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## Revisiting the Definition of Particular Social Group in the Refugee Convention & Increasing the Refugee Quota as a Means of Ameliorating the International Displaced Person's Crisis

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**REVISITING THE DEFINITION OF PARTICULAR SOCIAL GROUP IN THE  
REFUGEE CONVENTION & INCREASING THE REFUGEE QUOTA AS A  
MEANS OF AMELIORATING THE INTERNATIONAL DISPLACED PERSON'S  
CRISIS**

Brienna Bagaric\*

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## I. INTRODUCTION

The most pressing and compelling human rights crisis of our time is the massive increase in displaced people over the past decade. There are now more displaced people in the world than at any other time since the Second World War.<sup>1</sup> Without any hint of exaggeration there is now a monumental international crisis stemming from the more than sixty million people who are now displaced.<sup>2</sup> Regrettably, there is nothing approaching even a tenable, durable solution to this problem. The strain regarding so many displaced people has been felt most acutely in Europe where there are literally millions of people waiting to be hopefully absorbed.<sup>3</sup> The likelihood of absorption is greatly diminished following a reversal by Germany—the greatest recipient of refugees—regarding its appetite to absorb more refugees.<sup>4</sup> However, the crisis now extends to all regions.

In September 2016, then-United States President Barack Obama convened a crisis summit in New York to attempt to find solutions to the refugee crisis.<sup>5</sup> An important backdrop to this summit is that, since 1975, the United States has resettled more than 3.2 million refugees and increased its annual refugee intake from 70,000 to 110,000.<sup>6</sup> The summit was co-hosted by then-United Nations Secretary-General Ban Ki-moon and a number of countries who are regarded as discharging a considerable disproportionate burden in accommodating refugees.<sup>7</sup> These countries include Sweden,

1. U.N. HIGH COMM’R FOR REFUGEES (UNHCR), GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015 5 (2016), <http://www.unhcr.org/en-us/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> [hereinafter UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015].

2. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 2.

3. *See infra* Part II.

4. *See* Anthony Faiola, *Germany Used to be the Promised Land for Migrants. Now, It’s Turning Back More of Them*, WASH. POST (Sept. 29, 2016), [https://www.washingtonpost.com/world/europe/germany-used-to-be-the-promised-land-for-migrants-now-its-turning-back-more-of-them/2016/09/27/6b5c7a7a-7a7c-11e6-8064-c1ddc8a724bb\\_story.html?utm\\_term=.ef143214cfce](https://www.washingtonpost.com/world/europe/germany-used-to-be-the-promised-land-for-migrants-now-its-turning-back-more-of-them/2016/09/27/6b5c7a7a-7a7c-11e6-8064-c1ddc8a724bb_story.html?utm_term=.ef143214cfce).

5. *See* Tara John, *World Leaders Meet at U.N. to Craft Response to Migrant Crisis*, TIME (Sept. 19, 2016), <http://time.com/4499150/un-obama-refugee-summit-migrants/>.

6. Off. of the Press Sec’y, *Fact Sheet on the Leaders’ Summit on Refugees*, WHITE HOUSE (Sept. 20, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/fact-sheet-leaders-summit-refugees> [hereinafter *Fact Sheet on the Leaders’ Summit on Refugees*].

7. *Id.*

Germany, Canada, and Mexico.<sup>8</sup> Fifty-two countries participated in the summit.<sup>9</sup> The summit followed UN talks several days before, which failed to provide any tenable solutions.<sup>10</sup> Ultimately, while the summit recognized the desperate need to find ways of dealing with more than sixty million displaced people, it fell well short of providing effective solutions.<sup>11</sup> Recently, the refugee crisis has been significantly exacerbated as a result of U.S. President Donald Trump's January 27, 2017 executive order, which bans indefinitely the admission of people fleeing Syria into the United States and temporarily freezes the entry of other refugees for 120 days.<sup>12</sup> A federal district court enjoined the ban; however, following a request by the Justice Department to reinstate the ban, the U.S. Court of Appeals for the Ninth Circuit upheld the freeze.<sup>13</sup> At the time of writing this Article, President Trump had signed a revised executive order, which imposes a ninety-day ban on citizens from six countries—Syria, Iran, Libya, Somalia, Sudan, and Yemen.<sup>14</sup> Further, although the revised order removes the indefinite suspension of Syrian refugee admissions, the order does place a freeze on all refugee entries into the United States (under the U.S. Refugee Admissions Program) for at least 120 days.<sup>15</sup> Most notably, President Trump has reduced the 2017 annual refugee quota set by the previous Obama Administration by more than half—from 110,000 to 50,000 under the new order.<sup>16</sup>

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8. *Id.*

9. *Id.*

10. Julian Borger & Patrick Kingsley, *Swift Response to Refugee Crisis Rests on Obama Summit After UN Talks Fail*, *GUARDIAN* (Sept. 19, 2016), <https://www.theguardian.com/world/2016/sep/18/refugee-crisis-rests-on-Obama-summit-un-talks-fail> [hereinafter Borger].

11. The commitments given at the summit related to increasing financial aid and some countries indicated they would slightly increase their refugee intake. However, it is clear that these changes, albeit welcome, are only the starting point in terms of tackling the refugee crisis. *See generally* G.A. Res. 71/1 (Sept. 19, 2016).

12. Michael D. Shear & Helene Cooper, *Donald Trump Freezes Refugee Program, Orders New Vetting for Entry*, *SYDNEY MORNING HERALD* (Jan. 29, 2017), <http://www.smh.com.au/world/donald-trump-freezes-refugee-program-orders-new-vetting-for-entry-20170128-gu0id6.html>.

13. Adam Liptak, *Court Refuses to Reinstate Travel Ban, Dealing Trump Another Legal Loss*, *N.Y. TIMES* (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/politics/appeals-court-trump-travel-ban.html>.

14. Glen Thrush, *Trump's New Travel Ban Blocks Migrants from Six Nations, Sparing Iraq*, *N.Y. TIMES* (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html> [hereinafter Thrush]; *see* Off. of the Press Sec'y, *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*, *WHITE HOUSE* (Mar. 6, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [hereinafter *Executive Order Protecting the Nation*].

15. *Executive Order Protecting the Nation*, *supra* note 14.

16. *See Executive Order Protecting the Nation*, *supra* note 14; Thrush, *supra* note 14.

The key basis upon which displaced people have been settled since World War II (WWII) is the 1951 Convention Relating to the Status of Refugees (Refugee Convention). While the Refugee Convention is the international instrument which has guided the absorption of more refugees than any other document or agreement, it has been well-recognized that it is no longer adequate to deal with the scale and nature of the current crisis. At the same time, it is clear that no international consensus will be reached regarding a wide-ranging and effective response to the refugee problem. Accordingly, the operation and application of the Refugee Convention is more important now than at any time since the drafting of the document.

There are several key reasons why the Refugee Convention is not a holistic solution to the refugee problem. One of these reasons obviously relates to the willingness of countries to absorb a far greater amount of refugees than they have done historically. There are also significant legal limitations relating to the Convention which potentially can considerably curtail the number of people who can request asylum under the document. In particular, the Refugee Convention does not on its face apply to all destitute and displaced people. The only people who can qualify as refugees under the Convention are those who are at risk of persecution in their homeland for one of five specified reasons. These reasons are race, nationality, religion, political opinion, and membership of a particular social group.<sup>17</sup> Displaced people who do not come within the scope of one or more of these five grounds are automatically precluded from invoking the Refugee Convention as a basis for making a claim for asylum in another country. As a result, the interpretation and meaning of these five grounds is more important now than at any other time in human history.

In this Article, I examine the context, background, and meaning that should be accorded to one of these grounds, namely, membership of a particular social group. I focus on this ground because it is the one that is most obscure and devoid of clear jurisprudential analysis. In addition, this ground also potentially offers the greatest prospect of a wide interpretation, thereby potentially resulting in large numbers of asylum seekers being able to increasingly rely on the ground. By way of summary, I conclude that the meaning previously associated with particular social group is far too narrow and under-inclusive. A much broader meaning is appropriate in light of the historical origins of the Refugee Convention and the purpose of the agreement. So I propose a new, wider definition. Expanding the scope of this term will result in a far greater number of displaced people being able to

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17. *See infra* Part III.

base their claim for asylum on a ground within the scope of the Refugee Convention.

I also propose a second reform that will significantly reduce the number of displaced people in the world. Many countries, including the United States, settle two main categories of refugees. The first category is onshore refugees. These are asylum seekers who manage to enter the country in question generally by airplane, but sometimes by boat or by crossing a land border. Generally speaking, onshore refugees constitute the highest portion of asylum seekers who are settled in third countries. The second category of refugees are offshore refugees. These are people who are often in refugee camps and generally lack the mobility to travel to refugee-accepting countries.

The United States has an annual refugee quota, which was set at 110,000 for 2017.<sup>18</sup> However, as noted above, in recent days President Trump has halved this quota. The peak quota was 142,000 in 1993.<sup>19</sup> The refugees that are settled onshore are called asylees, and their numbers vary from year to year. The most recent data shows that in Fiscal Year 2015, 26,124 asylees were granted asylum.<sup>20</sup> The quota does not include asylees to which there is no limit in granting protection.<sup>21</sup> The United States should considerably increase the amount of offshore refugees it settles. This is essential due to the considerable spike in international displaced people and is also commensurate with the capacity of the United States to absorb and resettle destitute people. The United States should also increase its quota of offshore refugees to 500,000. It should do so in a stepwise, methodical manner with an increase of 50,000 per year. Not only would this immensely improve the flourishing of thousands of destitute people, it would also make the United States the world's moral leader in providing a humanistic solution

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18. Presidential Determination on Refugee Admissions for Fiscal Year 2017, 81 Fed. Reg. 70, 315 (Sept. 28, 2016). The President, following consultation with Congress, determines the annual refugee ceiling and its regional allocation in accordance with INA § 207(a). See generally U.S. DEP'T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2017: REPORT TO THE CONGRESS (2016), <https://www.state.gov/documents/organization/262168.pdf>.

19. Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL'Y INST. (Oct. 28, 2015), <http://www.migrationpolicy.org/article/refugees-and-asylees-united-states>.

20. NADWA MOSSAAD, U.S. DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2015, at 1 (2016), [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asylees\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2015.pdf).

21. ANDORRA BRUNO, CONG. RES. SERV., REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 2, n.8 (2016), <https://fas.org/sgp/crs/misc/RL31269.pdf> ("Asylees are not included in the refugee ceiling. There are no numerical limitations on the granting of asylum.").

to the current displaced person crisis. In due course, it is hoped that other countries would follow this example and increase their refugee quota.

In Part II of this Article, I provide an overview of the current crisis regarding displaced people and put this into historical perspective. Part III follows with a discussion of the history and current status of the Refugee Convention, including an explanation of its limitations relating to its capacity to house all displaced people. In Part IV of this Article, I provide an overview of the background and context relating to the most nebulous refugee ground—membership of a particular social group. Part V of this Article is a jurisprudential analysis regarding the meaning and scope that should be attributed to particular social group. In Part VI, I propose that the United States should considerably increase its offshore refugee intake. I also analyze the implications of my proposals on displaced people and refugee-accommodating countries. In the concluding remarks, I summarize the main recommendations in this paper and the impact that they are likely to have on the numbers of displaced people.

## II. THE CURRENT DISPLACED PERSON CRISIS

### *A. Overall Picture Regarding the Current Number of Displaced People*

Recorded human history has long documented the existence of people who are displaced from their homeland and have no place to live.<sup>22</sup> However, the extent of this phenomenon is now at unprecedented levels. Global forced displacement has continued to increase, with more people forced from their homes by war, conflict, generalized violence, and persecution since WWII.<sup>23</sup> The global population of forcibly displaced people today is larger than the population of the United Kingdom.<sup>24</sup> In fact, if the total global population of forcibly displaced people today combined to form their own country, it would be the 21st largest country in the world.<sup>25</sup>

The starkest figures are set out in the UNHCR Global Trends Report (UNHCR Report), which notes that at the end of 2015, 65.3 million individuals were forcibly displaced worldwide—increasing for the fifth

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22. See generally Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT. REV. RED CROSS 727 (2002).

23. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 5.

24. *Id.* at 6 (citing U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD POPULATION PROSPECTS: THE 2015 REVISION (2015)).

25. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 6.

consecutive year.<sup>26</sup> This equates to 1 in every 100 people worldwide being displaced from their homes, the highest ratio since 1951 when the United Nations High Commissioner for Refugees (UNHCR) began collecting data on displaced persons.<sup>27</sup>

This is 5.8 million more refugees and displaced individuals than the previous year (59.5 million).<sup>28</sup> The rate of increase at which the displaced population is growing is marked over the most recent five-year period.<sup>29</sup> According to UNHCR data, there were 42.5 million forcibly displaced people recorded worldwide in 2011.<sup>30</sup> This is a 50% increase in only five years.<sup>31</sup> Approaching the issue from a somewhat wider lens further highlights the current extent of the crisis. In 1996, there were 37.3 million displaced persons recorded worldwide.<sup>32</sup> Thus, the rate of displacement has been rapidly growing over the last twenty years.

There are a number of different cohorts that make up the global figure of displaced persons. Broadly, they consist of refugees who account for about 21 million of the displaced persons; internally displaced persons (IDPs) who account for approximately 41 million people; and finally, asylum seekers who account for slightly more than 3 million people.<sup>33</sup> The main entity or institution that monitors and has a broad supervisory or caretaker function in relation to asylum seekers is the UNHCR.<sup>34</sup> Its oversight of displaced people has grown to 52.6 million, compared to 46.7 million at the end of 2014.<sup>35</sup>

The below table from the UNHCR sets out the large number and rapid increase in displaced people.<sup>36</sup>

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26. *Id.* at 2, 20.

27. Phillip Connor, *Nearly 1 in 100 Worldwide Are Now Displaced from Their Homes*, PEW RES. CTR.: FACT TANK (Aug. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/08/03/nearly-1-in-100-worldwide-are-now-displaced-from-their-homes/>; *see* UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 2.

28. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 2.

29. *See id.* at 5.

30. *Id.*

31. The number of displaced persons was 45.2 million in 2012; 51.2 million in 2013; and 59.5 million in 2014. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 5.

32. *Id.* at 6.

33. *Id.*

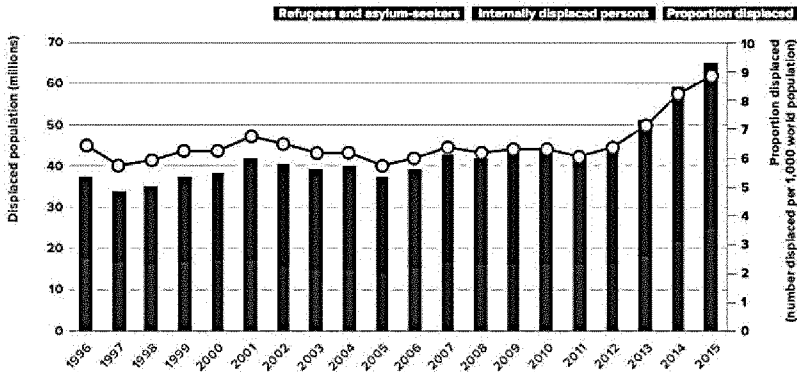
34. *See infra* Part III.

35. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 5.

36. *Id.* at 6.



Fig.1 Trend of global displacement &amp; proportion displaced | 1996 - 2015 (end-year)



### B. The Significant Recent Increase in the Number of Displaced People

The rapid increase in displaced persons is demonstrated by the fluctuation in the most recent calendar year for which the number of displaced people has been reported.

During the course of 2015, more than 12.4 million individuals were forced to leave their homes and seek protection elsewhere; of this number, 8.6 million remained within their own countries and around 1.8 million sought international protection abroad. In addition, 2.0 million new claims for asylum were made within the year.<sup>37</sup>

To further illuminate the marked rate at which the number of displaced persons is increasing, in 2015, approximately twenty-four people in the world became displaced every minute.<sup>38</sup> In other terms, every day over 34,000 people were forcibly displaced due to conflict or persecution.<sup>39</sup> There were only six persons newly displaced per minute in 2005.<sup>40</sup>

There have been a number of discrete events which have contributed significantly to the growth in displaced people. For example, the rising prevalence of displaced persons is particularly pronounced in the Syrian Arab Republic. In 2015, there were a total of 11.7 million Syrians

37. *Id.* at 5–6.

38. *Id.*

39. *Id.*

40. *Id.* at 2.

displaced—both within and outside Syrian borders.<sup>41</sup> This figure is composed of 4.9 million refugees, 6.6 million IDPs, and nearly 250,000 asylum seekers.<sup>42</sup> However, more recent data suggests that by mid-2016, the total global number of displaced Syrians had already risen to 12.5 million.<sup>43</sup> Afghans, Colombians, Congolese, Iraqis, Nigerians, Somalis, Sudanese, South Sudanese, and Yemenis also comprised significant populations of displaced persons—each with over 2 million.<sup>44</sup>

As noted above, one of the largest cohorts of displaced people is refugees. The total number of refugees alone also increased for the fifth consecutive year.<sup>45</sup> In the four-year period from 2011 to 2015 (inclusive), the refugee population grew by 55% from 10.4 million to 21.3 million.<sup>46</sup> Further, the UNHCR notes that there were 16.1 million refugees registered under its mandate in 2015.<sup>47</sup> Strikingly, this is 1.7 million more recorded refugees than the previous year.<sup>48</sup> As noted by the UNHCR Report, one of the largest contributing factors to this exponential growth has been the conflict in the Syrian Arab Republic, which began in 2010.<sup>49</sup> The Syrian Arab Republic produced over half of the world's new refugees in 2015.<sup>50</sup> There were also an additional 5.2 million Palestinian refugees registered by the UNRWA (United Nations Relief and Works Agency).<sup>51</sup>

The significance of the refugee crisis is further underlined by the fact that, by the end of 2015, half of the world's refugees were children (51%).<sup>52</sup> According to the UNHCR, in 2015, 98,400 asylum claims were made worldwide by children who were either unaccompanied or separated from their families.<sup>53</sup> The number of such applications made in 2014 was 34,300.<sup>54</sup> Thus, this is nearly a threefold increase in a single year.<sup>55</sup>

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41. *Id.* at 6.

42. *Id.*

43. Phillip Connor & Jens Manuel Krogstad, *About Six-in-Ten Syrians Are Now Displaced from Their Homes*, PEW RES. CTR.: FACT TANK (June 13, 2016), <http://www.pewresearch.org/fact-tank/2016/06/13/about-six-in-ten-syrians-are-now-displaced-from-their-homes/>.

44. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 6.

45. *Id.* at 13.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 2.

52. *Id.* at 3.

53. *Id.*

54. *Id.* at 8.

55. *Id.*

C. *Key Refugee and Displaced Person Producing Countries*

According to the UNHCR Report, developing countries are the top ten refugee-producing countries.<sup>56</sup> In fact, 12.2 million (76%) of the 16.1 million refugees registered under the UNHCR's mandate originated from these ten countries alone in 2015.<sup>57</sup> Further, most of these countries have produced significant numbers of refugees for at least the past five years. For example, Afghanistan has produced some of the largest numbers of refugees for over thirty years.<sup>58</sup>

As mentioned above, the continued conflict in Syria has resulted in the most profound refugee and displaced persons problem in the world. Six in every ten Syrians are currently displaced—this figure is unprecedented in recent history for a single country.<sup>59</sup> In 2015 alone, there were over 1 million newly registered displaced Syrian refugees.<sup>60</sup> Thus, as mentioned above, by the end of 2015 there were 4.9 million Syrian refugees worldwide, making the Syrian Arab Republic the largest refugee-producing country. A significant proportion of the total Syrian refugee population is hosted in bordering countries—specifically Turkey (2.5 million), Lebanon (1.1 million), Jordan (628,200), Iraq (244,600), and Egypt (117,600).<sup>61</sup> A paradoxical feature relating to these host countries is that they are some of the poorest and most unstable countries in the world.<sup>62</sup> The countries that hosted the largest Syrian refugee population, not located in the bordering region, were Germany and Sweden—115,600 and 52,700, respectively.<sup>63</sup> Syrians also accounted for the largest number of asylum applications registered globally during 2015.<sup>64</sup> A total of 373,700 new applications for asylum were made, comprising 18% of the world's total number of applications. This is compared to 12% the previous year.<sup>65</sup>

Afghanistan remained the second largest refugee-producing country at the end of 2015; at the time, the Afghan refugee population worldwide was

56. *Id.* at 16.

57. *Id.*

58. *Id.*

59. Phillip Connor & Jens Manuel Krogstad, *Key Facts About the World's Refugees*, PEW RES. CTR.: FACT TANK (Oct. 5, 2016), <http://www.pewresearch.org/fact-tank/2016/10/05/key-facts-about-the-worlds-refugees/>.

60. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 14.

61. *Id.* at 16.

62. *See id.*

63. *Id.*

64. *Id.* at 40.

65. *Id.*

estimated at 2.7 million.<sup>66</sup> A significant proportion of these Afghan refugees sought protection in Pakistan and the Islamic Republic of Iran—1.6 million and 951,100, respectively.<sup>67</sup> The third largest country of origin was Somalia, with 1.12 million refugees worldwide in 2015.<sup>68</sup> Notably, approximately 54% of the world's refugees in 2015 originated from only these three countries—Syria, Somalia, and Afghanistan.<sup>69</sup>

The remaining top ten refugee-producing countries in 2015 were South Sudan (778,700—compared to 616,200 a year earlier), Sudan (628,800), the Democratic Republic of the Congo (541,500), the Central African Republic (471,100), Myanmar (451,800), Eritrea (411,300), and Colombia (340,200).<sup>70</sup>

*D. Poor Countries Continuing to Shoulder a Disproportionate Burden of Admitting Displaced People*

The trend of poor countries shouldering a disproportionate burden of the refugee intake not only applies in relation to Syrian refugees but also to the entire cohort of the refugee population. Turkey was host to the largest refugee population for the second consecutive year—hosting 2.54 million refugees in 2015.<sup>71</sup> This is also a significant increase from the 1.6 million refugees it hosted in 2014.<sup>72</sup> Pakistan and Lebanon were the second and third largest refugee-hosting countries worldwide—1.6 million and 1.1 million refugees, respectively.<sup>73</sup> The below table sets out the top ten refugee-hosting countries in 2015, which accounted for almost 60% of the total number of refugees registered under the UNHCR mandate.<sup>74</sup>

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66. *Id.* at 3.

67. *Id.* at 16.

68. *Id.* at 3.

69. *Id.*

70. *Id.* at 17.

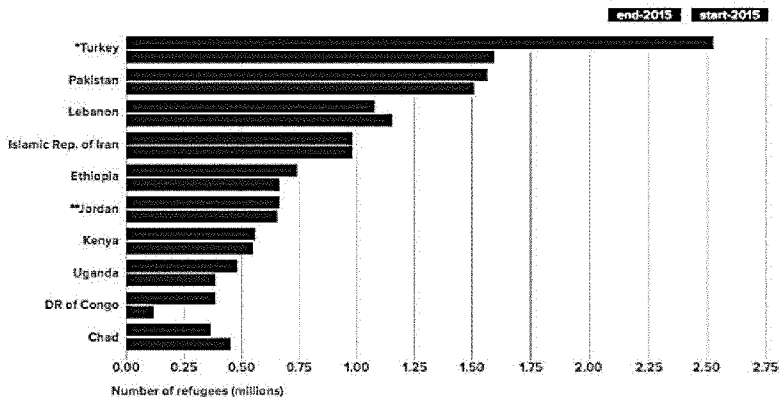
71. *Id.* at 3.

72. U.N. HIGH COMM'R FOR REFUGEES (UNHCR), GLOBAL TRENDS: FORCED DISPLACEMENT IN 2014 (2015), <http://www.unhcr.org/en-us/statistics/country/556725e69/unhcr-global-trends-2014.html> [hereinafter UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2014].

73. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 3.

74. *Id.* at 15.

Fig.3 Major refugee-hosting countries | 2014 - 2015 (end-year)



\* Refugee figure for Syrians in Turkey is a Government estimate.

\*\* Includes 33,300 Iraqis registered with UNHCR in Jordan. The Government estimates the number of Iraqis at 400,000 individuals at the end of March 2015. This includes refugees and other categories of Iraqis.

For the third consecutive year, developing countries have disproportionately hosted almost 90% of all refugees under the UNHCR's mandate.<sup>75</sup> By the end of 2015, developing countries hosted 13.9 million of the total global number of refugees under the UNHCR's mandate.<sup>76</sup> Moreover, the world's Least Developed Countries (LDCs) hosted 26% of the world's refugee population—that is, 4.2 million refugees.<sup>77</sup> This is in stark contrast to the 2.2 million refugees that developed countries hosted.<sup>78</sup>

The pattern of wealthy countries failing to shoulder a reasonable burden of the displaced person crisis is further highlighted in a recent report by Amnesty International, which states that “wealthy countries have shown a complete absence of leadership and responsibility, leaving just 10 countries, which account for less than 2.5% of world GDP, to take in 56% of the world's refugees.”<sup>79</sup> In fact, the world's six wealthiest countries (including

75. *Id.* at 18.

76. *Id.* at 15.

77. *Id.* There are currently forty-seven countries classified by the UN as least developed countries (LDCs) according to their low level of gross national income per capita, level of human capital, and economic vulnerability to economic and environmental shocks. For a list of the world's least developed countries, see *LDCs at a Glance*, U.N. DEP'T OF ECON. & SOC. AFFAIRS, [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc\\_list.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf) (last visited Oct. 27, 2017).

78. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 18.

79. *Rich Nations' Self-Interest Means Refugee Crisis Set to Get Worse, Not Better*, AMNESTY INT'L (Oct. 4, 2016, 12:10 PM), <https://www.amnesty.org/en/latest/news/2016/10/refugee-crisis-set-to-get-worse/>; see AMNESTY INT'L, TACKLING THE GLOBAL

the United States) hosted less than 9% of the world's total refugee and asylum seeker population in 2015, according to a recent OXFAM report.<sup>80</sup> Despite accounting for over half of the global economy (56.6%), the United States, China, Japan, Germany, France, and the United Kingdom combined hosted only 2.1 million refugees and asylum seekers in 2015; Germany hosted the largest share of this population (736,740).<sup>81</sup>

To further complete the picture regarding countries that most drastically increased their refugee intake in 2015, Turkey registered the largest number of new refugees within its borders in 2015, including 946,800 from the Syrian Arab Republic.<sup>82</sup> Russia was the second largest host of newly displaced refugees in 2015, with 149,600 Ukrainian refugees seeking protection within the country. The third largest number (132,400) of refugees sought protection in the United Republic of Tanzania as a result of violence and conflict in neighboring Burundi.<sup>83</sup> The UNHCR Report also notes that Ethiopia, Rwanda, Cameroon, the Democratic Republic of the Congo, and Uganda registered significant numbers of new refugees in 2015.<sup>84</sup>

A similarly dispiriting picture emerges regarding IDPs, which constitute the highest number of displaced people. The total number of IDPs in 2015 was unprecedented—almost 41 million.<sup>85</sup> This is 2.6 million more IDPs than in 2014.<sup>86</sup> Once again, the countries in which this crisis is occurring are overwhelmingly impoverished countries with fragile political and rule of law institutions. In 2015 alone, 8.6 million people were newly displaced within their own countries as a result of conflict and violence.<sup>87</sup> UNHCR statistics show that 84% of the world's new IDPs were located in only six countries in 2015.<sup>88</sup> The country with the highest number of new IDPs was Yemen,

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REFUGEE CRISIS: FROM SHIRKING TO SHARING RESPONSIBILITY (2016), <https://prod.amnesty.org.au/wp-content/uploads/2016/10/Tackling-the-global-refugee-crisis-From-shirking-to-sharing-responsibility.pdf>.

80. OXFAM INT'L, A POOR WELCOME FROM THE WORLD'S WEALTHY 1 (2016), [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/mb-a-poor-welcome-refugees-180716-en\\_0.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/mb-a-poor-welcome-refugees-180716-en_0.pdf).

81. *Id.* at 3. The United States hosted 559,370 refugees and asylum seekers; China hosted 301,729; France hosted 336,183; United Kingdom hosted 168,937; and Japan hosted 16,305.

82. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 14.

83. *Id.*

84. *Id.*

85. *Id.* at 29.

86. *Id.*

87. *Id.*

88. *Id.* at 30.

where 10% (2.5 million people) of its population was internally displaced in one year.<sup>89</sup>

This data shows the continuation of an unremitting pattern whereby the countries that can least afford to absorb and accommodate new arrivals are the ones that are continuing, in increasing numbers, to take in new refugees.

A similar picture emerges in relation to asylum seekers. An asylum seeker is an individual who has sought asylum protection but whose claims have yet to be assessed.<sup>90</sup> The UNHCR Report states that at the time of the report, approximately 3.2 million asylum applications were yet to be determined.<sup>91</sup> Notably, 2015 saw the highest number of asylum claims submitted in a single year—2.45 million.<sup>92</sup> This compared to 1.66 million in 2014 represents a 58% rise in one year.<sup>93</sup> Further, a considerable proportion of the asylum applications lodged in 2015, over 2 million, were new applications lodged by individuals for the first time.<sup>94</sup>

The contrast between refugees and asylum seekers is not so much the general source of these respective communities, but rather the destinations where they are seeking to locate, which are invariably first world, wealthy countries. The country that registered the highest number of new individual asylum applications in 2015 was Germany, with 441,900 claims made.<sup>95</sup> This is an increase of 255% from 2014 when 173,100 people applied for protection in the country.<sup>96</sup>

#### *E. Overview of the United States' Response to Accepting Displaced People*

While most of the top refugee-producing countries have been very remote from the United States, and the United States has not been significantly affected by the refugee crisis, there was a considerable rise in people seeking protection within the United States.<sup>97</sup> According to the UNHCR Report, the United States received the second highest number of

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89. *Id.* at 29–30 (“Other countries highlighted in the report as having a large IDP population included Iraq (808,700), Ukraine (800,000), Sudan (639,500), the Democratic Republic of the Congo (637,900) and Afghanistan (492,600).”).

90. *Id.* at 37.

91. *Id.* at 2.

92. *Id.* at 3.

93. *Id.* at 37.

94. *Id.*

95. *Id.* at 38.

96. *See id.*

97. *Id.*

new asylum applications in 2015—172,700 compared to 121,200 in 2014.<sup>98</sup> This is a 42% increase.<sup>99</sup> Over half of these new asylum applicants originate from Central America, specifically Honduras, El Salvador, and Guatemala<sup>100</sup>—an area considered one of the most violent in the world largely due to the prevalence of gang-related crime.<sup>101</sup> Almost 50,000 of these asylum applicants originate from these three countries alone.<sup>102</sup> A large number of new asylum claims were also made in Sweden and Russia in 2015, 156,000 and 152,500, respectively.<sup>103</sup>

The United States received 84,995 refugees in 2016, effectively meeting the 85,000 ceiling set by the Obama Administration at the beginning of the year.<sup>104</sup> The Democratic Republic of the Congo (16,370), Syria (12,587), and Myanmar (12,347) were the top countries of origin of refugees in 2016.<sup>105</sup> Together, refugees from these three nations represented nearly half (49%) of all refugees admitted to the United States over the past year.<sup>106</sup>

The above data illustrates a humanistic crisis of almost incalculable magnitude. The crisis is getting worse, and there is no obvious solution. The crisis is reflected not only by the tens of millions of people who are displaced and in desperate need for a new homeland, but is exacerbated by the fact that the countries that are providing temporary accommodations to displaced people are overwhelmingly developing countries that have no capacity to provide meaningful levels of resources that are essential to human subsistence, such as access to healthcare, education, and housing.

In the remainder of this Article, I examine whether the international instrument, which has been the substratum against which more displaced

98. *Id.*

99. *Id.*

100. *Id.*; see Nora Sturm, *UNHCR Calls for Urgent Action as Central Asylum Claims Soar*, U.N. HIGH COMM'R FOR REFUGEES (Apr. 5, 2016), <http://www.unhcr.org/en-au/news/latest/2016/4/5703ab396/unhcr-calls-urgent-action-central-america-asylum-claims-soar.html> (explaining the origination of new asylum applicants).

101. For a discussion of the violence and crime in this region, see Joshua Partlow, *Why El Salvador Became the Hemisphere's Murder Capital*, WASH. POST (Jan. 5, 2016), [https://www.washingtonpost.com/news/worldviews/wp/2016/01/05/why-el-salvador-became-the-hemispheres-murder-capital/?utm\\_term=.6695dbb3d9b5](https://www.washingtonpost.com/news/worldviews/wp/2016/01/05/why-el-salvador-became-the-hemispheres-murder-capital/?utm_term=.6695dbb3d9b5); Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (Jan. 19, 2016), <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle>.

102. See Partlow, *supra* note 101; see also Sturm, *supra* note 100 (totaling the number of asylum applicants from Honduras, El Salvador, and Guatemala).

103. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, *supra* note 1, at 38.

104. BRUNO, *supra* note 21, at 2.

105. Ruth Igielnik & Jens Manuel Krogstad, *Where Refugees to the U.S. Come From*, PEW RES. CTR.: FACT TANK (Feb. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/02/03/where-refugees-to-the-u-s-come-from/>.

106. *Id.*



people have been settled than any other instrument in history, can be adapted to provide at least part of the solution to the current displaced person crisis. I also set forth reasons why the United States should admit a far higher number of refugees. Prior to doing so, I examine the history, background, and current status of the Refugee Convention.

### III. BACKGROUND TO THE REFUGEE CONVENTION

Mass refugee movements have been an enduring global issue throughout the twentieth century.<sup>107</sup> In this part of this Article, I provide a brief historical review of international refugee protection and begin by looking back to refugee agreements made during the first half of the twentieth century. This is important because to understand the scope and potential application of the Convention, it is necessary to first examine its origin and history.

#### A. *The First Agreements*

The twentieth century was a period of mass disturbance and movement on a large global scale following numerous political events and violent conflicts in Europe.<sup>108</sup> Governments were particularly ill-prepared for the mass population flows that arose following the First World War, and in the absence of protection obligations on governments or the existence of a central body, legal responses by governments to the displaced person crisis was not regular or systematic. Rather, those displaced by the war were left largely dependent on the material assistance and relief provided by charitable organizations.<sup>109</sup>

These displaced persons drew the attention of the international community because “they numbered millions, not thousands,”<sup>110</sup> and the crisis was further “magnified by the fact that Europe was drained by war; stirred by political tensions; and exhausted of capacities to provide adequate relief.”<sup>111</sup> Thus, although refugees existed prior to this time, large groups of refugees were virtually non-existent, and there was no need for governments

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107. See generally CLAUDENA M. SKRAN, REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME (1995) [hereinafter SKRAN, REFUGEES IN INTER-WAR EUROPE].

108. *Id.*

109. Jaeger, *supra* note 22, at 728.

110. SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 13.

111. Alessandra Rovarsi, *The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period*, 22 REFUGEE SURV. Q. 21, 23 (2003).

to clearly delineate the meaning and scope of a “refugee” or establish formal institutions to provide for their protection and relief.

In response to the mass migration of refugees during and following the conclusion of the First World War, the League of Nations was established in 1919 out of the Treaty of Versailles.<sup>112</sup> Its primary purpose was “to promote international co-operation and to achieve international peace and security.”<sup>113</sup> Thus, the League of Nations was the first intergovernmental organization to address refugee issues, and its establishment subsequently marked the beginning of the inter-war era of refugee protection that was marked by a series of refugee flows.<sup>114</sup>

The conclusion of the First World War in 1917 also coincided with the beginning of the mass exodus of Russians following the events of the Russian Revolution and the collapse of the Russian Empire.<sup>115</sup> By 1921, it is estimated that over 1 million refugees displaced from Russia were displaced abroad, making up the largest post-war group of refugees.<sup>116</sup> Their situation was desperate—for the most part, they were without identity or travel documents and thus were unable to identify themselves, work, or travel.<sup>117</sup> They had little possibility of repatriation by the new Soviet authorities, who made those Russians who fled the Revolution stateless.<sup>118</sup>

Further, the mass movements of at least 1 million Russian refugees, scattered across Europe after fleeing the Bolshevik regime, were exacerbated by the fact that governments worldwide continued to be increasingly reluctant to admit refugees and other immigrants following the conclusion of World War I (WWI).<sup>119</sup> As noted by James C. Hathaway, “freedom of international movement accorded to persons broadly defined as refugees came to an abrupt halt after the First World War”<sup>120</sup> following the implementation of more guarded immigration policies by governments in an

112. *See generally* League of Nations Covenant.

113. *Id.*

114. For a historical overview of the creation of the League of Nations, see Claudena M. Skran, *Profiles of the First Two High Commissioners*, 1 J. REFUGEE STUD. 277 (1988) [hereinafter Skran, *Profiles*].

115. *Id.*

116. SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 33. However, it is noteworthy that estimates in relation to this vary significantly. *See generally* EVAN MAWDSLEY, THE RUSSIAN CIVIL WAR (1987); DANIELE JOLY & CLIVE NETTLETON, REFUGEES IN EUROPE: THE HOSTILE NEW AGENDA (1990); JOHN C. TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP & THE STATE (2000).

117. James A. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT’L & COMP. L.Q. 348, 351 (1984) [hereinafter *Evolution of Refugee Status*].

118. *Id.*

119. *Id.* at 350–51.

120. *Id.* at 348.

attempt to tighten their borders and control the movements of refugees.<sup>121</sup> Movement restrictions began in the United States with the enactment of the 1924 Immigration Act that imposed the first numerical quota on immigration to the United States.<sup>122</sup> Thus, the imposition of border restrictions was a continuing, significant obstacle facing the refugee crisis during the inter-war period in Europe.

In response to the crisis facing Russian refugees, the International Red Cross Committee (IRCC), unable to deal with the population flows, appealed to the Council of the League of Nations in February 1921 to deal with the “Russian refugees scattered throughout Europe without legal protection or representation.”<sup>123</sup> The IRCC appealed to the Council on the basis that the need for action was an issue that went beyond humanitarian duty and was rather “an obligation of international justice,”<sup>124</sup> and that the League of Nations was “the only super national political authority capable of solving a problem which is beyond the power of exclusively humanitarian organizations.”<sup>125</sup>

The move by the Red Cross to frame the refugee crisis in juridical and legal, rather than strictly humanitarian terms, encouraged a positive response from the Council which established the office of High Commissioner for Refugees after consulting with member governments.<sup>126</sup> The Council appointed Dr. Fridtjof Nansen to the newly created post of “High Commissioner on Behalf of the League in Connection with the Problems of Russian Refugees in Europe” in 1921.<sup>127</sup> The High Commissioner’s mandate included defining the legal status of Russian refugees, organizing their repatriation or employment outside of Russia, and organizing measures to provide for their assistance and relief.<sup>128</sup> The High Commissioner’s office was intended to be a temporary agency for dealing with the problems created by Russian refugees and subsequent civil war (1917–1922), though it established what eventually became the basic structure of the UNHCR.

121. *See id.*; *see also* SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107; Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT’L L. 680 (1938) [hereinafter Holborn, *The Legal Status of Political Refugees*].

122. SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 33.

123. *Evolution of Refugee Status*, *supra* note 117, at 351 (quoting the International Red Cross Committee appeal to the Council of the League of Nations in February 1921).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See Skran, Profiles*, *supra* note 114, at 280.

128. *Evolution of Refugee Status*, *supra* note 117, at 351. For a detailed overview of the High Commissioner period, *see generally* BRUNO CABANES, *THE GREAT WAR AND THE ORIGINS OF HUMANITARIANISM, 1918–1924* (2014).

The establishment of the League of Nations and the appointment of the High Commissioner marked an awareness by governments as to the international nature of the refugee problem and ultimately led to the creation of a number of legal international instruments attempting to afford some degree of protection to the refugees of the inter-war period.

The first such legal instrument addressing the international protection of refugees was the Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees (1922 Arrangement).<sup>129</sup> The High Commissioner devoted particular attention to securing the legal protection and status of refugees during his mandate, and in July 1922 convened an international conference in Geneva regarding the lack of internationally recognized identification papers for Russian refugees.<sup>130</sup>

Under the terms of the 1922 Arrangement, governments could issue and renew legal identity certificates to Russian refugees living within their borders. These certificates became known as "Nansen passports."<sup>131</sup> Although the certificates were not equivalent to a national passport in that they did not grant citizenship rights or provide the right to return to the country of issue (unless expressly granted), they did give refugees, who were effectively stateless, a recognizable legal identity and allowed them to travel internationally more freely to find better living conditions.<sup>132</sup> However, they were valid for only one year.<sup>133</sup> Notably, this agreement was not a treaty but simply a nonbinding agreement. These certificates were generally well-accepted by governments and, as noted by Skran, "the beginning of international refugee law can properly be dated to the creation of the Nansen passport system."<sup>134</sup>

In 1924, under the 1924 Plan for the Issue of a Certificate of Identity to Armenian Refugees, the High Commissioner extended the issuance of the certificates to Armenian refugees who were displaced from the former Ottoman Empire.<sup>135</sup> This arrangement essentially mimicked the 1922 Arrangement, allowing for the issuance of identity and travel documents to refugees of Armenia.<sup>136</sup>

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

130. Skran, *Profiles*, *supra* note 114, at 280.

131. See Holborn, *The Legal Status of Political Refugees*, *supra* note 121, at 684.

132. See *id.*

133. See *id.*; SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 105.

134. SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 105.

135. Plan for the Issue of a Certificate of Identity to Armenian Refugees, May 31, 1924, 5 L.N.O.J. 969 [hereinafter 1924 Plan]; see SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 105.

136. See *Evolution of Refugee Status*, *supra* note 117, at 352.

The subsequent 1926 Arrangement Relating to the Legal Status of Russian and Armenian Refugees (1926 Arrangement) made several improvements to these earlier arrangements.<sup>137</sup> The most significant among them was the inclusion of a “return” clause to the identity certificates.<sup>138</sup> As mentioned above, the certificates were at first relatively limited; however, the 1926 Arrangement recommended that the certificates make a provision for a return visa. Thus, governments would undertake to re-admit the holder to the country of issue in an effort to enable the “freedom of movement of the refugees.”<sup>139</sup> As a result, the identity certificates became increasingly accepted as *de facto* passports.<sup>140</sup>

However, under the 1922 and 1924 Arrangements, refugees were simply defined as “Russian” or “Armenian” refugees which presented a constant difficulty for governments in identifying refugees entitled to the certificates.<sup>141</sup> In response to this, the 1926 Arrangement expressly set out a definition as to who is a Russian or Armenian refugee.<sup>142</sup> However, the definitions, which were proposed by the High Commissioner, were relatively narrow.<sup>143</sup> The 1926 Arrangement defined a refugee according to their country of origin (namely, whether the refugee was of Russian or Armenian origin) and required that the refugee be deprived of the “protection” of their country of origin, and further, the refugee could not have acquired another nationality.<sup>144</sup> Nonetheless, the 1926 Arrangement became the first international legal instrument to define a refugee, and the definitions were eventually adopted by the 1933 Convention Relating to the International Status of Refugees (1933 Convention).<sup>145</sup>

Under the 1928 Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, the Council of the League of Nations extended the legal protections afforded under the certificate system to other categories of refugees affected by war and thereby living in the same conditions as the

137. Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 47 [hereinafter 1926 Arrangement].

138. *Id.* at 49.

139. *Id.*

140. See Holborn, *The Legal Status of Political Refugees*, *supra* note 121, at 685–86.

141. See *Evolution of Refugee Status*, *supra* note 117, at 353.

142. 1926 Arrangement, *supra* note 137, at 49.

143. See *Evolution of Refugee Status*, *supra* note 117, at 353.

144. 1926 Arrangement, *supra* note 137, at 49.

145. Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199, 203 [hereinafter 1933 Convention].

Russian and Armenian refugees.<sup>146</sup> Following an intergovernmental conference on refugees in June 1928, governments agreed to extend the issuance of the certificates to Assyrians, Assyro-Chaldean persons of Syrian or Kurdish origin, as well as persons of Turkish origin.<sup>147</sup> This continued to reflect the ad hoc, category-oriented nature of classifying refugees according to country of origin or group affiliation that was favored during this period.

A second agreement concluded under the League of Nations, following the June 1928 intergovernmental conference, was the 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees (1928 Arrangement).<sup>148</sup> This arrangement was effectively an enhanced arrangement on the legal status of Russian and Armenian refugees; however, it differed markedly from the earlier arrangement with regard to one fundamental aspect. The arrangement marked the League's first attempt to confer a range of rights upon refugees. These rights included the recognition of the refugees' personal status, including divorce and marriage rights, and contained other favorable treatment including rights to work, protection against expulsion, and equality in taxation. Notably, the arrangements prior to 1928 did not establish any specific responsibilities for states other than cooperation in the recognition of League of Nations documentation.<sup>149</sup>

These standards, however, were not legally binding; they were simply recommendations. Ultimately, relying on goodwill to deal with the mass population flows was insufficient. By the 1930s, governments were plagued with enormous political and economic instability, and thus had become increasingly unwilling to accept many defined categories of refugees under these arrangements. In an attempt to preserve any entitlements for their own citizens, particularly those relating to the workforce, governments began promulgating laws, unfavorable to refugees, particularly dealing with limits on foreign workers and further restrictions on immigration and asylum laws.<sup>150</sup>

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146. Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, Jun. 30, 1928, 89 L.N.T.S. 63.

147. *Id.* at 65.

148. Arrangement Relating to the Legal Status of Russian and Armenian Refugees, Jun. 30, 1928, 89 L.N.T.S. 53 [hereinafter 1928 Arrangement].

149. See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 86 (2005) [hereinafter HATHAWAY, *THE RIGHTS OF REFUGEES*].

150. *Id.* at 86–87; see SKRAN, *REFUGEES IN INTER-WAR EUROPE*, *supra* note 107, at 122–24 (describing laws affecting refugees).

*B. The 1933 Refugee Convention*

In reality, these earlier arrangements were ineffective in providing solutions or relief to the ongoing mass movements of refugees and imposed unfavorable conditions on them. As noted in a Secretariat memorandum, “with the exception of the Nansen passport, the existing so-called arrangements are producing practically no effect upon the position of the refugees.”<sup>151</sup> Further, the League of Nations Intergovernmental Commission, tasked with supervising refugee protection following the cessation of the Office of the High Commissioner, argued “that the stabilization of the legal status for refugees can only, owing to the very nature of the steps to be taken, be brought about by a formal agreement concluded by a certain number of states concerned.”<sup>152</sup>

Accordingly, a draft convention was submitted at an intergovernmental conference in Geneva in 1933 to secure the legal status of the refugee and to seek a more permanent solution for the protection of refugees.<sup>153</sup> The resultant 1933 Convention was applicable to Russian, Armenian, Assyrian, Assyro-Chaldean, and Turkish refugees.<sup>154</sup> It adopted the definitions set out in the 1926 and 1928 Arrangements and guaranteed these refugees their basic civil and economic rights.<sup>155</sup> These rights included those with respect to identity certificates, education, taxation, expulsion, social welfare, and labor conditions.<sup>156</sup> As highlighted by Hathaway, “it is noteworthy however, that the 1933 convention guaranteed almost all refugee rights either absolutely or on terms of equivalency with the citizens of most-favored states.”<sup>157</sup> Thus, the 1933 Convention placed particular emphasis on promoting the concept of equal or same treatment that governments should accord to all refugees. However, the drafters seemed to be merely consolidating earlier practices as many of the rights guaranteed in the

151. SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 124 (quoting Secretariat memorandum of 3 Feb. 1933. LNA R5614/686).

152. HATHAWAY, THE RIGHTS OF REFUGEES, *supra* note 149, at 87 (quoting Work of the Inter-Governmental Advisory Commission for Refugees during its Fifth Session and Communication from the International Nansen Office for Refugees, May 22, 1933, 14 L.N.O.J. 854, 857).

153. *Id.*

154. *Id.*

155. 1933 Convention, *supra* note 145, at 203. Article 1 of the 1933 Convention states that it is applicable to “Russian, Armenian, and assimilated refugees, as defined by the Arrangements of May 12th, 1926, and June 30th, 1928.” *Id.*

156. For a detailed discussion on the rights and standards set out under the 1933 Convention, see SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 125–29. *See also* HATHAWAY, THE RIGHTS OF REFUGEES, *supra* note 149, at 88.

157. HATHAWAY, THE RIGHTS OF REFUGEES, *supra* note 149, at 88.

Convention simply formalized or enhanced those in the 1928 Arrangement.<sup>158</sup>

Importantly, the 1933 Convention was the first instrument to set a binding obligation on signatory states in relation to expulsion and the non-refoulement of refugees, which became increasingly common practice during the 1930s.<sup>159</sup> This principle means that governments should not expel or return a refugee to their country of origin or any country against their will if there is a risk of persecution—this includes the refusal to admit someone at the frontier. The right to non-refoulement is considered to be fundamental to modern international refugee law.<sup>160</sup>

Ultimately, only eight states formally ratified and applied the provisions of the treaty; however, many did so with reservations.<sup>161</sup> Nonetheless, the 1933 Convention marked a significant milestone in the history of the international refugee regime. It was the first legally binding, comprehensive instrument addressing the legal protection and standard of conduct to be accorded to refugees. It is also significant because it served as the basis of the 1951 Refugee Convention.

In response to a number of specific world events between 1936 and the adoption of the current refugee convention, a number of ad hoc treaties and intergovernmental agreements were formulated in an attempt to provide some measure of protection to the affected refugees.<sup>162</sup>

### C. *Refugee Law Following the Second World War*

The years that followed were dominated by dire economic events, and the outbreak of further violent conflicts dampened the possibility of any

158. *Id.*

159. 1933 Convention, *supra* note 145, at 205. Although the obligation not to expel and to avoid refoulement of Armenian and Russian refugees was first set out in the 1928 Arrangement, *supra* note 148, this obligation was in the form of nonbinding recommendations. See SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 133.

160. U.N. HIGH COMM'R FOR REFUGEES, ADVISORY OPINION ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 2 (2007).

161. See SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107, at 125; see also HATHAWAY, THE RIGHTS OF REFUGEES, *supra* note 149, at 88.

162. See generally SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 107; HATHAWAY, THE RIGHTS OF REFUGEES, *supra* note 149 (including two international treaties concluded under the League of Nations concerning the protection of refugees from Germany—the Provisional Arrangement Concerning the Status of Refugees Coming from Germany, July 4, 1936, 171 L.N.T.S. 75 [hereinafter 1936 Provisional Arrangement] and the Convention Concerning the Status of Refugees Coming From Germany, Feb. 10, 1938, 192 L.N.T.S. 61 [hereinafter 1938 Convention]).



further ratifications of states to the Convention. In particular, the Second World War marked a new era of mass exodus for millions of people. When the war ended in 1945, there were more than 40 million displaced people (the largest group displaced in history) who were reluctant or could not return home because of border changes.<sup>163</sup>

In 1943, prior to the beginning of the war, the United Nations Relief and Rehabilitation Administration (UNRRA) was established, and it relied on cooperation and charitable funding by governments.<sup>164</sup> Although it was not created principally as a refugee organization, it had a wide-ranging mandate to address the massive groups of refugees following the upheaval of WWII.<sup>165</sup> This included providing measures for their relief and repatriation and assisting with the rehabilitation of war-torn areas.<sup>166</sup>

Following the conclusion of the war, the UNRRA assisted with the repatriation of approximately 7 million people.<sup>167</sup> However, the mandate of the UNRRA was not extended past 1947 after its repatriation and rehabilitation efforts were effectively hampered due to Cold War tension and opposition from the Soviet Union.<sup>168</sup> Further, the United States government, which was responsible for providing the majority of the UNRRA funding, refused to grant any further financial aid to the organization, effectively vetoing the extension of its mandate.<sup>169</sup> This was largely due to the United States government's preference to replace the UNRRA with an international body with a more wide-ranging capacity of operations and authority to deal with the protection of refugees displaced in the aftermath of the war.<sup>170</sup>

Subsequently, the International Refugee Organization (IRO) was created in 1947 by a resolution of the recently established United Nations General Assembly.<sup>171</sup> The IRO was initially established as a non-permanent specialized intergovernmental agency of the United Nations and primarily tasked with providing relief, repatriation, resettlement, and protection for the approximately 1.5 million refugees left in Europe.<sup>172</sup> However, unlike the

163. U.N. HIGH COMM'R FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION 13 (2000) [hereinafter UNHCR, THE STATE OF THE WORLD'S REFUGEES].

164. *Id.* at 13–14.

165. *Id.* at 14.

166. *Id.*

167. *Id.*

168. *Id.* at 16.

169. *Id.*; see *Evolution of Refugee Status*, *supra* note 117, at 372–73 (analyzing the U.S. veto of the UNRRA funding).

170. *Id.* at 16.

171. *Id.*; *Evolution of Refugee Status*, *supra* note 117, at 374.

172. UNHCR, THE STATE OF THE WORLD'S REFUGEES, *supra* note 163, at 16.

UNRRA, its efforts focused on the resettlement of refugees as opposed to their repatriation.<sup>173</sup> Although its work was restricted to assisting displaced European refugees, the IRO was the first international refugee body to fully address all issues arising from the refugee crisis.<sup>174</sup> Ultimately, the IRO's activities formally ceased in 1952 as a result of its inability to bring the refugee crisis to an end with masses of people still adrift in Europe.<sup>175</sup> The IRO was the last refugee organization to precede the United Nations High Commissioner for Refugees.<sup>176</sup>

#### *D. The 1951 Refugee Convention*

By 1950, the international community recognized that the refugee problem sparked by the Second World War was not a temporary one. A more durable solution was necessary, especially given that there was no obligation at the time on states to assist refugees. The only agreements providing for refugee protection that were in place were those formulated under the League of Nations and were created in response to specific events that triggered significant refugee movements. Thus, it was recognized that an instrument with a broader approach would be more effective in addressing the ongoing refugee problem.

The 1951 Convention Relating to the Status of Refugees was drafted in response to the problems confronting the international community as a result of the mass displacement of people from Europe following World War II.<sup>177</sup> It was the first and remains the only binding refugee protection instrument of a universal character.

The Convention Relating to the Status of Refugees was adopted by a special United Nations conference on July 28, 1951, and came into force on April 21, 1954.<sup>178</sup> The Convention was drafted by a combination of United Nations organs, ad hoc committees, and a conference of plenipotentiaries with the intent of ensuring that states could not again turn their backs on vulnerable groups escaping persecution, as well as providing a guarantee of non-refoulement.<sup>179</sup>

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173. *Id.*

174. *Id.*

175. *Id.* at 17; see LOUISE HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION: A SPECIALIZED AGENCY OF THE UNITED NATIONS: ITS HISTORY AND WORK 1946–1952, at 559–75 (1956).

176. See *infra* Section III.E.

177. Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

178. *Id.*

179. JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 6 (1st ed. 1991).

The definition of refugee adopted by the Refugee Convention was restricted to those persons who were displaced as a result of “events occurring before 1 January 1951.”<sup>180</sup> Further, it allowed signatory states to elect to *limit* their obligations to refugees originating from “events occurring within Europe.”<sup>181</sup> Thus, it is clear that the Refugee Convention was originally drafted to directly respond to and assist displaced European refugees who had been affected by the Second World War.<sup>182</sup>

However, in recognition of the continuing displacement of persons across different parts of the world following events unrelated to WWII, the Convention was subject to an amendment by the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).<sup>183</sup> The 1967 Protocol was entered into force on October 4, 1967, and is an independent instrument from the Refugee Convention.<sup>184</sup> Further, accession to it is not limited to those states already party to the Convention.<sup>185</sup>

The 1967 Protocol did not change the refugee definition in any material way other than by removing the aforementioned temporal and geographical limitations, and thereby strengthening the protection of refugees. Article 1(2) of the 1967 Protocol states “for the purpose of the present protocol, the term ‘refugee’ shall . . . mean any person within the definition of Article 1 of the Convention.”<sup>186</sup>

Article 1A(2) of the Convention, as amended by the 1967 Protocol, mandates that refugee status be granted to:

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.<sup>187</sup>

Thus, as the Refugee Convention stands today, the rights and protections conferred by the Convention are extended to all refugees.<sup>188</sup>

180. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 268 [hereinafter 1967 Protocol] (amending 1951 Refugee Convention).

181. 1951 Refugee Convention, *supra* note 177, at art. 1B.

182. See JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 175 (2nd ed. 2014).

183. 1967 Protocol, *supra* note 180.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. See HATHAWAY & FOSTER, *supra* note 182, at 1–2.

Moreover, the 1967 Protocol did not broaden the Convention rights but simply incorporated them by reference under Article 1(1). Thus, in effect the aim of the amendment was to expand the scope of the Convention and allow for the universal coverage of refugees.

However, the Convention definition applies only to specific types of displaced people. In other words, to qualify for refugee status, an individual must have a well-grounded basis for fearing persecution in their homeland. The basis for persecution is not generic. It can be for only one of five designated reasons.<sup>189</sup> These reasons include race, religion, nationality, political group, or membership of a particular social group.<sup>190</sup> In addition to this, in order for the Refugee Convention to apply, the individual must be outside their country of origin.<sup>191</sup>

These limitations are very considerable. Imagine a person is outside his country of origin and is almost certain to be killed if he returns to his country of origin because of general conflict or because the person is being targeted by powerful criminal gangs or corrupt government officials. Such a person is not entitled to invoke the Refugee Convention.

Importantly, the 1951 Refugee Convention continues to provide the guarantee of non-refoulement under Article 33. According to this principle, refugees cannot be expelled or returned to a country where they may be subject to persecution on account of their race, religion, nationality, membership of a particular social group, or political opinion.<sup>192</sup> However, this right is not conferred upon refugees reasonably regarded as posing a risk to national security or considered a danger to the community.<sup>193</sup> The Convention extends a number of other rights to refugees. For example, refugees are entitled to the same rights as citizens in relation to freedom of religion,<sup>194</sup> intellectual property,<sup>195</sup> access to courts<sup>196</sup> and legal assistance,<sup>197</sup> accessing elementary education,<sup>198</sup> labor rights,<sup>199</sup> and social security.<sup>200</sup>

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189. 1967 Protocol, *supra* note 180.

190. *Id.*

191. *Id.*

192. 1951 Refugee Convention, *supra* note 177, at art. 33.

193. *Id.*

194. *Id.* at art. 4.

195. *Id.* at art. 14.

196. *Id.* at art. 16.

197. *Id.*

198. *Id.* at art. 22.

199. *Id.* at art. 24.

200. *Id.*

As of April 2015, the total number of states party to the 1951 Refugee Convention is 145 and those party to the 1967 Protocol is 146.<sup>201</sup> The number of states who are parties to both the Convention and the 1967 Protocol stands at 142.<sup>202</sup> There are three countries (including the United States) who have agreed only to the 1967 Protocol, and two small countries who have agreed only to the Convention.<sup>203</sup> The Convention has been responsible for settling more displaced people than any other international instrument. Thus, despite the somewhat arbitrary limits imposed in the Convention, it has proven to be an incredibly successful platform upon which resettlement has occurred for millions of asylum seekers.

*E. The Role of the United Nations High Commissioner for Refugees (UNHCR)*

The UNHCR, replacing the IRO, was established by the UN General Assembly with a three-year mandate beginning January 1, 1951.<sup>204</sup> It was initially tasked with the goal of providing protection and establishing permanent solutions to deal with the refugee crisis.<sup>205</sup> As mandated under Article 2 of the UNHCR Statute, the work of the High Commissioner “shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.”<sup>206</sup>

UNHCR’s mandate and its operations were repeatedly renewed to address the ongoing refugee movements.<sup>207</sup> However, in 2003, the UN General Assembly converted the UNHCR into a permanent independent agency.<sup>208</sup>

It is also important to note that the Refugee Convention and UNHCR mandate were drafted at the same time. Thus, the framework of the UNHCR was very much built upon and centered around the intentions reflected in the Convention—mainly to assist and seek protection for the European refugees

201. *State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last updated Apr. 2015).

202. *Id.*

203. *Id.*

204. *See* UNHCR, *THE STATE OF THE WORLD’S REFUGEES*, *supra* note 163.

205. *Id.* at 22.

206. *Id.* at 19 (quoting UNGA Res. 319 (IV) (Dec. 3, 1949)).

207. U.N. HIGH COMM’R FOR REFUGEES, *UNHCR RESETTLEMENT HANDBOOK: DIVISION OF INTERNATIONAL PROTECTION 7* (revised Jul. 2011), <http://www.unhcr.org/46f7c0ee2.pdf> [hereinafter *UNHCR RESETTLEMENT HANDBOOK*].

208. *Id.*

displaced in the aftermath of the war.<sup>209</sup> However, as refugee movements became larger and more complex, the Convention's refugee definition presented significant limitations on the scope and activities of the UNHCR. In response, the mandate of the UNHCR was extended by the General Assembly to not only assist and monitor refugees but also displaced persons who fell outside the scope of the Refugee Convention.<sup>210</sup> Although the Convention definition itself was not broadened, the UNHCR's mandate was broadened to provide assistance to a number of other categories of persons it considers to be of concern.<sup>211</sup> This includes internally displaced persons, stateless persons, asylum seekers, and returnees.<sup>212</sup>

From a staff of thirty-four at the time of its founding, UNHCR now employs a staff of 10,700 as of October 31, 2016. The agency is active in over 128 countries, and its budget has grown from \$300,000 in its first year to more than \$1 billion in the early 1990s and reached \$7.2 billion in 2015.<sup>213</sup> In 2015, UNHCR celebrated its 65th anniversary.<sup>214</sup>

#### F. *Summary of International Refugee Instruments*

The above discussion shows that mass people movements are not new. There have been several large waves of displaced people throughout the twentieth century. On each occasion, countries that were affected by these movements found tenable solutions to deal with the problem. At times the solutions were ad hoc, while more recently they were more wide-ranging. However, none of the solutions were perfect and none involved receiving countries assuming legally enforceable obligations to accept displaced people. The world is currently experiencing an unprecedented problem associated with the forced movement of people. Unlike previous scenarios, there seems to be very little appetite by sovereign states to increase their intake of displaced people. It does not seem tenable that a new agreement or arrangement will be reached that will foreseeably resolve or significantly assist the current displaced people crisis. To the extent that some nations

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209. *Id.*

210. See UNHCR, THE STATE OF THE WORLD'S REFUGEES, *supra* note 163, at 24.

211. UNHCR RESETTLEMENT HANDBOOK, *supra* note 207, at 8.

212. *Id.* at 13–14.

213. See *Figures at a Glance*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/en-au/figures-at-a-glance.html> (last visited Aug. 25, 2017); see also *Donors Promise Initial US\$ 687.2 Million for UNHCR Operations in 2016, the Highest Amount Ever*, U.N. HIGH COMM'R FOR REFUGEES (Dec. 16, 2015), <http://www.unhcr.org/en-au/news/press/2015/12/56711bf96/donors-promise-initial-6872-million-unhcr-operations-2016-highest-amount.html>.

214. See UNHCR, THE STATE OF THE WORLD'S REFUGEES, *supra* note 163, at 1.

were willing to absorb significantly increased numbers of displaced people, this approach seems to have irretrievably stalled. This is highlighted by the reversal in Germany's approach to admitting displaced people.<sup>215</sup> In light of that, part of the solution may involve a more expansive interpretation of the existing Refugee Convention, and it is to that that I now turn.

#### IV. THE MEANING OF PARTICULAR SOCIAL GROUP IN A NUMBER OF REFUGEE COUNTRIES

##### *A. Overview of the Meaning of Particular Social Group*

Membership of a particular social group is one of the five persecution grounds as set out in Article 1A(2) of the Refugee Convention.<sup>216</sup> Article 1A(2) states:

For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(2) . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it . . . .<sup>217</sup>

It has consistently generated the most debate. The interpretation of this ground has been the most ill-defined persecution ground in the refugee definition. It is also potentially the widest. Thus, the manner in which it is interpreted can have immense ramifications for the capacity of displaced people to obtain asylum in a country and also for the obligations of states to absorb refugees within their borders.

There is relatively little precedent on the boundaries of particular social group and that which does exist is subject to conflicting interpretations. There is no uniform or consistent approach that has been taken on its meaning. The difficulty in achieving a clear and definitive interpretation can

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215. Faiola, *supra* note 4.

216. 1951 Refugee Convention, *supra* note 177, at art. 1A(2).

217. *Id.*

be seen across all jurisdictions, as it has generated considerable debate and controversy and resulted in various interpretations.<sup>218</sup> As noted by Justice McHugh of the High Court in Australia in *Applicant A & Another v Minister for Immigration and Ethnic Affairs & Another*:

Courts and jurists have taken widely differing views as to what constitutes “membership of a particular social group” for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.<sup>219</sup>

One reason for this is the lack of interpretative guidance provided within the Refugee Convention itself as to the intended meaning of the ground. As is well-known, the Convention itself does not attempt to expressly define the ground nor does it contain any specific list of groups that may constitute a “particular social group” within the meaning of Article 1A(2). Further, reference to the travaux préparatoires of the Refugee Convention is also particularly unhelpful in ascertaining the meaning of the ground. In fact, they show very little debate or insight as to the inclusion of the ground. All that is recorded is the Swedish delegate’s observation that: “Experience has shown that certain refugees [have] been persecuted because they belonged to ps groups. The draft convention made no provision for such cases, and one designed to cover them accordingly should be included.”<sup>220</sup>

In effect, the term was added near the end of deliberations on the draft convention as a last-minute addition with no clarity as to who the intended beneficiaries of the provision were to be.<sup>221</sup>

The lack of clarification in the Refugee Convention itself and within the legislative history of the Convention regarding the meaning of particular social group has resulted in a marked uncertainty regarding its scope and meaning. There is also a considerable lack of consensus within the case law

218. See generally James C. Hathaway & Michelle Foster, *Development: Membership of a Particular Social Group*, 15 INT’L J. REFUGEE L. 477 (2003).

219. *Applicant A & Another v Minister for Immigration and Ethnic Affairs & Another* (1997) 190 CLR 225, 259 (Austl.).

220. U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Third Meeting*, U.N. Doc. A/CONF.2/SR.3 (Nov. 26, 1951).

221. It has been suggested that the ground was included to provide a basis for persons in Eastern Europe during the Cold War and subject to persecution because of their social origins to claim protection. See Richard Plender, *Admission of Refugees*, 15 SAN DIEGO L. REV. 45, 52 (1977).



on the meaning of a particular social group, as a number of different approaches have emerged, even within the same jurisdiction, resulting in often conflicting interpretations of particular social group.<sup>222</sup> Thus, the case law merely adds to the uncertainty related to this concept.

Broadly, however, major common law countries—the United States, Canada, New Zealand, and the United Kingdom—have followed the principled “immutable characteristic” approach. The immutable characteristic approach examines whether a group shares an innate characteristic or a characteristic that is so fundamental that it would be unconscionable to force them to abandon or alter it. Australia, on the other hand, has focused on the “social perception” approach. This approach focuses on establishing the existence of a common characteristic that unites group members, and in turn, they are objectively a cognizable group within the society in question. The uniting characteristic or attribute does not need to be “immutable.” With respect to civil law jurisdictions, the case law suggests that the particular social group ground has not been developed in any meaningful or detailed manner.<sup>223</sup>

Irrespective of the approach followed, the case law demonstrates that it is widely accepted that it is not an essential condition that members of a particular social group interact and behave as a group, nor is it necessary that members are aware of the existence of other members to satisfy the Convention’s refugee definition.<sup>224</sup> Further, it is generally accepted that the fact that a group may be united by persecutory conduct or the shared fear of persecution cannot be the sole defining factor in establishing the existence of a particular social group for the purposes of the Convention definition. One must only demonstrate that a fear of persecution is based on his or her membership in the group. Nevertheless, it has been suggested that it may be a relevant factor in determining that the group is cognizable within society.<sup>225</sup>

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222. See discussion *infra* Sections IV.C, IV.D, IV.E.

223. U.N. High Comm’r for Refugees, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 8, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <http://www.unhcr.org/3d58de2da.pdf> [hereinafter UNHCR, Guidelines on International Protection].

224. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group’*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller et al., eds., 2003) [hereinafter Aleinikoff].

225. See discussion *infra* Section IV.D.

I now examine in more detail the current approaches to defining particular social group and recommendations regarding the preferable approach to this concept.

### B. UNHCR Guidance

The UNHCR Handbook, although not legally binding, has long been recognized as a leading source of practical guidance by courts in interpreting and applying the Refugee Convention and 1967 Protocol.<sup>226</sup> However, it is noteworthy that the UNHCR Handbook offers no real guidance as to what test or groups may satisfy the ground, going only as far as to state that, “a ‘particular social group’ normally comprises persons of similar background, habits or social status.”<sup>227</sup>

In an effort to provide some clarification, the UNHCR convened an expert roundtable in San Remo in September 2001 to address the interpretation and application of membership in a particular social group.<sup>228</sup> The seminar was attended by representatives “drawn from governments, NGOs, academia, the judiciary, and the legal profession.”<sup>229</sup>

In May 2002, UNHCR issued the resultant UNHCR Guidelines on International Protection (the Guidelines), which effectively updated the UNHCR Handbook which was last edited in 1992.<sup>230</sup> In the Guidelines, the UNHCR recognizes that membership in a particular social group is the protected “ground with the least clarity”; that it is being “invoked with increasing frequency”; and further, that the ratifying history does not shed any light as to which claimants may satisfy the ground.<sup>231</sup> Thus, the primary objective of the Guidelines is to provide legal “interpretative guidance for

226. U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) [hereinafter UNHCR, Handbook].

227. *Id.* at ¶ 77.

228. *Summary Conclusions: Membership of a Particular Social Group, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* (Erika Feller et al., eds., 2003) [hereinafter *Summary Conclusions*]. The seminar was part of the UNHCR’s Global Consultations on the International Protection of Refugees which began in 2000 and was designed by UNHCR to review a broad range of issues relating to the mass refugee movements—including various aspects of the Refugee Convention. For information on the Global Consultations on International Protections, see generally *Global Consultations General*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/en-us/protection/globalconsult/3b95cbce4/global-consultations-general.html> (last visited Aug. 25, 2017).

229. *Summary Conclusions*, *supra* note 228.

230. UNHCR, Guidelines on International Protection, *supra* note 223.

231. *Id.* at 2, ¶ 1.

governments, legal practitioners and decision-makers, including the judiciary” in their understanding and application of the ground in assessing protection claims of an applicant’s well-founded fear of persecution based on their membership in a particular social group.<sup>232</sup> It also directs that “the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>233</sup>

Although the ground “cannot be interpreted as a catch-all,”<sup>234</sup> the Guidelines ultimately propose a combination of the “protected characteristic” and “social perception” approaches in establishing the existence of a particular social group.<sup>235</sup> In other words, it proposes a “single standard that incorporates both dominant approaches” to avoid gaps in the protection of refugees<sup>236</sup>—ultimately broadening the scope of the ground.

This reconciliation of approaches is reflected in the definition set out in the Guidelines:

A group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>237</sup>

Further, the Guidelines recommend that:

If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless

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232. *Id.* at 1.

233. *Id.* at 2, ¶ 3.

234. *Id.* at 2, ¶ 2.

235. *Id.* at 2–3, ¶¶ 5–7.

236. *Id.* at 3, ¶ 11.

237. *Id.*

constitute a particular social group if in the society they are recognized as a group which sets them apart.<sup>238</sup>

Accordingly, the Guidelines maintain that the existence of an immutable characteristic will ultimately lead to the finding that the purported group is a particular social group for the purposes of the Refugee Convention definition. However, where there is no immutable characteristic, the analysis should then turn to the social visibility of the group. Thus, the social perception approach acts as an alternative limb.

The Guidelines also confirm that the cohesiveness of a particular social group is not a necessary requirement.<sup>239</sup> Further, the group “cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted”—however, persecutory conduct may still be considered.<sup>240</sup>

### C. *United States of America*

The Refugee Convention definition was first codified in domestic United States law under the Refugee Act of 1980<sup>241</sup>—described as “the most comprehensive U.S. law ever enacted concerning refugee admissions and resettlement.”<sup>242</sup> The Act was largely intended to ensure United States immigration law was consistent with its rights and obligations under the Refugee Convention and, as such, incorporated a new definition of refugee that was in line with the Convention’s definition.<sup>243</sup> The refugee definition is now contained under the Immigration and Nationality Act (INA) and classifies a refugee as a person who is “outside the United States and is unable or unwilling to return to his or her country of origin because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political

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238. *Id.* at 4, ¶ 13.

239. *Id.* at 4, ¶ 15.

240. *Id.* at 4, ¶ 14.

241. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a)(42)(A), 94 Stat. 102 (1980). The United States did not sign the Refugee Convention; however, it adopted the obligations under the Refugee Convention by accession to the 1967 Protocol. The 1967 Protocol explicitly incorporated the convention’s refugee definition.

242. Arnold H. Leibowitz, *The Refugee Act of 1980: Problems and Congressional Concerns*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 164 (1983).

243. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505 (1993).

opinion”—as amended by the Refugee Act of 1980.<sup>244</sup> However, as was the case with the legislative history of the Convention, the United States Congress did not provide any guidance or explanation as to the meaning intended to attach to the particular social group ground.<sup>245</sup> As a result, the definition of particular social group within the United States has been predominately developed through determinations handed down by the Board of Immigration Appeals (BIA).

The BIA first took on the task of interpreting and identifying the hallmarks of a particular social group in the seminal case of *Matter of Acosta* in 1985.<sup>246</sup> In that case, the BIA rejected the purported particular social group of taxi drivers in El Salvador who were members of a taxi cooperative targeted by guerrillas.<sup>247</sup> In reaching their determination, the BIA put forth a singular and somewhat narrow test to determine whether an asylee qualified as a member of a particular social group.<sup>248</sup> The test, now known as the “protected characteristic” approach, is based on the existence of an immutable characteristic.<sup>249</sup>

After reviewing the drafting history of the particular social group ground in the Refugee Convention and the work of commentators, the BIA noted that this provided no relevant guidance and subsequently turned to the traditional methods of statutory interpretation. Specifically, they relied on the principle of *ejusdem generis* which, as the BIA explained:

We find the well-established doctrine of *ejusdem generis*, meaning literally, “of the same kind,” to be most helpful in construing the phrase “membership in a particular social group.” That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words . . . . Those being: “race,” “religion,” “nationality,” and “political opinion.”<sup>250</sup>

Accordingly, the BIA turned to the four specific grounds enumerated under the INA, as set out above, to identify central elements consistent among them and found that “each of these grounds describes persecution

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244. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(42)(A), 66 Stat. 163 (1952).

245. Fullerton, *supra* note 243, at 513.

246. *Matter of Acosta*, 19 I&N Dec. 211, 212 (BIA 1985).

247. *Id.* at 225–33.

248. *Id.*

249. *Id.*

250. *Id.* at 233.

aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>251</sup>

In observing a standard consistent with each of the four other grounds of asylum, the BIA determined that a particular social group involved persecution that is directed toward an individual who is a member of a group of persons all of whom share a “common, immutable characteristic.”<sup>252</sup> More specifically, the particular social group ground is akin to the other Convention grounds in that it restricts refugee status to individuals who fear persecution or harm on the basis of innate characteristics that cannot be changed *or* fundamental characteristics which, as a matter of conscience, should not be required to be changed to avoid persecution.<sup>253</sup>

Thus, there are effectively two limbs to the immutability requirement delineated by the BIA. Firstly, asylum protection is extended to any member of a group whose common characteristic or attribute is *unchangeable*. The BIA, by way of example, cites that “the shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances . . . a shared past experience such as former military leadership or land ownership.”<sup>254</sup> Alternatively, although a trait may be changeable, it should not be expected to be changed because it is truly fundamental to the individual’s identity or conscience. This effectively embraces an unconscionability analysis in that requiring an individual to abandon or change the trait would contravene their most fundamental human rights.<sup>255</sup> Although this aspect of the *Acosta* standard is not well-developed in case law, possible examples of social groups that may satisfy this test include individuals defined by their homosexuality.<sup>256</sup>

By way of example, the BIA has found that the following are particular social groups defined by either immutable or fundamental characteristics under the *Acosta* standard: former members of the Salvadoran National Police;<sup>257</sup> young women from a tribe in Togo who have not had female genital mutilation that was practiced by that tribe and who oppose the practice;<sup>258</sup> Iranian women who refuse to comply with the government’s

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251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. See HATHAWAY & FOSTER, *supra* note 182 (explaining law of refugee status).

256. See Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

257. Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988).

258. Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996).

gender-specific laws and norms;<sup>259</sup> and, as mentioned above, Cubans whose sexual orientation is homosexual.<sup>260</sup>

Ultimately, the BIA rejected the claimed particular social group of taxi drivers because the characteristic that defined the group (that is, their occupation as taxi drivers) was neither immutable nor fundamental.<sup>261</sup> The taxi drivers were free to change their occupations; further, it was not unconscionable to require them to do so in order to avoid persecution or fear of persecution.<sup>262</sup> The BIA recognized that “it may be unfortunate, that [Acosta] either would have had to change his means of earning a living or cooperate with the guerillas in order to avoid threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.”<sup>263</sup>

Moreover, the BIA also confirmed that a particular social group cannot be established on the grounds that the group is solely defined by persecution or the fear of persecution.<sup>264</sup>

However, the clarity *Acosta* provided within the United States context was, at the least, muddled in 2006 when the BIA set out additional factors relevant to the particular social group analysis in *Matter of C-A*.<sup>265</sup>

The BIA began its analysis by reaffirming that members of a particular social group must share a common, immutable characteristic.<sup>266</sup> It also affirmed that “a past experience is, by its very nature, immutable, as it has already occurred and cannot be undone.”<sup>267</sup> The BIA also addressed the cohesiveness and voluntary association of group members in a particular social group and confirmed that neither is necessary to be established in finding the existence of a particular social group.<sup>268</sup>

However, according to the BIA in *Matter of C-A*, the existence of a protected characteristic does not necessarily go on to mean that all groups that satisfy this requirement will constitute a particular social group because they are not all cognizable within a society.<sup>269</sup> Thus, the BIA would also consider in its analysis “the extent to which members of a society perceive

259. *Fatin v. I.N.S.*, 12 F.3d 1233, 1241 (3d Cir. 1993).

260. *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

261. *Matter of Acosta*, 19 I&N Dec. 211, 233–34 (BIA 1985).

262. *Id.*

263. *Id.* at 234 (citing ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 214 (1966)).

264. *Id.*

265. *Matter of C-A*, 23 I&N Dec. 951, 956 (BIA 2006).

266. *Id.* at 955.

267. *Id.* at 958.

268. *Id.* at 956–57.

269. *Id.* at 958.

those with the characteristic in question as members of a social group.”<sup>270</sup> In other words, a particular social group must also be perceived as a recognizable and distinct group within the relevant society.

Notably, this was the first time the BIA made express reference or consideration to the concept of “social visibility” in its particular social group analysis. Further, the BIA did not acknowledge any departure from the *Acosta* standard, rather it stated that its decisions had always “considered the recognizability i.e. the social visibility, of the group in question.”<sup>271</sup> To support this assertion, the BIA noted a number of groups it had previously found to constitute a particular social group on the basis of, not only that its members shared a protected trait, but also that the protected traits were “‘highly visible’ and ‘recognizable’ by others in the country in question,” and as such were “generally easily recognizable and understood by others to constitute social groups.”<sup>272</sup>

Accordingly, the BIA began its analysis by applying the *Acosta* formulation as the starting point for the social group analysis—that is, whether the proposed social group shared an immutable or fundamental characteristic.<sup>273</sup> The BIA held that it did not because of “the voluntary nature of the decision to serve as government informants.”<sup>274</sup> The BIA then went on to consider the social visibility of the proposed group. In doing so, it found that the group was not sufficiently distinct or recognizable in Colombian society because “the very nature of the conduct at issue is such that it is generally out of the public view.”<sup>275</sup> Further, the BIA emphasized that the claimant, in his capacity as an informant, intended “to remain unknown and undiscovered” which did not support the notion that the group was perceived as a distinct group within the relevant society.<sup>276</sup>

Ultimately, the BIA held that the purported group of “drug informants” did not constitute a particular social group for the purposes of INA § 101(a)(42)(A) due to the “voluntary nature of the decision to serve as a government informant, the lack of social visibility of the members of the

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270. *Id.* at 957.

271. *Id.* at 959.

272. *Id.* at 959–60; see Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 64–65 (2008).

273. Matter of C-A-, 23 I&N Dec. 951, 955 (BIA 2006).

274. *Id.* at 961.

275. *Id.* at 960.

276. *Id.*



purported social group, and the indications in the record that the Cali cartel retaliates against anyone perceived to have interfered with its operations.”<sup>277</sup>

Thus, key to the social visibility requirement is that the relevant characteristic is significant pursuant to broad social perceptions, as opposed to merely the victim or the persecutor.<sup>278</sup>

Further, the BIA considered a third element relevant to its particular social group analysis: the “particularity” of the proposed social group. The BIA did not—in any comprehensive manner—deal with this issue but simply held that the group of non-criminal informants was “too loosely defined” to meet the particularity requirements set forth by the court.<sup>279</sup> It was again noteworthy that the concept of particularity had not previously been articulated or considered by the BIA under the *Acosta* standard.

In 2007, the analysis under *Matter of A-M-E- & J-G-U-* added further confusion to the social group analysis.<sup>280</sup> Although affirming the requirement of an immutable or fundamental characteristic, the BIA’s analysis of the requirement was rather brief. The BIA noted that “wealth” was a characteristic that can change and therefore is not an immutable characteristic.<sup>281</sup> However, it did not fully address whether it is a characteristic so fundamental that a person should not be required to change or alter it.<sup>282</sup>

The BIA then went on to reaffirm social visibility, as set out in *Matter of C-A-*, as a factor relevant in determining the existence of a particular social group.<sup>283</sup> The BIA also emphasized that the social visibility of a group is determined by examining the country of concern.<sup>284</sup> Thus, according to the BIA, the group must be easily recognizable and distinct from others in the relevant society.

Ultimately, the BIA found that the claimed group of affluent Guatemalans were not a cognizable group within Guatemalan society because “violence and crime in Guatemala appear to be pervasive at all socio-economic levels.”<sup>285</sup> Thus, the claimed group did not satisfy the social visibility test.<sup>286</sup> The BIA also considered the particularity requirement articulated in *Matter in C-A-*, stating:

277. *Id.* at 961.

278. *See* Marouf, *supra* note 272, at 64–65.

279. *Matter of C-A-*, 23 I&N Dec. at 957.

280. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).

281. *Id.* at 73–76.

282. *Id.*

283. *Id.* at 74.

284. *Id.*

285. *Id.* at 75.

286. *Id.*

The terms “wealthy” and “affluent” standing alone are too amorphous to provide an adequate benchmark for determining group membership. Depending upon one’s perspective, the wealthy may be limited to the very top echelon; but a more expansive view might include small business owners and others living a relatively comfortable existence in a generally impoverished country. Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.

The respondents’ proposed social group is indeterminate, and not just at the margins, as will often be the case in describing group membership. Rather, when “wealth” is the sole criterion, group membership is difficult to delimit for a large swath of potential members. The characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group.<sup>287</sup>

Thus, the BIA ultimately held that the social visibility and particularity tests could not be satisfied on the facts; therefore, wealthy Guatemalans did not constitute a particular social group for the purposes of INA § 101(a)(42).

Both *Matter of C-A-* and *Matter of A-M-E- & J-G-U-* represent a significant departure from the precedent set out in *Acosta*. Whether the BIA is applying “social visibility” and “particularity” as an important factor or essential requirement in all social group cases, it still represents a sudden, significant, and unexplained departure from *Acosta* and other precedents, not to mention international authorities. The BIA’s new emphasis on social visibility undermines the principled framework for analyzing social group claims set forth in *Acosta* and will lead to incoherent, inconsistent decisions. Moreover, the decisions failed to follow the sequential steps set out in the UNHCR Guidelines, which explicitly provide that social perception should be considered only if there is no protected characteristic—in other words, as alternative tests, as opposed to additional mandatory requirements.

In two subsequent cases, the BIA attempted to provide some additional clarification as to how these concepts should be applied, and additionally, somewhat illuminated the reasoning in adopting social visibility and particularity.

In *Matter of S-E-G-*, the BIA considered whether “Salvadoran youths who have resisted gang recruitment [into the MS-13 criminal gang], or

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287. *Id.* at 76.

family members of such Salvadoran youth” constituted a particular social group.<sup>288</sup> In its analysis, the BIA stated that not only would the group members need to share an immutable or fundamental characteristic, but they must also “have particular and well-defined boundaries . . . and . . . possess a recognized level of social visibility.”<sup>289</sup> The ruling, in effect, affirmed that social visibility and particularity are requirements in the particular social group analysis—giving “greater specificity to the definition of a social group.”<sup>290</sup>

*Matter of E-A-G-* provided the BIA with further opportunity to provide clarification to the newly articulated social visibility requirement.<sup>291</sup> The BIA stated:

In recent years, we have issued a line of cases reaffirming the particular social group formula set forth in *Matter of Acosta* . . . and providing further clarification regarding its proper application. *See Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007) (indicating that young Bambara women who oppose arranged marriage were not a particular social group); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74–75 (BIA 2007) (holding that “affluent Guatemalans” did not constitute a particular social group); *Matter of C-A-*, 23 I&N Dec. 951, 959–61 (BIA 2006) (finding that noncriminal informants working against the Cali drug cartel in Colombia were not a particular social group), *aff’d*, *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom. Castillo-Arias v. Gonzales*, 127 S. Ct. 977 (2007). In each of these cases, we emphasized that the purported group’s social visibility—i.e., the extent to which members of a society perceive those with the characteristic in question as members of a social group—is of particular importance in determining whether an alien is a member of a claimed particular social group . . . .<sup>292</sup>

The BIA held that there was no societal perception that members of the claimed group of “persons resistant to gang membership” was a cognizable group within society.<sup>293</sup>

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288. *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

289. *Id.* at 582.

290. *Id.*

291. *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

292. *Id.* at 594.

293. *Id.*

In 2014, in *Matter of M-E-V-G-* and *Matter of W-G-R-*, the BIA addressed the uncertainties and provided some clarification regarding the two new requirements.<sup>294</sup> In each of these decisions, the BIA clarified that social visibility was never intended to require a literal or ocular visibility.<sup>295</sup> Rather, “[t]o be socially distinct, a group need not be seen by society; it must instead be perceived as a group by society . . . . Members of the group may be visibly recognizable, but society can also consider persons to be a group without being able to identify the members by sight.”<sup>296</sup> Thus, it is not essential that the protected characteristics that define the group are visible on sight. In fact, in an effort to avoid any potential for further confusion, the BIA, in *Matter of W-G-R-*, renamed the “social visibility” requirement to “social distinction.”<sup>297</sup> The BIA also clarified that the concept of particularity is concerned with the demarcation of the group, that is “whether the group is ‘sufficiently distinct’ that it would constitute a ‘discrete’ as opposed to ‘amorphous’ group of persons.”<sup>298</sup>

In summary, the BIA confirmed:

[T]hat an applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is

- (1) composed of members who share a common immutable characteristic;
- (2) defined with particularity and;
- (3) socially distinct within the society in question.<sup>299</sup>

In *Matter of M-E-V-G-*, the BIA considered the purported group of “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”<sup>300</sup> The BIA held that the group was not perceived as a distinct group in Honduran society and further

294. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240–41 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

295. *W-G-R-*, 26 I&N Dec. at 216 (citing *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087–89 (9th Cir. 2013) (en banc)); *M-E-V-G-*, 26 I&N Dec. at 234.

296. *W-G-R-*, 26 I&N Dec. at 216–17 (citing *In re C-A-*, 23 I&N Dec. 951, 956–57 (BIA 2006)).

297. *Id.* at 216 (citing *Henriquez-Rivas*, 707 F.3d at 1087–89); *M-E-V-G-*, 26 I&N Dec. at 228.

298. *W-G-R-*, 26 I&N Dec. at 210 (citing *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008)).

299. *Id.* at 208; *M-E-V-G-*, 26 I&N Dec. at 237.

300. *M-E-V-G-*, 26 I&N Dec. at 228.

that the group was not particularly defined.<sup>301</sup> In *Matter of W-G-R-*, “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” were not found to be a particular social group because its boundaries were too general and wide-ranging, and there was no evidence to suggest the group was viewed as distinct from society at large.<sup>302</sup>

Thus, the jurisprudence in the United States regarding the meaning of particular social group is currently unclear and replete with vague definitions and concepts. In particular, the inclusion of the new social visibility and particularity requirements has resulted in a narrow and somewhat harsh construction of the term particular social group. This obviously makes it very difficult for applicants to predict the likely outcome of their applications and engenders an unsatisfactory degree of uncertainty within this area of law. However, it is clear that the requirement for an immutable characteristic remains central to the test of particular social group.

#### *D. Australia*

The position in the United States regarding the meaning of a particular social group can be contrasted with that adopted in Australia. As noted above, the “social perception” approach is the dominant approach in Australian jurisprudence. This test was first set out by the High Court of Australia in *Applicant A*.<sup>303</sup>

As noted by Justice Dawson, a particular social group is a group of persons “who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognizable group within their society.”<sup>304</sup> In other terms, the existence of a particular social group ultimately turns on whether the group shares a common attribute and as a result may be perceived as a distinct group within their society.

In *Applicant A*, Justice McHugh further explained:

The use of [the term “membership”] in conjunction with “particular social group” connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people

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301. *Id.* at 249.

302. *W-G-R-*, 26 I&N Dec. at 221–22.

303. *Applicant A & Another v Minister for Immigration and Ethnic Affairs & Another* (1997) 190 CLR 225 (Austl.).

304. *Id.* at 241.

in the relevant country as a particular social group, *it will usually but not always be the case that they are members of such a group*. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerillas, for example, are not a particular social group.<sup>305</sup>

The main point of contrast between the American and Australian position is that the Australian interpretation does not require the substratum for the claim to particular social group to be an immutable characteristic. Rather, the analysis falls on the “external perceptions of the group.”<sup>306</sup> The High Court did not follow the BIA’s approach in aligning the particular social group ground with the other four Convention grounds, and as such, the social perception approach is more likely to catch a broader range of groups. This is also recognized in the UNHCR Guidelines which state the following:

For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class.<sup>307</sup>

The High Court also acknowledged the widely accepted position that persecution or the fear of persecution will not satisfy as the uniting attribute so as to avoid the ground becoming a catch-all.<sup>308</sup> However, persecutory conduct on the basis of a characteristic may be a factor in establishing that the group is socially recognizable within a society. As noted by Justice McHugh:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors *may serve to identify or even cause the creation of a particular social group in society*. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group.

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305. *Id.* at 264–65.

306. *Id.* at 264.

307. UNHCR, Guidelines on International Protection, *supra* note 223, at 3.

308. *Applicant A*, 190 CLR at 242.

Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.<sup>309</sup>

Ultimately, the court rejected the proposed social group of “those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilized” by China’s One Child policy on the basis that “there was no social attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a particular social group for Convention purposes.”<sup>310</sup>

The meaning of particular social group was again considered by the High Court of Australia in 2004 in *Applicant S v Minister for Immigration and Multicultural Affairs*.<sup>311</sup> *Applicant S* confirms that it is not a mandatory requirement to show that the group in question is perceived as a collection of individuals that comprises a particular social group. Rather, social recognition of group status is merely an evidential consideration that can assist in determining whether the collection of individuals are objectively set apart from other members of society and united by a common characteristic. Chief Justice Gleeson and Justices Gummow and Kirby noted the following:

[P]erceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society.<sup>312</sup>

In rejecting it as a mandatory requirement, the High Court reasoned:

Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community. Those communities do not recognise or perceive the

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309. *Id.* at 264.

310. *Id.* at 269–70.

311. *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 400 (Austl.).

312. *Id.* at 397–98.

existence of the particular social group, but it cannot be said that the particular social group does not exist.<sup>313</sup>

In summary, the finding of a particular social group, as articulated by Chief Justice Gleeson and Justices Gummow and Kirby in a joint judgment, falls on the following three factors:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of [Justice Dawson] in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a “social group” and not a “particular social group.” As this Court has repeatedly emphasised, identifying accurately the “particular social group” alleged is vital for the accurate application of the applicable law to the case in hand.<sup>314</sup>

#### *E. Canada*

The leading authority on the definition of a particular social group in Canada is the decision of *Canada (Attorney General) v. Ward*.<sup>315</sup> The Supreme Court of Canada adopted a relatively narrow reading of the term so as to avoid the ground becoming a “safety net to prevent any possible gap” in protection, and thereby rendering the other four Convention grounds effectively redundant.<sup>316</sup>

Justice La Forest reasoned that the meaning of membership in a particular social group should take into account “the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.”<sup>317</sup>

Accordingly, a particular social group, as defined by Justice La Forest, includes the following three categories: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should

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313. *Id.* at 400.

314. *Id.* at 400–01.

315. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.).

316. *Id.* at 728, 740.

317. *Id.* at 739 (following the approach of a U.S. case, *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)).



not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>318</sup>

Thus, the approach set out by the Supreme Court of Canada goes beyond that espoused in *Acosta* by recognizing groups beyond those which share a characteristic that is immutable. For example, the second category includes voluntary associations based on characteristics that are fundamental to human dignity but perhaps changeable. One example used by the court is human rights activists.<sup>319</sup>

Under this standard, the court ultimately found that the Irish National Liberation Army (INLA), of which the claimant was a former member, did not constitute a particular social group because his membership status was not an immutable characteristic in the sense that it could be altered, nor was it “unalterable due to its historical permanence.”<sup>320</sup> The court further held that his fear was not based on his past membership in the INLA and stated that his membership “placed him in the circumstances that led to his fear, but the fear itself was based on his action, not his affiliation.”<sup>321</sup>

In the subsequent case of *Chan v. Canada (Minister of Employment and Immigration)*, Justice La Forest revisited the second category of potential particular social groups he had set out in *Ward*.<sup>322</sup> He clarified that the categories enunciated were working rules only, as opposed to absolute rules, and in relation to category two, “a refugee alleging membership in a particular social group does not have to be in a voluntary association with other persons similar to him or herself.”<sup>323</sup>

## V. THE PREFERRED DEFINITION OF PARTICULAR SOCIAL GROUP

Thus, it follows from the above discussion that there is no consistent or established jurisprudence regarding the meaning of particular social group. The manner in which the term is interpreted varies from jurisdiction to jurisdiction. We have seen that the definition adopted in the United States is probably the narrowest interpretation of the countries that have been examined in this Article. Given the lack of consensus and innate uncertainty regarding the meaning of particular social group, it is opportune to critically evaluate the manner in which this concept should be interpreted and applied.

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318. *Id.*

319. *Id.*

320. *Id.* at 744.

321. *Id.* at 693.

322. *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 (Can.).

323. *Id.* at 597.

In interpreting the meaning of particular social group, there are a number of fundamental assumptions and principles which should guide this analysis. Firstly, it is unquestionable that the historical and normative backdrop to the Convention should guide the manner in which it is interpreted, including the meaning of particular social group. Secondly, for any proposed new interpretation to be tenable it must be cognizant of existing jurisprudence and contemporary values and needs. There has been a large degree of analysis in the United States context regarding the meaning of particular social group, and there is a degree of clarity regarding the theoretical test which is applied to determine if a person fits within this category of asylum seeker. In practice, however, the test that has been proposed is so vague and impressionistic that there is often a large degree of uncertainty and unpredictability regarding whether a trait falls within a particular social group. As we have seen, there is no agreed standard for determining, for example, whether or not a characteristic is immutable and whether the social visibility test is satisfied. Accordingly, it follows that a proposed reform to this definition will not undercut the desirability for certainty and predictability in the law.

Also, as we have seen, the history and drafting of the Convention provide very little concrete guidance regarding the meaning that should be attributed to particular social group. The UNHCR has indicated what it believes to be the preferred definition; however, its views do not carry any persuasive weight, apart from the intrinsic coherence of its argument. Thus, it follows that there are few historical anchors which forcefully compel a specific definition of particular social group. Accordingly, the main drivers of a preferred definition are the intention behind the Convention overall, contemporary needs, and pragmatic political and social realities.

Further, the broad objective underpinning refugee law is to provide a coherent and clear pathway for people that are persecuted in their homeland to obtain sanctuary in other countries that have the means to facilitate their entry and residence. For this to be achieved, it is necessary to have a definition setting the profile of people who qualify for asylum. The definition adopted in the Convention has a number of key integers, including that the person must be outside their homeland and have a fear of persecution. As we have seen, the persecution must also be for one or more of five enumerated grounds.

In assessing these integers, it is important to distinguish between those that are core to the nature of a refugee and those which are incidental. To this end, it is clear that fear of persecution is a central element to the definition. It is this situation that drives people from their homelands and simultaneously often engenders empathy for them by other people, even those living in other countries. The need for persecution is in fact the entire

fulcrum around which refugee law and practice is based. This is evident from the fact that people who are of the exact profile of refugees but seek asylum for other reasons, such as economic prosperity, are habitually and consistently refused sanctuary in other countries.

In principle, there is no need for a person who is in fear of being persecuted to be outside of their homeland and in desperate need of asylum elsewhere. International borders are in effect simply invisible lines on the earth's surface. Whether or not a person is one meter within or outside their country of origin should not make a difference regarding their eligibility for refugee status. However, this requirement, while having no normative basis, does have a pragmatic underpinning. It is used as a mechanism to distinguish and thereby limit the amount of displaced people who can apply for refugee status under the Convention. If this was not in existence, there would be a risk that countries would be overwhelmed by applications under the Refugee Convention and therefore inclined to withdraw from their obligations under the Convention.

When it comes to the current grounds in the Convention, different considerations emerge. There is no logical or normative reason for limiting refugee status to these grounds. As we have seen, this is nearly a matter of historical accident, stemming from the profile of most of the people who were in fear of persecution at the time of the Convention's drafting. Further, there was no principled reason for limiting refugee status to these five grounds at the time the Convention was drafted. In addition to this, there was clearly no express desire to provide a narrow meaning to particular social group. In fact, there was virtually no consideration given to this concept. To the extent that some express consideration was given to this ground, it seems like it was designed to provide a vehicle through which the criteria for refugee status could evolve as political and social factors changed over time.

Moreover, it is important in interpreting any legal instrument that moral considerations guide the analysis, at least to the extent that they are not undercut by existing jurisprudence. It is important to note that whether or not a person qualifies as a refugee can have a profound, often life-changing effect on the person. It is an incontestable moral truth that, to the extent possible, decisions that have a central impact on peoples' lives should be made by reference to clear and defensible standards as opposed to arbitrary norms.

In addition to this, there is no doubt that the world is experiencing an almost unprecedented crisis regarding the amount of displaced people, many of whom qualify as refugees according to current understandings or who could qualify subject to minor changes to the definition of a refugee.

From the above analysis, it follows that particular social group should be interpreted in an inclusive and broad manner. As we have seen, there is

no principled or historical reason that the ground should relate only to immutable characteristics. This is especially true given that there is no clear definition of an immutable characteristic. The core aspect of this term is membership in a group. The other clear aspect of the definition is that it must to some degree have social recognition or positioning. The definition of particular social group which is the most defensible is that adopted by the High Court of Australia. As we have seen, this has three different requirements, none of which include the requirement that the relevant trait is immutable. This requirement does not seem to have any basis in logic, history, or jurisprudence. It should be abolished. This would result in a far greater number of people being able to use the Refugee Convention as a basis for asylum without undermining the legal or normative integrity of the Convention.

The definition of a particular social group in Australia, while somewhat obscure in its application, allows for the acceptance of a far greater number of traits and behaviors to come within the scope of particular social group. The definition is so broad that it would allow not only narrow subgroups to be recognized, for example, alcoholics in Iran,<sup>324</sup> but also extremely wide characteristics, such as being a female. In fact, it has been postulated that this trait of itself comes within the meaning of particular social group in Australia.<sup>325</sup>

In addition to this, other broad characteristics which are not immutable could also qualify under the Australian definition but are unlikely to be consistent with current United States case law. This expansion would include people who have avoided military service, members of a stigmatized professional group or trade union, and people employed or living in regional areas.<sup>326</sup> This approach would have the advantage of considerably expanding the number of people who would be eligible for resettlement in the United States on the basis of their refugee status. It would also make the law more coherent and considerably improve the amount of net humans flourishing in the world.

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324. Tessa Akerman, *Iranian Man Who Can't Stop Drinking May Get Refugee Status*, AUSTRALIAN, (Dec. 27, 2016, 12:00 AM), <http://www.theaustralian.com.au/national-affairs/immigration/iranian-man-who-cant-stop-drinking-may-get-refugee-status/news-story/d417f0c05042c7aeb5487fd9>.

325. JOHN VRACHNAS ET AL., *MIGRATION AND REFUGEE LAW: PRINCIPLES AND PRACTICE IN AUSTRALIA* 216 (3d ed. 2012).

326. *Id.* at 218.

## VI. INCREASING THE REFUGEE QUOTA

In this part, I discuss the second aspect of my solution to ameliorating the current refugee and displaced person crisis. This solution involves the United States considerably increasing its intake of offshore refugees. The current United States intake of refugees consists of two main cohorts. There are onshore refugees who are also called asylees.<sup>327</sup> These figures vary from year to year, but the most recent data shows that there are generally around 26,000 asylees.<sup>328</sup> The second cohort is offshore refugees.<sup>329</sup> This figure also varies, and the refugee ceiling for Fiscal Year 2017 stands at 110,000, an increase of 25,000 from Fiscal Year 2016, although as noted earlier, the refugee quota has recently been halved.<sup>330</sup>

These projections are now somewhat speculative given that, as indicated in the Introduction to this Article, President Trump in March 2017 put a freeze on refugee arrivals and has halved the refugee quota.<sup>331</sup> These changes make the proposal in this part of the Article even more important and pressing. This is because the United States should in fact significantly increase the number of refugees it admits rather than suspending refugee arrivals.

In objective terms, the 110,000 refugee quota established by the previous United States administration is a considerable number but, relatively speaking, the United States still lags behind other developed countries in terms of its pro rata acceptance of offshore refugees. Australia, for example, accepts approximately 10,000 people offshore annually and has a population that is approximately less than 10% of the United States.<sup>332</sup> The collective sympathy demonstrated by the United States for admitting refugees is also significantly dwarfed by the empathy expressed by other developed countries. Figures in 2016 show that Sweden admitted almost

327. *Refugees & Asylum*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, at 1, <https://www.uscis.gov/humanitarian/refugees-asylum> (last updated Nov. 12, 2015).

328. MOSSAAD, *supra* note 20, at 1.

329. *Refugees & Asylum*, *supra* note 327, at 1.

330. BRUNO, *supra* note 21, at 2.

331. As noted, at the time of the writing of this Article, this freeze had been halted by a U.S. Appeals Court. *See* Liptak, *supra* note 13, at 1, 5–6.

332. *See Australia's Offshore Humanitarian Programme: 2013–2014*, DEP'T IMMIGRATION AND BORDER PROTECTION (DIBP) (2014), <https://www.border.gov.au/ReportsandPublications/Documents/statistics/australia-offshore-humanitarian-program-2013-14.pdf>; *Department of Immigration and Border Protection Annual Report 2014–2015*, DEP'T IMMIGRATION AND BORDER PROTECTION (DIBP) (2015), <https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/DIBP-Annual-Report-2014-15.pdf>.

exactly the same number of refugees and asylum seekers as the United States, yet its population is approximately 10 million. Germany, which has a population less than one-third the size of the United States, has admitted four times as many asylum seekers. Even relatively poor developed countries such as Greece and Spain have on a pro rata basis admitted far more asylum seekers.<sup>333</sup>

The United States is the world's leading and largest economy. It is also the world's third biggest country based on land mass.<sup>334</sup> It has more capacity and a greater financial ability to absorb more people than perhaps any other country on earth. In addition, at the geopolitical level, it is the most influential nation on earth and has assumed a role as a democratic and moral exemplar to other nations. The flipside of this is that the United States is morally and politically obliged to meaningfully assist in ameliorating international crises.

As we have seen, the number of displaced people is the greatest modern-day crisis, as defined by the amount of net human suffering that has and continues to be caused. The number of displaced people is currently at unprecedented levels. While displaced people come from certain geographical regions, the world is now far more integrated than at any point in human history, and the moral responsibilities of individuals and countries are universal. All countries have a duty to assist in accommodating the burgeoning number of displaced people. There is no clear cut, optimal number of displaced people that each country should absorb. As noted by Peter Singer in the context of Australia's refugee quota (the same normative argument applies in the context of the United States refugee quota):

[T]here is a strong case for Australia to double its refugee intake. But there was nothing in the argument that relied on the specific level of refugees now being taken by Australia. If this argument goes through, it would also seem to follow that Australia should be taking not an extra 12,000 refugees, but an extra 24,000 refugees a year. Now the argument seems to be going too far, for it can then be reapplied to this new level: should Australia be taking 48,000 refugees? We can double and redouble the intakes of all the major nations of the developed world, and the refugee camps around the

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333. *2016 Report: Situation of Refugees in Spain and Europe Executive Summary*, COMISION ESPANOLA DE AYUDA AL REFUGIADO (2016); *Greece: A Year of Suffering for Asylum Seekers*, HUMAN RTS. WATCH (Mar. 15, 2017, 12:00 AM), <https://www.hrw.org/news/2017/03/15/Greece-year-suffering-asylum-seekers>.

334. *The World Fact Book*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html> (last updated July 25, 2017).

world will still not be empty. Indeed, the number of refugees who would seek resettlement in the developed countries is not fixed, and probably there is some truth in the claim that if all those now in refugee camps were to be accepted, more refugees would arrive to take their places. Since the interests of the refugees in resettlement in a more prosperous country will always be greater than the conflicting interests of the residents of those countries, it would seem that the principles of equal consideration of interests points to a world in which all countries continue to accept refugees until they are reduced to the same standard of poverty and overcrowding as the third world countries from which the refugees are seeking to flee.<sup>335</sup>

Thus, there is no clear number of refugees which a developed country is normatively obliged to absorb. However, it is clear that by relative standards, the United States is shirking its responsibility to accommodate the growing number of displaced people. There is a desperate and unequivocal need for the United States to increase its refugee numbers. Thus, a fivefold increase is tenable, given the current resources the United States has. I suggest that the intake needs to be incrementally increased to 500,000. This is of course a significant number of people; however, the number is tenable because it is in fact less than the annual intake of Germany in 2015, which has a far smaller land size, population, and gross domestic product than the United States.<sup>336</sup>

The benefit that would flow from increasing the refugee intake to 500,000 annually would not only manifest in the immense enhanced flourishing of the new arrivals, but it would extend to the United States being able to demonstrably and persuasively establish itself as a world leader in the approach to settling displaced people. It could then legitimately and effectively exert moral pressure on other developed countries to also proportionately increase their own refugee numbers and thereby provide an overarching solution to the current displaced person crisis. This approach and prospective has perhaps never been more important in recorded United

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335. PETER SINGER, PRACTICAL ETHICS, at 260–61 (2d ed. 1993).

336. *Germany on Course to Accept One Million Refugees in 2015*, GUARDIAN (Dec. 8, 2015), <https://www.theguardian.com/world/2015/dec/08/Germany-on-course-to-accept-one-million-refugees-in-2015>. In 2016, Germany's refugee intake dropped to approximately 300,000. See Agence France-Presse, *Germany Expects up to 300,000 Refugees in 2016, Official Says*, GUARDIAN, at 1 (Aug. 28, 2016), <https://www.theguardian.com/world/2016/aug/28/germany-300000-refugees-2016-bamf>.

States history, given the magnitude of the displaced person crisis and the recent move by the Trump Administration to suspend refugee arrivals.

## VII. CONCLUSION

The number of displaced people in the world is currently at a record high. Governments around the world have been unable to find a mechanism for dealing with the rising tide of desperate people leaving their country of origin in search of a safe destination for themselves and their families. A large portion of the 65 million displaced people are refugees. The legal instrument, which for the past six decades has provided the platform for facilitating asylum for more displaced people than any other, is the 1951 Refugee Convention. Despite the fact that more than 140 countries are signatories to the Convention, this instrument has been ineffective in meaningfully reducing refugee numbers in light of the current massive growth in displaced people.

There is currently no strategy for significantly reducing the number of displaced people in the world. Regrettably, recent developments indicate an overall hardening by many countries in their willingness to accept more displaced people. The United States in particular has indicated that it is likely to absorb less displaced people.

In this Article, I have argued that the current hardening towards displaced people is misguided and morally objectionable. All countries on earth share some responsibility for accommodating displaced people. This responsibility is especially acute in relation to the United States, given that it is one of the largest countries on earth and economically the most powerful and well-off country.

In order for the United States to coherently and systematically increase its refugee intake, I have proposed two reforms. The first is that the definition of particular social group in the Refugee Convention should be expanded, consistent with the approach taken in Australia. This would remove the need for immutable characteristics to be an essential requirement to satisfy this refugee ground. The effect of this would be to broaden significantly the number of people who could qualify as refugees under the Convention. This broader perspective is consistent with the rationale and history of the Refugee Convention and could be implemented in a coherent and systematic fashion.

The other reform I have suggested is that the United States proactively settle many more displaced people that are currently located in refugee camps around the world. It should lift its quota to approximately 500,000 people per year from the current 110,000. This is commensurate with the economic and social capacity of the United States to absorb more destitute



people and would set a desirable example for other first world countries, thereby significantly ameliorating the displaced person crisis. My proposal will not provide a total solution to the displaced person crisis; however, the approach I take in this Article will hopefully provide a catalyst for a more critical and humanistic approach and reinterpretation of other potential pathways for displaced people to gain asylum.