policy vis-à-vis human rights, see Mazower, supra note 11, at 393-4.}

Other countries followed the UK in expressing concerns about floods of refugees overflowing their borders. Sweden and Turkey, expressed concerns that the Convention might create a “pull factor” for refugees, and that security concerns and infrastructural limitations might limit their ability to manage these new refugees. Sweden noted that it would like to continue its liberal policies toward refugees, “but the fact must be taken into account that its capacity for absorbing large numbers was limited and that . . . considerations of national security must play a certain part.”\footnote{Quoted in Walker, supra note 127, at 593.} The Italian, Turkish, and Lebanese delegates echoed these concerns.\footnote{Id. at 593-94.} Like France and the UK, the United States seemed torn between its own commitment to human rights ideals, its desire to manipulate human rights as an element of its Cold War foreign policy strategy, and its own skepticism of international law. Weis summarized the debates:\footnote{Quoted in Glynn, supra note 130, at 137.}

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

France eventually withdrew its liberal proposal, agreeing that many states would be unwilling to sign onto such a broad definition. The definition that was eventually adopted closely resembled the U.S. proposals.

The Conference agreed on narrowing the definition to stress that
refugees’ reasons for fearing persecution needed to be directly connected to their flight abroad. The “well-founded fear of persecution requirement” in the 1951 Convention definition replaced the approach of prior refugee protection agreements, which delineated places of origin or categories of people to be protected. The term “persecution” was left deliberately undefined, with France wanting to link it to violations of human rights found in the UDHR, and the U.S. wanting to leave it vague so that it could reserve its small resettlement capacity for dissidents from the Soviet bloc.

This agreed-upon definition, then, which stands today, says that a refugee is someone who:

... owing to wellfounded [sic] fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Plenipotentiaries also agreed that reservations to Article 1 would be impermissible because they would conflict with the object and purpose of the treaty.

3. Conflict over Temporal and Geographic Limitations

The primary source of controversy over Article 1 of the Convention was whether the Convention would be universally applicable or include temporal and geographic restrictions. Most countries did not wish to sign onto a Convention that would commit them to the protection of indeterminate numbers of refugees claiming a lack of national protection in

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186 ZIMMERMANN ET AL., supra note 24, at 323.
187 ZIMMERMANN ET AL., supra note 24, at 335.
189 Declarations, however, were acceptable and were made by four states. The Netherlands, Turkey, Ecuador, Mexico all clarified that their signing of the 1951 Convention did not imply their acceptance of prior international agreements involving refugees, to which they were not parties. The Netherlands also refused to regard Ambonese transported by the Netherlands after Indonesian independence as refugees. In the boldest declaration, Mexico clarified that its Government would determine refugee status without prejudice to the Convention definition. See ZIMMERMANN ET AL., supra note 24, at 312-313.
the wake of World War II. Ultimately, to ensure the broadest possible acceptance of the Convention, the Conference of Plenipotentiaries adopted a restriction limiting the Convention to events occurring before 1951.

The inclusion of a geographic restriction was even more controversial. The U.S. and European states wanted to limit the Convention to events happening within Europe. Many countries did not wish to open themselves to refugee claims emanating from the developing world. As Henkin deftly explained, certain refugee groups in the world were simply too large for the U.S. to grant protection to them. Citing the 600,000 Palestinians already under U.N. protection, 6 million ethnic Germans who had returned to Germany from elsewhere in Europe, and new Kashmiri and Indian refugees, he described a universal definition as an infeasible “blank cheque” that would “undertake obligations toward future refugees, the origin and number of which would be unknown.” The French delegation strenuously argued that all refugee problems were regional, and that adopting a universal definition to solve all refugee problems would be “futile.” These states also noted that previous refugee agreements had been limited in their geographical scope. Developing states, particularly Mexico, Pakistan, and India, vigorously protested any geographic restriction, arguing that such a limitation would undermine the universality of the Convention and its human rights aims. Eventually, the Holy See brokered a compromise, allowing individual states the choice to limit the scope of the Convention to events occurring in Europe, while underscoring the universal aims of the Convention elsewhere in the text. The Convention itself, in Article I.B., required states to make a declaration at the time of signature, ratification, or accession, stating whether they intended the Convention to be geographically limited to events occurring in Europe alone.

Once “refugee” was defined, states’ concerns with protecting their national security remained a prominent theme throughout the rest of the conference. According to the travaux, the most hotly contested provision was Article 9 of the Convention, which permitted a state to take provisional measures with respect to a particular person on national security grounds

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190 Id. at 350-51.
191 Id. at 322; 1951 Convention, supra note 2, Article I, A.(2).
192 Henkin, cited in Glynn, supra note 130, at 138.
193 ZIMMERMANN ET AL., supra note 24, at 471.
194 Id. at 470.
195 Id. at 469-71.
“in time of war or other grave and exceptional circumstances,” pending determination that the person is a “bona fide refugee.” At the core of the Convention is the *jus cogens* norm of non-refoulement, the concept that no signatory state will return a refugee to his country of origin if “his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.” While most states did not contest the inclusion of this norm, nor the statement of its non-derogable nature, Weis noted the difficulty of deducing a duty of states “to refrain from actions which may lead to the return of a refugee to a country where he may become the victim of persecution” without conflicting with the doctrine of a state’s unlimited right to regulate the admission of aliens.” Eventually, the definition of “bona fide” refugee was not included in the text of the Convention and was left intentionally vague.

**H. Human Rights versus Security Interests**

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

While other commentators have argued that the inclusion of the term “political persecution” was merely a relic of Cold War politics, the historical record does not support this claim. The use of the category of persecution on the basis of political opinion was later used expressively as a foreign policy tool against the Soviet Union, as discussed above. However,

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197 See 1951 Convention, *supra* note 188.
198 Weiss, *supra* note 114, at 199.
199 ZIMMERMANN ET AL., *supra* note 24, at 50.
the category of political persecution was already established in previous refugee instruments that the 1951 Convention succeeded. Zimmerman notes that, despite the lack of participation by Eastern bloc countries in the drafting, it is unlikely that the definition of refugee would have looked any different absent the Cold War context. The Cold War merely affected only the scope of the limitations, which were deliberately formulated so as not to exclude refugees from communist Europe as long as communist regimes were in power.

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

I. The Creation of UNHCR

The U.N. designed a unique administrative agency to supervise the 1951 Convention even before it was signed. In December 1950, the U.N. General Assembly passed a statute creating the Office of the United Nations High Commissioner for Refugees (UNHCR) with an initial mandate of three years. UNHCR’s Statute defined a refugee as anyone who previously enjoyed the protection of the IRO, along with those meeting a definition of “refugee” nearly identical to that in the 1951 Convention, but containing no geographic or temporal restriction.

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201 Weis, supra note 196, at 39.
202 ZIMMERMANN ET AL., supra note 24, at 59, 67; but see Hathaway, supra note 46, (stating that the “political opinion” category of the 1951 Convention was directly influenced by Cold War politics at the time)
203 ZIMMERMANN ET AL., supra note 24, at 56.
204 Glynn, supra note 130, at 137.
205 Weis, quoted in id., at 138.
206 Id.
207 Id.
208 On administrative functions of UNHCR, see Goldenziel, supra note 21.
209 Cite UNHCR Statute.
Effectively, the agency’s operations were based on the legal principle of complementarity: the international organization would step in to grant a remedy where sovereign states had failed.\textsuperscript{210} UNHCR’s Statute defined its work as primarily legal. The agency’s goal was to provide international protection to refugees, a vague term that was understood to mean legal protections that states were unable to provide.\textsuperscript{211} As the U.N. saw it, UNHCR had four primary responsibilities related to international refugee law: “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”\textsuperscript{212} For the U.N.’s purposes, UNHCR’s job was to work with governments to establish legal arrangements for refugees through international conventions and otherwise.\textsuperscript{213} According to its statute, UNHCR was not to serve as a humanitarian organization in its own right, but could facilitate and coordinate private organizations wishing to assist refugees.\textsuperscript{214} Thus, researchers have observed that UNHCR was initially designed “to do very little and do only what states told it to do.”\textsuperscript{215} European states and the U.S. still viewed its existence as temporary, and in any case, within their control.


Over time, discrepancies between the 1951 Convention and the realities faced by states throughout the world became increasingly problematic. Like most international law, the concept of international refugee law developed in Europe. Its application then became problematized as it spread elsewhere. First, the Convention’s temporal limitation, and its acceptance by some states and not others, created a disjuncture in the legal status between those who became refugees before and after 1951. Particular problems arose upon the Hungarian refugee crisis of 1956 and the Soviet occupation of Czechoslovakia in 1968. Thanks to the


\textsuperscript{211} Weiss, \textit{supra} note 114, at 211.


\textsuperscript{213} Weiss, \textit{supra} note 114, at 211.

\textsuperscript{214} UNHCR Statute, \textit{supra} note 212, para 8.

\textsuperscript{215} MICHAEL BARNETT & MARTHA FINNEMORE, \textit{RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS} (2004), at 73.
legal genius of Paul Weis, UNHCR interpreted these as after-effects of earlier events, and those displaced were given refugee status. However, other discrepancies in treatment remained based on the temporal restriction.

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

Third, an increasing discrepancy arose between the legal definition of refugee and the broader scope of UNHCR’s mandate as defined in its statute. In the face of growing numbers of refugees in Africa and elsewhere, UNHCR grew increasingly frustrated with its limited support from the international community, as accessions to the Convention were lower than expected. As Cold War rhetoric continued to dominate discussion of refugees in the U.N., the Soviet Union repeatedly pointed out that the Convention was never adopted by the U.N. itself, but by an unrepresentative Conference of Plenipotentiaries comprising only 26 states.

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216 Lewis, supra note 105.
217 Weis, supra note 196.
218 The Organization for African Unity’s 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa defines a refugee as, “... every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” Organization for African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45. See also Statement of Mr. Waldron-Ramsey, delegate of the United Republic of Tanzania, at the Economic and Social Council’s 1453rd Meeting, 18 November 1966.
220 Weis, supra note 196, at 40, says this discrepancy is actually between the personal scope of the Convention and the “competence ratione personae” of UNHCR defined in its statute.
221 Sara Davies, Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol, INT. J. REFUG. LAW (2008), at 703. Only 50 states by that time were parties to the Convention. See statement of High Commissioner Prince Sadruddin Aga Khan, Economic and Social Council, 1453rd Meeting, 18 November 1966.
that were primarily from Western Europe.\(^{222}\) UNHCR sought to revise or create new international refugee law to make it more widely and universally applicable.\(^ {223}\)

Non-Western states pushed successfully to change the 1951 Convention to reflect their needs.\(^ {224}\) In 1965, the Carnegie Endowment of International Peace, with support from the Swiss government and in consultation with UNHCR, held a “Colloquium on Legal Aspects of Refugee Problems with particular reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner for Refugees” in Bellagio, Italy.\(^ {225}\) Thirteen legal experts from across the world participated in their personal capacities, including Louis Henkin, who was still working for the U.S. State Department. The experts agreed that, for humanitarian reasons, it was now imperative for refugees not currently covered by the Convention to be given similar benefits by way of a binding international instrument.\(^ {226}\) The urgency of the situation meant that there was no time to prepare and adopt a new Convention or revise the existing one.\(^ {227}\) Instead, they proposed a Protocol to the Convention to remove the temporal and geographic restrictions in the 1951 Convention. So as not deter state parties to the Convention from accepting the Protocol, they permitted existing declarations limiting the application of the Convention to continue unless states explicitly withdrew them.\(^ {228}\) The High Commissioner polled the states parties to the Convention and found them to be overwhelmingly enthusiastic about the removal of the dateline.\(^ {229}\) Recognizing the urgency of the situation ExCom, through EcoSoc, submitted the draft Protocol to the General Assembly so that the Secretary General could open the Protocol for government accession as quickly as possible.\(^ {230}\)

On many levels, the Protocol was a tremendous success. It expanded

\(^{222}\) Weis, supra note 196, at 46-47.
\(^{223}\) Davies, supra note 221, at 705-6.
\(^{224}\) Several states first raised the need for an amendment to the Convention in the 1964 and 1965 meetings of ExCom, the Executive Committee of the High Commissioner’s Program. Weis, supra note 196, at 41.
\(^{225}\) Id. at 41.
\(^{226}\) Id. at 42-43.
\(^{227}\) Id. at 43.
\(^{228}\) Id. at 43.
\(^{230}\) Id. This procedure was followed because it was necessary to submit through committee since the recommendation came from experts outside the U.N. process. See Lewis, supra note 105.
Convention protections to refugees throughout the world. Since 1967, the numbers of states parties to the Convention or Protocol grew from 50 to 147.\textsuperscript{231} The U.S., which initially refused to sign the 1951 Convention, acceded to the Protocol in 1968. However, Gil Loescher has noted that Western states were motivated to sign the 1967 Protocol to restrict refugee protections, not to increase them. The existence of the Organization of African Unity’s expansive definition encouraged Western countries to sign on to the lesser of two known evils.\textsuperscript{232}

\textit{K. Post-1967: Legal Contraction, Aid Expansion}

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

However, the 1951 Convention and 1967 Protocol are widely regarded as increasingly irrelevant because of their inapplicability to modern displacement crises.\textsuperscript{233} Scholarly criticisms focus on the fact that the 1951 Convention does not provide a legal basis for protecting most of the world’s displaced people, including those displaced by civil conflict, famine, and natural disaster. Most strikingly, the 1951 Convention offers no guidance to states facing mass influxes of refugees, which overwhelm state processing capacity, even in wealthier states. Critics have also noted that the Convention relies on displacement outside the state as a solution to refugee problems rather than requiring the international community to address the systematic cause of refugee outflows. After all, the Convention imposes no requirement for states not to persecute or expel their citizens; it merely guarantees them certain rights if they are able to flee to a signatory country. Divergent application of the term “refugee” from state to state sows confusion in the community of asylum-seekers and encourages irregular

\textsuperscript{231} Of these states, only four retain the geographic restriction to refugees in Europe: Turkey, Congo, Madagascar, and Monaco. Madagascar, Monaco, and St. Kitts and Nevis also retain the temporal restriction to refugees since 1951.

\textsuperscript{232} GIL LOESCHER, UNHCR AND WORLD POLITICS: A PERILOUS PATH, (2001), at 80.

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

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

Recognizing the problem of population displacement beyond the plight of refugees, some countries have made regional agreements to address these issues. These efforts have largely failed. The 1969 OAU Refugee Convention and 1984 Cartagena Declaration for Refugees in Latin America expand the definition of refugee to include people who have fled violent conditions or disturbances in public order.234 However, both documents are non-binding, states have been slow to incorporate them into their domestic law, and they include no burden-sharing mechanisms. EU Directives, most recently a set of 2011 Directives meant to be adopted in June 2015, are largely focused on curbing migration, although they do allow for “subsidiary protection” for people fleeing generalized conditions of violence who do not qualify for refugee status.235 Recent caselaw shows that EU states are not following the directives, and many states have opted out of the most recent Directive. Temporary Protection (TP) regimes have been adopted by some states in response to humanitarian emergencies. However, TP regimes are applied haphazardly, sow confusion by differing from state to state, and arguably have been used by countries to avoid their obligations under the 1951 Convention.236 The “Deng Principles” on internal displacement are not binding and are left to individual states to adopt in their own policies and caselaw, and do not address the root causes of displacement that may cause both internal and external displacement. None

234 See, e.g., Organization for African Unity, supra note 218; CARTAGENA DECLARATION ON REFUGEES, COLLOQUIUM ON THE INTERNATIONAL PROTECTION OF REFUGEES IN CENTRAL AMERICA, MEXICO AND PANAMA, 22 November 1984.

235 EU Directive 2011/95/EU.

of these documents deals with all of the causes of modern flows of displaced people that have threatened international peace and security. Moreover, the protections associated with all of these documents are ambiguous because of terms left undefined, lack of state will or capacity, or because such non-binding regional agreements may clash with the aims of the 1951 Convention.

The dire humanitarian need engendered by forced displacement requires international action beyond the regional label. An international problem of this scope requires an international solution. However, additional legal protections for displaced people must not come at the expense of the minority rights that states have always sought to preserve through international law. Discussing what such a Displaced Persons Convention might look like lies beyond the scope of this article, but I discuss the theoretical basis for such a convention and outline it in a companion piece.237

CONCLUSION

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

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

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

More generally, international refugee law sheds light on the
fundamental question of the role of the individual as a subject of
international law. The protection of the individual in international law has
long been the subject of heated scholarly debate. In an international system
based on sovereignty, states are the primary subject of international law.
International law is made by states to regulate the behavior of states.
However, international refugee law is an affirmation by the community of
nations that states owe duties to individuals who are not their own citizens.
The existence of refugee law suggests that states have legal duties to people
beyond the borders of their own political community, and beyond the
boundaries where their own laws can reach. States agreed to this basic
notion that individuals fleeing persecution deserve some basic legal
protections long before the modern conception of an international
community of nation-states came to be. Refugee law reflects a cosmopolitan
notion that wherever one flees, he will retain some basic rights and duties as
citizens of the world.238 Those who support the ideals of a liberal
international community bound by common respect for fundamental
freedoms must take refugee protections seriously.

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

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

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238 On cosmopolitanism and law, see Noah Feldman, *Cosmopolitan Law?*, 116 YALE
so quintessentially involved the victimization of a discrete and insular minority.\footnote{ELY, supra note 30, at 181-82.}

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