

Global Governance and the Evolution of the International Refugee Regime

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Abstract

Since the Treaty of Westphalia in 1648 the refugee regime has evolved with our modern state system, reflecting changes in international law, politics, economics and ideology. Responding to a history of religious and political persecutions, a comprehensive refugee regime finally emerged under the League of Nations after World War I. This regime underwent dramatic change during World War II to create a permanent framework to cope with the refugee problem through the United Nations High Commissioner for Refugees and the UN Convention Relating to the Status of Refugees. The Cold War had an overwhelming influence on the norms and rules of this regime, and in the post-Cold War era the regime has struggled to reflect and adapt to emerging global concerns — from internally displaced persons to gender and race distributional issues. As UNHCR is forced to reconsider its definitions, laws, and policies, the larger evolving regime must give way to a form of global governance in which the international authority of the UN body has more meaningful influence on the implementation of national law and policy.

In today's transnational world where borders are losing their definition and populations mobilize on a global scale, the refugee issue is an increasingly pressing one. Since the Treaty of Westphalia in 1648 the refugee regime¹ has evolved with our modern state system, reflecting changes within the broader scope of international politics, and highlighting

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¹ The term 'regime' is subject to varying interpretations, however this paper relies on an understanding found in international relations and political theory. Regimes may be defined as explicit rules or implicit norms guiding the actions of states and individuals, together with institutions and organizations expressing these rules or norms. Friedrich Kratochwil and John Gerard Ruggie ('International Organization: A State of the Art on an Art of the State' (1986) 40(4) *International Organization* 753 at 759) define a regime broadly as 'governing arrangements constructed by states to coordinate their expectations and organize aspects of international behaviour in various issue areas. They thus comprise a normative element, state practice, and organizational roles.'

notions of ideology, economics, and balance of power. Since the early religious and political persecutions of the Huguenots, then the aristocrats of the French Revolution, a more comprehensive refugee regime finally emerged under the auspices of the League of Nations after World War I. This regime responded to circumstance, undergoing dramatic change during the Second World War to create a permanent framework to cope with the refugee problem through the United Nations High Commissioner for Refugees. The Cold War had an overwhelming influence on the norms and policies of this regime, and in the post-Cold War era the regime has had to adapt to reflect global concerns.

Today the refugee regime is struggling to respond to gender and race distributional issues. Forced to reconsider its definitions and policies, the emerging regime must create an environment where the collective international authority of the UN body has meaningful influence on the autonomous implementation of individual government policy. In a world where the rigid constructions of the traditional international system are beginning to crumble, established approaches to refugee policy are becoming irrelevant as well. The regime that took root in 1648 no longer dictates, as customary concepts of global governance adapt to an uncertain environment of shifting politics and security.

1. A Historical Perspective

Although the phenomenon of people forced to flee their homes has always existed, the first true refugees recognized as such in the modern state system were the Huguenots, French Protestants fleeing France in 1685. King Louis XIV provoked this flight by revoking the Edict of Nantes, a proclamation issued by Henry IV in 1598 tolerating religious minorities under Catholic rule. With the Revocation of the Edict of Nantes came royal decrees against emigration and harsh punishments for those who attempted escape; yet 200,000 Huguenots still managed to flee France to the Netherlands, Switzerland, England, Germany, Denmark, and the United States. This number constituted one fifth of all Huguenots, and 1 per cent of the entire French population.² The early modern international system went on to see the flights of many other populations in Europe, most notably during the French Revolution in 1789. The persecution of all those who stood against the egalitarian ideal of the Revolution culminated in the execution of the royal family in 1793. Many of the French aristocracy fled to Austria and Prussia, seeking refuge from certain death at home.

² Richard M Golden, 'Introduction' in Richard M Golden (ed.), *The Huguenot Connection: the Edict of Nantes, its Revocation, and Early French Migration to South Carolina* (Dordrecht: Kluwer Academic Publishers, 1988), 1 at 1 + 23.

Such flights marked the beginning of the modern refugee movement in Europe, leading to early formations of the international refugee regime. The regime was characterized by elements of the modern state system established at the Peace of Westphalia in 1648, firmly entrenching the concept of refugees within the territorial notion of boundaries.³ Borders may have been open for refugees to cross but each nation remained in territorial isolation, ignoring the collective and international implications of the refugee issue. No groups or policies were established to deal with refugees, and each nation reacted to them in its own way and on an entirely *ad hoc* basis.⁴ There was no definition for a refugee in this international system and the phrase was rarely used, although the Huguenots were considered a classic version of what the term represented.⁵ The aristocrats fleeing the French Revolution were referred to as *émigrés*, a signal of the dignity and respect accorded to their position and one that seemed to refute their desperate situation. A 1798 revision of the *Encyclopaedia Britannica* marks the first time that the term 'refugee' was applied to anyone other than the Huguenots, extending the term to 'all such as leave their country in times of distress . . .' However this extension remained generally unrecognized in popular usage.⁶

The refugee regime itself was based on the almost entirely *laissez-faire* attitude of nations towards the fugitives that crossed their borders. Officials did not distinguish between immigrants and refugees, treating all equally and applying few restrictions to entry. Governments tended to encourage the admission of new arrivals, recognizing the fact that those who could afford to travel would strengthen society through their presence and wealth. Frederick William, Elector of Brandenburg and Duke of Eastern Prussia, welcomed the desperate Huguenots to his territory because of their religious kinship. In these early years, refugees were rarely a cause of strain in international relations and were not considered an issue of government concern.⁷ By the time the *émigrés* fled France in 1789, the situation had slightly changed. Now politics played a significant role in the decision to accept refugees. Austria had close ties to the French royal family and was willing to foster resistance to the revolutionary terror. The Conservative alliance of Austria, Prussia, Russia and England was also willing to help the refugees in order to protect the balance of power in Europe by quashing the new French Republic's increasingly hegemonic

³ Luke T Lee, 'Internally Displaced Persons and Refugees: Towards a Legal Synthesis' (1996) 9(1) *Journal of Refugee Studies* 27 at 30.

⁴ Michael R Marrus, 'Introduction' in Anna C Bramwell (ed.), *Refugees in the Age of Total War* (London: Unwin Hyman, 1988), 1 at 3.

⁵ Tony Kushner and Katharine Knox, *Refugees in an Age of Genocide* (London: Frank Cass, 1999), 127.

⁶ Michael R Marrus, *The Unwanted: European Refugees in the Twentieth Century* (Oxford: Oxford University Press, 1985), 9.

⁷ *Ibid.* at 6–7.

goals. Although it had begun as an entirely *ad hoc* and national issue, the refugee regime began to take on international shape as refugees came to represent potential shifts in the European power balance.

By 1815 the Concert of Europe had effectively restored the balance of power, presenting a united front for international issues in Europe. The nineteenth century then saw a tide of nationalist and political revolutions spread across the continent, with political dissidents fleeing their homes and seeking refuge elsewhere in Europe. There was still no concrete regime established to deal with such dilemmas, and reception of the exiles and refugees remained *ad hoc* and state-centric. No Europe-wide legal definition of a refugee developed to cope with the problem in a coherent fashion.⁸ By the mid-nineteenth century restrictions increased as the wave of revolutions grew in scale and governments began to fear the prospect of anarchy within their own borders. After the Revolution of 1848 it was clear that revolutionaries were no longer simply philosophical visionaries, but dangerous zealots who were not afraid to act violently. However, organized bureaucracy was undeveloped, and it was practically difficult for nations to block access across their borders or to track new arrivals. Even as restrictions grew in many nations, others such as England and Switzerland continued to accept them, becoming known as hotbeds for revolutionary exiles. Refugee issues were finally becoming an issue in international relations. At the request of Turin officials, in 1832 France expelled the Italian revolutionary Mazzini from within its borders. France and Austria also increasingly harassed England over its lax policies in harbouring exiles.⁹ Even if no clear refugee regime was established among nations, political ideology combined with a respect for territory and balance of power began to play an important role in bringing international recognition to the problem of refugees in the international system.

2. Ramifications of World War

The creation of the League of Nations marked the next significant period in the development of refugee policy, representing the first truly international refugee regime and sparking a change that eventually led to the establishment of the United Nations High Commissioner for Refugees. The twentieth century was an extraordinary period of movement and upheavals,¹⁰ with fewer impediments to mobility allowing population movements on a global scale. The Russian Revolution of 1917 caused the first mass exodus of the century, with Russian aristocrats and others fleeing the Bolshevik regime. More than one million people fled Russia

⁸ Cecilia Ruthström-Ruin, *Beyond Europe: the Globalization of Refugee Aid* (Lund: Lund University Press, 1993), 15.

⁹ Marrus, n. 6 above at 17–22.

¹⁰ Kushner and Knox, n. 5 above at 1.

between 1917 and 1921.¹¹ Subsequently, the persecution of Jews in Nazi Germany provided another important refugee flow during the interwar period; 350,000 Jews had escaped Germany, Austria, and Czechoslovakia by 1939.¹²

The League of Nations High Commissioner for Refugees was established in 1921 under the direction of Fridthof Nansen. Intended to be a temporary agency for dealing with the problem created by Russian refugees, HCR received administrative support from the League of Nations but relied on non-governmental organizations for personnel and supplies.¹³ This was the first time that the refugee problem was recognized as an international issue, but the success of the new regime was marred by two important absences: neither the US nor the USSR, two significant world powers, were members of the League of Nations. Because the refugee problem was seen as temporary and specific, the need for more universality was not immediately apparent. HCR created no general definition for a refugee, relying instead on a category-oriented approach that identified refugees according to group affiliation and origin.¹⁴ Russian exiles were defined as refugees because a category existed specifically to grant them such status. In 1933 the position of these groups was finally regularized in the Convention Relating to the International Status of Refugees. The Convention provided a definition that based refugee status on lack of protection and effective non-nationality. Although still category-oriented, this provided a clear indication of what was required to belong to such a group. Reflecting the specific nature of such categories however, the Convention on the Status of Refugees Coming From Germany was signed in 1938, and created a stricter definition that precluded people fleeing from Germany for reasons of pure personal convenience from becoming refugees.¹⁵

HCR's goal was the repatriation and resettlement of refugees, Nansen concentrating on voluntary repatriation. The High Commissioner created 'Nansen passports' for refugees, legal documents that gave refugees a recognizable status and allowed them to travel more freely. The League of Nations first agreed to Nansen passports at the Geneva Conference in June 1922. Again emphasizing the categorical nature of refugee status, these documents were originally issued to the Russian refugees, but were extended to Armenians in 1924, and Turks, Assyrians, Syrians, Assyro-Chaldeans, and Kurds in 1928.¹⁶ Although no state was obliged to receive

¹¹ Danièle Joly and Clive Nettleton, *Refugees in Europe* (Nottingham: Russell Press Ltd, 1990), 6.

¹² Kushner and Knox, n. 5 above at 126.

¹³ Joly and Nettleton, n. 11 above at 6.

¹⁴ Marrus, n. 6 above at 89–90.

¹⁵ Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (The Hague: Martinus Nijhoff Publishers, 1997), 51.

¹⁶ Joly and Nettleton, n. 11 above at 6.

refugees who held Nansen passports, all agreed to recognize the documents as valid identity papers. This divergence between obligation and recognition emphasizes the dilemma that plagued HCR, often rendering its international measures ineffective in practical terms. This limitation is clearest when looking at Western Europe's denial of refugee status for most Jewish refugees in the 1930s. Until 1938, when the Nazi atrocities had become common knowledge, the Netherlands sent asylum seekers back to Germany unless they could prove 'immediate danger to life'.¹⁷ The new High Commissioner, James McDonald, resigned in 1935 in protest against the international community's unwillingness to help or to cope with the root of the problem by dealing with Germany itself. McDonald recognized the interdependence of global, local and national initiatives, but was thwarted in his efforts because it was ultimately the nation that had power to grant entry to refugees, rendering HCR powerless.¹⁸ In 1938, American President Roosevelt called a Conference at Evian to deal with the issue. This meeting failed, as Germany refused to let Jews leave with their assets and the countries of resettlement refused to accept any financial burden.¹⁹ One of the problems still facing the international community throughout this period was the economic upheaval caused by the Great Depression in 1931. Receiving nations who could not support their own people were unwilling to undertake new financial obligations.²⁰ Ultimately the Jews were a victim of international complacency and diplomatic priorities. Western European receiving nations were trying to avoid a war, not provoke one.²¹ Thus many Jews were forced to stay home and face persecution in Germany, while 10,000 Jewish refugees were left unsettled at the outbreak of the Second World War.²²

The Second World War marked a new period of upheaval and displacement for the international refugee regime. When the war ended in 1945, 30 million people were left uprooted — soldiers and displaced people who did not want or could not return home because of border changes,²³ including more than twelve million ethnic Germans who were expelled from the USSR.²⁴ The League of Nations was dissolved as the war drew to a close, and the Allies created the United Nations Relief and Reconstruction Agency in 1944 to deal with the new population

¹⁷ Jan Lucassen and Leo Lucassen, 'Migration, Migration History, History: Old Paradigms and New Perspectives' in Jan Lucassen and Leo Lucassen (eds.), *Migration, Migration History, History: Old Paradigms and New Perspectives* (Bern: Peter Lang, 1997), 1 at 15.

¹⁸ Kushner and Knox, n. 5 above at 9+126.

¹⁹ Joly and Nettleton, n. 11 above at 7.

²⁰ Marrus, n. 6 above at 123.

²¹ Kushner and Knox, n. 5 above at 11.

²² Joly and Nettleton, n. 11 above at 7.

²³ Kushner and Knox, n. 5 above at 10+218.

²⁴ Joly and Nettleton, n. 11 above at 7.

flows. However, UNRRA was effectively thwarted by Cold War tensions and Soviet hostility, and when its mandate came to an end in 1947 the International Refugee Organization was established to deal with those left in European camps and still arriving from Eastern Europe. The IRO came formally into existence in 1948 as a temporary, intergovernmental United Nations agency created to regularize the status of the Second World War's refugees. Although the IRO had few members, many countries contributed to its efforts. The USSR was one significant absence and never became a member, as the Soviets felt that the IRO was merely protecting traitors and serving US policy.²⁵ The IRO thus remained dominated by Western Europe and the US, and all cooperation on refugee issues permanently ended between the two Cold War powers.²⁶

When establishing a definition for those they protected during the war, England and the US were unwilling to use the word 'refugee'; instead they referred to 'displaced persons', implying that the individuals could return home.²⁷ When UNRRA was established it adopted this terminology; its mandate was to assist 'victims of war in any area under the control of the United Nations.'²⁸ The IRO Constitution went further, actually defining those they protected as refugees. These were victims of Nazi, fascist, or similar regimes; victims of persecution for reasons of race, religion, nationality, political opinion; and refugees of long standing. This definition thus included Eastern European political dissidents and the Jews who remained in Germany and Austria.²⁹ Finally breaking away from the categorical method of identifying refugees, the IRO definition focussed on individuals and made each refugee determination on a case-by-case basis. Although it was still very Euro-centric, the IRO provided a neutral framework through which to comprehensively identify refugees.³⁰

The policies of these two post-war organizations were similar in scope. UNRRA's goal was to organize relief, and set up mass repatriation and resettlement.³¹ The USSR was critical of its policies however, alleging that UNRRA prevented displaced persons from returning home. In fact, the Western powers did assist forced repatriation to the Soviet bloc until 1945, later turning from these more coercive measures to promote resettlement in host nations.³² Taking over in 1948, the IRO's goal was to find a solution for the 1.5 million refugees left in Europe, providing relief, repatriation, resettlement, and legal protection for the most difficult

²⁵ Marrus, n. 6 above at 324 + 342.

²⁶ Ruthström-Ruin, n. 8 above at 17.

²⁷ Kushner and Knox, n. 5 above at 217.

²⁸ Göran Melander, "The Concept of the Term "Refugee"" in Bramwell (ed.), *Refugees in the Age of Total War* 7 at 8.

²⁹ Kourula, n. 15 above at 51.

³⁰ Ruthström-Ruin, n. 8 above at 17.

³¹ Kourula, n. 15 above at 171.

³² Ruthström-Ruin, n. 8 above at 17.

cases left by UNRRA. In the end, UNRRA helped 7 million people return to their own countries, while the IRO repatriated 70,000 mainly to Eastern European nations and settled more than one million refugees in Canada, Australia, the US, and Israel.³³ Western European countries were relatively willing to receive displaced persons and refugees during this period, as many nations suffered from depleted manpower after the war. Many Polish soldiers were permitted to stay in England due to this increased need for labour. Western countries also made an effort to support refugees from the Eastern Bloc, adopting a Cold War ideology that would dominate refugee assistance for the next forty years. Throughout their mandate, both UNRRA and the IRO were blocked by the USSR and were consequently unable to operate in Soviet controlled Germany.³⁴

3. United Nations High Commissioner for Refugees

3.1 The Cold War Begins

By 1950 the international community recognized that the refugee problem sparked by the Second World War was not a temporary one. So many years after the war had ended, 1.25 million refugees were still left in Europe.³⁵ A new agency was established to deal with the problem on 1 January 1951. Taking over from the IRO, the United Nations High Commissioner for Refugees soon became a permanent body and went on to play a fundamental role in the consolidation of future developments and trends in the refugee regime. An independent, non-operation agency that worked under the UN General Assembly, UNHCR was entirely dependent on member contributions and was initially a weak organization with little staff.³⁶ UNHCR operated under a governing body — now the Executive Committee of the High Commissioner's Programme. EXCOM's role is merely advisory, but it publishes annual conclusions on international refugee protection that have a standard-setting effect.³⁷ The United Nations Convention Relating to the Status of Refugees was signed in July 1951, significantly regularizing the status of refugees and setting out a series of rights and obligations. However, although this Convention establishes the fundamental elements of the refugee regime it does not grant the right to obtain asylum, as this is strictly a national prerogative. In fact, UNHCR has no formal supervisory body with a

³³ *Ibid.* at 10.

³⁴ Kushner and Knox, n. 5 above at 10 + 217.

³⁵ Kourula, n. 15 above at 172.

³⁶ Ruthström-Ruin, n. 8 above at 13 + 206.

³⁷ Volker Türk, 'The Role of the UNHCR in the Development of International Refugee Law' in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), 153 at 164.

mandate to review state performance. Like its predecessors, UNHCR was a product of the Cold War and initially very Euro-centric in scope. Again, the USSR resisted the creation of the new organization, pushing for repatriation rather than resettlement-oriented policies. The USSR saw the Convention as protecting people associated with 'fascist and anti-democratic regimes' and accordingly never became a signatory.³⁸

Article 1A of the 1951 Convention provided the regime with its first universal refugee definition, formally recognizing the permanence of the issue:

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

Following the trend begun by the IRO, this definition was individual-oriented and emphasized the causes of flight rather than relying on the more categorical approach that focussed on the origin of specific groups. However, this definition still focussed on the European and the Second World War origins of the refugee problem.³⁹ The definition had temporal and geographic limitations, only covering refugee movements provoked by events that occurred before January 1951, and giving signatory nations the option to limit the Convention refugees it accepted to those from Europe.⁴⁰ This definition also introduced a new element into the regime's formal definition of a refugee, highlighting the fact that a refugee is someone who is 'outside the country of his former habitual residence.'⁴¹ This clarification emphasized the territorial nature of the refugee regime, reinforcing respect for sovereignty, and the inability of an international organization to look within a nation's borders. Today this Convention refugee definition is one of the most widely accepted international norms, and remains the sole legally binding international instrument that provides specific protection to refugees.⁴²

In terms of its actual role, UNHCR was founded with a mandate to provide international protection to refugees and to seek a permanent solution to the problem in cooperation with national governments, NGOs,

³⁸ Thomas Spijkerboer, *Gender and Refugee Status* (Dartmouth: Ashgate, 2000), 197.

³⁹ Kushner and Knox, n. 5 above 10–12.

⁴⁰ Türk, n. 37 above at 161.

⁴¹ Lee, n. 3 above at 31.

⁴² Daniel J Steinbock, 'The Refugee Definition as Law: Issues of Interpretation' in Nicholson and Twomey (eds.), *Refugee Rights and Realities* 13 at 13.

and other international organizations. UNHCR's task is to provide protection for refugees by putting together international treaties and supervising their application.⁴³ It promotes measures to improve the refugee situation and assists government efforts to encourage voluntary repatriation or entry and assimilation in a new country.⁴⁴ The 1951 Convention recognizes the refugee's right to remain and right to return, the principle of non-refoulement, and the right of first asylum,⁴⁵ it also defines minimum standards of treatment for refugees and outlines determination procedures and eligibility criteria for refugee status. UNHCR is also authorized to lend its 'good offices' to refugees that do not fall within the Convention definition, and is thus able to deal with large refugee flows and situations where there may be no strict persecution.⁴⁶ In its early stages, the organization paid little attention to causes, focusing instead on the rights and obligations that arise once a refugee has left home.

Moving away from its post-World War construction, UNHCR soon became fully involved in the Cold War issues that confronted the international system. Refugees flowing into Europe and North America came mainly from countries in the Communist bloc. The Hungarian crisis in 1956 created the first mass flux of refugees from the East, followed by the Czech refugees fleeing Soviet repression of the nationalist uprising in 1968.⁴⁷ However, the 1970s saw a shift in refugee flows as increasing numbers began to come from the developing world. By the mid-1970s these new flows were larger and more complex than in the past, and the line between refugees and migrants began to blur.⁴⁸

UNHCR began to expand as well, flourishing under the increasing support of the US.⁴⁹ As the UN body got stronger, other regional groups also began to focus more attention on the refugee issue. Recognizing flaws in the UN's refugee definition and responding to changes in the international system, the Organisation of African Unity and the Organisation of American States began to shape their own policies. The OAU adopted an expanded definition in 1969, seeing refugees as:

Every person who, owing to external aggression, occupation, foreign domination

⁴³ Türk, n. 37 above at 160.

⁴⁴ Kourula, n. 15 above at 209–210.

⁴⁵ Guaranteed by Art. 33 of the 1951 Convention, non-refoulement refers to the policy whereby a nation cannot send a refugee back to a country where his/her life or freedom would be threatened on account of race, nationality, religion, nationality, membership of a particular social group, or political opinion. The right of first asylum means that a refugee has a right to seek asylum in the first Convention signatory nation he/she passes through, but any subsequent country has the right to send the refugee back to that first country of asylum.

⁴⁶ Marrus, n. 4 above at 3.

⁴⁷ Joly and Nettleton, n. 11 above at 7.

⁴⁸ Jerzy Sztucki, 'Who is a Refugee? The Convention Definition: Universal or Obsolete?' in Nicholson and Twomey (eds.), *Refugee Rights and Realities* 55 at 69.

⁴⁹ Ruthström-Ruin, n. 8 above at 198.

or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁵⁰

In 1984 the OAS promulgated the Cartagena Declaration declaring refugees to be:

Persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed the public order.⁵¹

These new definitions effectively recognized the need for the refugee regime to be more inclusive, getting rid of reliance on strict persecution and viewing refugees as people fleeing war, violence, and serious public disorder.⁵² In 1967, UNHCR also responded to the globalization of the refugee issue by implementing the Protocol Relating to the Status of Refugees. This document waived the temporal and geographic limitations that obstructed the expansion of the refugee definition in the post-World War period, allowing more universal application.⁵³ Over the years the General Assembly has also allowed UNHCR to extend its protection to those outside the official Convention refugee definition by referring to ‘displaced persons’. Relying on a different construction of displaced persons than that adopted during the Second World War, UNHCR can use this definition to aid refugees, returnees, and internally displaced persons.⁵⁴ IDPs — people who would normally be considered refugees but have not crossed any national borders — received their first official assistance from UNHCR in Sudan in 1972.⁵⁵

Although the Convention definition itself was not changed to accommodate new refugee flows, in actual practice UNHCR applied an expanded definition to deal with the larger refugee movements of the 1970s in Cambodia, Laos, and Vietnam. The organization began to recognize the need for long term care in refugee camps and permanent refugee settlement in countries away from the wars causing refugee movement.⁵⁶ However, by the mid-1970s international economic growth had declined and unemployment grew. Countries no longer wanted an influx of labour and began raising restrictions against refugee access. Terms soon emerged to distinguish between ‘genuine’ Convention and

⁵⁰ Kushner and Knox, n. 5 above at 12.

⁵¹ *Ibid.*

⁵² Doris M Meissner et al, *International Migration Challenges in a New Era* (New York: the Trilateral Commission, 1993), 75.

⁵³ Sztucki, n. 48 above at 56.

⁵⁴ Kourula, n. 15 above at 177–182.

⁵⁵ Türk, n. 37 above at 155.

⁵⁶ Meissner, n. 52 above at 75.

'*de facto*' refugees.⁵⁷ By now it was clear that the refugee regime was dependent on economic and ideological considerations. While the political machinations of the Cold War had formed refugee flows, Western host nations were welcoming. In this sense, US omnipotence within the UN had a large role to play in shaping refugee policy and it is interesting to note that until the mid-1980s, 90 per cent of all refugees to the US were from the Eastern bloc.⁵⁸ According to Ruthström-Ruin, one of the reasons that UNHCR began to extend its influence into Africa was to block Soviet power in that vulnerable area.⁵⁹ By the 1970s, when the majority of refugees came from the developing world, host countries were less willing to receive them, perceiving a threat to economic and political stability.⁶⁰ The economic collapse of the 1970s led to tightened restrictions throughout the West, and refugees from the developing world were often seen as disguised immigrants claiming refugee status to facilitate access to receiving nations.⁶¹ Western Europe was particularly reluctant to help and tightened its laws against economic migrants. Refugee policy was affected by the European Community's move to harmonize immigration standards, creating a fortress mentality where internal border controls decreased but migrants from without were repulsed.⁶² The Cold War was an intense time for UNHCR, witnessing the expansion of the organization and its policies, in tandem with the increasing complexity of refugee flows and a burgeoning shift of focus to the South. As domestic acceptance policies grew more restrictive, the international body grew in both scope and potential.

3.2 The End of the Cold War

These trends have continued into the post-Cold War period, forcing UNHCR to seriously rethink its policies and approaches to adapt to the changing international system. The end of the Cold War sparked political and ethnic conflicts throughout the world, increasing mass migrations on a global scale. Borders became significantly easier to cross given cheaper transportation and the disintegration of many of the rigid boundaries and territories upheld by Cold War politics. As a result, asylum claims increased.⁶³ In 1974 UNHCR saw 2.4 million refugees; by 1984 this number had increased to 10.5 million, and by 1996 UNHCR was dealing with 27 million refugees, IDPs, asylum seekers, and returning refugees.⁶⁴

⁵⁷ Sztucki, n. 48 above at 69.

⁵⁸ Spijkerboer, n. 38 above at 197.

⁵⁹ Ruthström-Ruin, n. 8 above at 195.

⁶⁰ Kushner and Knox, n. 5 above at 11.

⁶¹ Joly and Nettleton, note 11 above at 8–9.

⁶² Kushner and Knox, n. 5 above at 335.

⁶³ *Ibid.* at 10 + 335.

⁶⁴ Pierre Hassner, 'Refugees: a Special Case for Cosmopolitan Citizenship?' in *Re-imagining Political Community*, D Archibugi, D Held, and M Kohler (eds.), (London: Polity Press, 1998), 273 at 275. Kushner and Knox, n. 5 above at 336.

The causes and context of persecution have changed, with a greater incidence of refugees from protracted civil war, communal violence, and civil disorder.⁶⁵ Although redrawing the European map created new states and refugees from the Commonwealth of Independent States, the refugee regime's shift towards a North-South rather than East-West focus has become particularly pronounced. The European paradigm has changed, and those typically considered persecuted along East-West lines are no longer.⁶⁶ Today the rapidly rising number of IDPs is also of increasing significance to the international system.

The end of the Cold War brought significant changes in the composition of UNHCR, with Russia finally joining the organization after nearly a century of refusing to cooperate with the international refugee regime. UNHCR's profile was raised during the Yugoslavia crisis in the early 1990s when the UN Secretary-General asked the agency to coordinate humanitarian action during the crisis, significantly broadening its scope and responsibility.⁶⁷ By 1993 UNHCR had a staff of 2000 with a budget of more than \$1 billion (US).⁶⁸ Still working with the refugee definition established by the 1951 Convention, UNHCR denounced a formal and legalistic approach to interpretation and has found that the earlier definition is vague enough to encompass many of today's new refugee flows,⁶⁹ demonstrating that application of the Convention depends strongly on the context in which it operates. Janice Marshall, Senior Legal Advisor at UNHCR Geneva's Department of Internal Protection, holds that UNHCR's mandate is

always broader than the Convention itself . . . Most people, including those at UNHCR, see refugees as those who have to flee for some reason, but the 1951 Convention had to somehow limit this broad concept. For UNHCR, refugees include others not strictly included in the Convention definition, unofficially applying a similar definition to the Cartagena Declaration and the OAU.⁷⁰

Despite this approach, economic refugees and IDPs are still largely ignored within the refugee regime.⁷¹ UNHCR has developed no definition of IDPs, partially because IDPs are so difficult to define operationally. Jeff Crisp, Head of the Evaluation and Policy Analysis Unit at UNHCR Geneva, points out that the question always asked is ‘‘how far do you have to move to become an IDP?’’ Most IDPs become an element of the

⁶⁵ Sztucki, n. 48 above at 60.

⁶⁶ Patrick Twomey and Frances Nicholson, ‘Introduction’ in Nicholson and Twomey (eds.), *Refugee Rights and Realities* 1 at 6.

⁶⁷ S Alex Cunliffe and Michael Pugh, ‘UNHCR as Leader in Humanitarian Assistance: a Triumph of Politics over Law?’ in Nicholson and Twomey (eds.), *Refugee Rights and Realities* 175 at 176.

⁶⁸ Ruthström-Ruin, n. 8 above at 14.

⁶⁹ Joly and Nettleton, n. 11 above at 9.

⁷⁰ Interview with Janice Marshall, 10 July 2001.

⁷¹ Kushner and Knox, n. 5 above at 12.

general population, taking part in the rural to urban movement.⁷² Given its pragmatic and operational perspective, UNHCR provides aid to such people on a case-by-case basis depending on the needs of the situation and the degree of connection with the refugee problem.⁷³ Arafat Jamal, Operational Policy Officer with Crisp's Evaluation and Policy Analysis Unit, comments that on the one hand UNHCR has

policies and guidelines that determine the contours of [its] involvement with IDPs. On the other hand, there is a very operational, 'can-do' spirit at UNHCR. If people are in need, and are not being assisted, UNHCR officers on the ground find it very hard, from a moral perspective, to do nothing at all.⁷⁴

And yet even if the organization is now interpreting the traditional definition of a refugee more broadly, those who do not meet the definition do not receive the same range of benefits as are accorded to true 'refugees' given the realities of the international regime.⁷⁵

A number of significant developments have come to characterize UNHCR in the post-Cold War world, emphasizing the changing nature of the international system. The first is UNHCR's apparent shift from international refugee protection regime to focusing on security, containment, and pre-emptive humanitarian action and assistance.⁷⁶ Today UNHCR is more solution-oriented when confronting impending refugee crises. Turning away from its refugee specific approach that saw problems as coming to an end once a refugee was safely settled, UNHCR is now more pro-active, preventative, and homeland-oriented; it has become a more 'broadly based humanitarian agency'.⁷⁷ The organization has shifted towards an operational approach, fostering local civil society, building democratic governance, and working for conflict prevention.⁷⁸ Recognizing that long-term refugee resettlement is no longer a viable option, UNHCR now attempts to provide care for refugees on location, emphasizing international presence to encourage potential refugees to stay.⁷⁹ Today most refugees never make it to the Western world, tending to stay in refugee camps close to or within their country.⁸⁰ In the post-Cold War order, UNHCR no longer turns a 'blind eye' to military controlled refugee camps, increasingly dealing with such camps as human

⁷² Interview with Jeff Crisp, 25 June 2001.

⁷³ Kourula, n. 15 above at 184.

⁷⁴ Interview with Arafat Jamal, 25 July 2001.

⁷⁵ Ruthström-Ruin, n. 8 above at 205.

⁷⁶ Twomey and Nicholson, n. 66 above at 7.

⁷⁷ Jeff Crisp, 'Mind the Gap! UNHCR, Humanitarian Assistance and the Development Process' (2001) 43 *New Issues in Refugee Research: Working Paper* at 7.

⁷⁸ Kourula, n. 15 above at 2+211.

⁷⁹ Guy Goodwin-Gill, 'Refugee Identity and Protection's Fading Prospect' in Nicholson and Twomey (eds.), *Refugee Rights and Realities* 220 at 225.

⁸⁰ Lucassen and Lucassen, n. 17 above at 17.

rights violations.⁸¹ UNHCR's repatriation policy is also coming back into force after the Cold War rendered it obsolete. In 1992–3 the UN Transitional Authority in Cambodia managed to repatriate 360,000 refugees who had been living on the Thai-Cambodian border for more than twelve years.⁸² The reintegration of displaced persons into their former countries and communities has thus become another component of UNHCR's homeland-oriented strategy.⁸³

A second major change to UNHCR policy is the move to include IDPs within its scope of responsibility. Today UNHCR deals with many migrants who do not fit the Convention refugee definition, helping IDPs, asylum seekers, stateless persons, returnees, and persons threatened with displacement or who are otherwise at risk. UNHCR recognizes that borders are disintegrating and the organization is attempting to provide international protection to IDPs wherever it is possible to take preventative action.⁸⁴ This can be done because, as pointed out by Marshall and Crisp, there is a difference between UNHCR's mandate and statute. 'While its statute is restrictive, the mandate is more dynamic and may be used by the UN Secretary-General. UNHCR does involve IDPs, although not all IDPs in all situations.'⁸⁵ The problem remains that IDPs are at the mercy of domestic jurisdictions; they receive no formal protection and assistance from international treaties and instruments because they do not fit the border-conscious requirement of crossing a national frontier.⁸⁶ The IDP issue is thus tied up in the sovereignty problem: because it is the responsibility of states to protect their own citizens within their own territory, UNHCR can seldom intervene for the purposes of IDP protection. However, IDPs are protected on an *ad hoc* basis by UNHCR when the General Assembly requests the agency to exercise its good offices, or if so directed by the Security Council.⁸⁷

Changes to Security Council actions represent a third way in which the refugee regime has changed in the post-Cold War period, demonstrating the UN's new emphasis on human security. Although the UN has traditionally remained tied within a state-centric framework and refuses to interfere in the domestic matters of individual countries, today the organization is increasingly involved in rectifying gross violations of human rights in the international system. The Security Council now perceives the refugee problem as a threat to international peace and security under Chapter VII of the UN Charter. Demonstrating this shifting

⁸¹ Crisp, n. 72 above.

⁸² Meissner, n. 52 above at 78.

⁸³ Crisp, n. 77 above at 5.

⁸⁴ Goodwin-Gill, n. 79 above at 225.

⁸⁵ Crisp, n. 72 above.

⁸⁶ Frances Deng, 'Foreword' in Janie Hampton ed., *Internally Displaced People: a Global Survey* (London: Earthscan Publications Ltd, 1998), i at xiii.

⁸⁷ Lee, n. 3 above at 28.

approach, the Security Council's Resolution 688 called for multilateral UN action to deal with the exodus of 1.8 million Kurds from Iraq in 1991. This was the beginning of the Security Council's move towards humanitarian intervention and is significant in that it treated refugees and IDPs as equally deserving of protection. Despite competing political interests within the Security Council, similar peace enforcement actions under Chapter VII continued in Somalia in 1992–93, in Bosnia and Herzegovina in 1993, and in Rwanda in 1994.⁸⁸ The Security Council has focussed its attention on the freedom of movement, unimpeded and safe access by international staff, the protection and security of refugees and IDPs, as well as government and warring faction compliance with international humanitarian law and individual responsibility.⁸⁹

However, even as UNHCR tries to widen the scope of the refugee regime, states narrow it again by increasing domestic restrictions. In Western Europe the rate of recognition of refugees has decreased significantly; in 1983 these countries recognized 42 per cent of applicants but by 1996 the number had fallen to 16 per cent.⁹⁰ One of the structural dilemmas underlying this falloff is reliance on traditional concepts of state versus non-state action. European harmonization also blocks refugee access, as EU nations attempt to consolidate their refugee determination procedures, resorting to more restrictive interpretations of the refugee definition. Denise Efonyai-Mäder, Project Manager at the Forum suisse pour l'étude des migrations, Université de Neuchâtel, emphasizes deteriorating reception standards within destination countries, increasing levels of social control, heightened policing and stricter detention policies, and the growing sophistication of expulsion procedures. She indicates that national interpretation of non-state persecution can lead to significant problems for refugees when the 'safe third country' principle is applied.⁹¹ The Cold War over, national political interest in supporting refugees has dried up.⁹² Although states recognize that they cannot ignore the refugee problem, their lack of trust in the system means that they are unwilling to tie themselves to a formal regime.⁹³ Thus despite impressive changes to the responsibility and scope of the refugee regime, national political and economic priorities are blocking benefits from the improved system.

⁸⁸ Kourula, n. 15 above at 11–13.

⁸⁹ *Ibid.* at 219.

⁹⁰ Sztucki, n. 48 above at 71.

⁹¹ Interview with Denise Efonyai-Mäder, 12 July 2001.

The 1990 Dublin Convention represents an attempt by the Member States of the European Community to prevent asylum seekers from making asylum claims in more than one country, establishing criteria such as the safe third country principle to determine which state is responsible for reviewing the claim. The safe third country principle refers to the situation in which an asylum seeker passes through one Dublin signatory country on his/her way to a third but processed no asylum claim while he/she was in the first country.

⁹² Goodwin-Gill, n. 79 above at 223.

⁹³ Marshall, n. 70 above.

As the refugee situation worsens and population flows increase on a globally significant scale, effective implementation of international policies is obstructed at the national level.

4. Issues of Distribution

In addition to these traditional paradoxes of international law, the refugee regime must also confront some inherent distributional issues as it enters the twenty-first century. Race and gender have become significant factors in refugee theory, and historical inadequacies must be taken into account for the regime to effectively adjust to the modern international system.

4.1 Race

Race is one problem that is omnipresent in the refugee regime, particularly since the shift to a North-South focus on refugee flows. Alleged differences in race and culture have made refugees a source of suspicion and hostility since the developing world became the source of significant refugee flows to the West in the 1970s. From the beginning, such refugees were accorded marginal status and treatment, and into the 1980s and 1990s Africans never received the same publicity as refugees from the East who 'were considered to have the right political mentality and were often skilled workers, thus considered easier to integrate into their new society.'⁹⁴

Janice Marshall opines that interpretation of the 1951 Convention was not even needed while Cold War politics still ruled the regime: 'One never asked questions — if an asylum seeker came from the East then he was clearly a refugee.'⁹⁵ Once the North-South flows began, rather than recognizing real persecution, receiving nations often labelled such refugees from the South as economic migrants, a fact which has earned Western governments harsh criticisms of racism.⁹⁶ Efonayi-Mäder highlights this situation, stating that in terms of racial politics, it is not refugee law that creates the problems, but the interpretations of such law . . . Looking at the politics of refugee return, it is clear that Europeans are less careful when dealing with the return of African asylum seekers than when dealing with those from other states. A major factor is proximity.

The perception is that we owe more to Yugoslavia — this is a population that is white like us and has a similar history. On the other hand, Europeans pay less attention to the situation of countries like Sierra Leone, and the reaction is that such asylum seekers should stay at home.⁹⁷

⁹⁴ Efonayi-Mäder, n. 91 above.

⁹⁵ Marshall, n. 70 above.

⁹⁶ Kushner and Knox, n. 5 above at 11 + 375.

⁹⁷ Efonayi-Mäder, n. 91 above.

Irena Omelaniuk, Director of Migration Management Services at the International Organization for Migration Geneva, argues that 'half of the migration management battle is won through the politics of perception. The way you sell the issue. It is a case of how the government can engineer perception of a community of migrants.'⁹⁸ However, this is not only true of the Western world. In Africa, the recent trend towards democratization has also led to a decline in refugee protection standards. Governments and political parties are encouraging nationalistic and xenophobic policies, and as in the West, national problems are often blamed on problems caused by asylum seekers.⁹⁹

On a broader level, it is also important to note that the refugee regime has never been truly international until the last quarter century. 'International' organizations that developed to deal with the refugee problem focussed exclusively on European and later Cold War issues. Refugees existed in other parts of the world, but these flows were generally ignored by a Euro-centric state system that concentrated on humanitarian action closer to home. Today, while Africa only makes up 12 per cent of the global population, 28 per cent of the world's refugees and just under 50 per cent of the world's IDPs live there.¹⁰⁰ This is a number that cannot be ignored.

4.2 Gender

While the issue of race and culture is currently being grappled with throughout the world in debates over the North-South divide, the problem of gender is only beginning to surface in the international system. How the refugee regime developed to exclude and differentiate women is a complex and deeply embedded issue that is difficult to unravel. What is clear is that women were rarely seen in the early stages of refugee movement in the modern international system, with the exception of the more inclusive religious persecution instituted by the Revocation of the Edict of Nantes in 1685. At this time the Princess of Orange in the Netherlands established herself as a generous protectress to daughters of Huguenot exiles, while other foundations were instituted specifically to aid women.¹⁰¹ But in the nineteenth century, political persecution was the major push factor for refugees and because women were seldom directly involved in politics, they were also rarely forced to flee their homes.¹⁰² On a public level males were typically seen as the largest threat

⁹⁸ Interview with Irena Omelaniuk, 9 July 2001.

⁹⁹ Jeff Crisp, 'Africa's Refugees: Patterns, Problems and Policy Challenges' (2000) 28 *New Issues in Refugee Research: Working Paper* at 8.

¹⁰⁰ *Ibid.* at 2.

¹⁰¹ Spijkerboer, n. 38 above at 1.

¹⁰² Patricia Tuitt, 'Rethinking the Refugee Concept' in Nicholson and Twomey (eds.), *Refugee Rights and Realities* 106 at 112.

to governments, and in the private sphere it was generally believed that men were better able to take care of themselves, leaving to establish a stable new home before the family followed.¹⁰³ Until the 1980s the general profile of a refugee was that of an educated or skilled young man.¹⁰⁴ Ultimately, the dilemma is that the refugee regime is founded on an ability to move, and due to structural conditions and cultural patterns this is often difficult for women to do. Unwilling and unable to leave children and families behind, women have traditionally formed only a small portion of the refugee flow.¹⁰⁵ However, the shifting forms of persecution and causes of refugee flows that characterized the later stages of the Cold War meant that by the 1980s women and children had begun to form a majority of the refugee population.¹⁰⁶ While men stayed behind to fight, women escaped civil conflict and their war-torn societies. Rape has created rising numbers of refugee women, particularly in areas such as Bosnia and Rwanda. Yet due to the cultural and structural patterns that formerly caused them to stay home, today more women than men remain in refugee camps, unwilling and often unable to make the life-changing decision that would take them on the longer journey to a receiving nation.¹⁰⁷

Inability to move is not the only factor that has kept women on the fringes of the refugee regime. Women's movement often falls outside the traditional refugee definition, either due to the technicalities of that definition or through an inability to perceive a woman's plight as the same as a man's. In the inter-war years of the twentieth century, many female Jews were welcomed into England as domestic workers and nurses, never going through the same refugee determination procedure as their male counterparts and thus receiving easier access to the host nation.¹⁰⁸ Women also face different types of discrimination and patterns of persecution. The refugee regime eligibility criteria typically focus on public forms of persecution such as torture, ignoring inherently private forms of persecution such as rape. In many societies it is this private sphere that has the most potential to touch women's lives and provoke the need to seek shelter.¹⁰⁹ Women are often oppressed when they infringe the moral or ethical codes of their society, such as non-compliance with dress codes, loss of virginity, refusal to enter into a contracted marriage. None of these private issues fall within the traditional refugee definition of persecution, preventing many potential migrant women from receiving

¹⁰³ Kushner and Knox, n. 5 above at 14.

¹⁰⁴ Lucassen and Lucassen, n. 17 above at 16.

¹⁰⁵ Tuitt, n 102 above at 110–113.

¹⁰⁶ Lucassen and Lucassen, n. 17 above at 16.

¹⁰⁷ Tuitt, note 102 above at 116.

¹⁰⁸ Kourula, n. 5 above at 158.

¹⁰⁹ Nasreen Mahmud, 'Crimes Against Honour: Women in International Refugee Law' (1996) 9(4) *Journal of Refugee Studies* 367 at 367 + 372.

or even seeking refugee status. The tension between the quantitative and the qualitative nature of this issue must be recognized. Although today there is no numerical discrimination against female asylum seekers — women even take up a larger proportion than men in the total number of recognized refugees — the decision making assumptions that lie behind the refugee regime need to be reconsidered.¹¹⁰

There have been some significant steps taken in recent years to incorporate gender issues into the refugee regime. In the 1980s scholars and NGOs began to recognize the importance of gender in refugee policy and by the 1990s a few governments issued non-binding guidelines to govern their domestic policy.¹¹¹ UNHCR has also taken concrete steps towards recognizing women within its traditional refugee definition. While in 1985 EXCOM published a Conclusion allowing women to fall within the ‘membership of a particular social group’ category of persecution, by the 1990s UNHCR had recognized that the issue was more complex. In 1993, EXCOM published a new Conclusion, this time allowing women to use the ‘well founded fear of being persecuted’ to encompass distinctly female forms of persecution such as sexual violence.¹¹² UNHCR understood that the entire concept of persecution must be left open to interpretation, and that more private actions such as sexual violence can be perceived as a cause of coerced displacement. As well, UNHCR has institutionalized gender sensitization in the field of protection, for example focusing on the gender implications of how shelters are run or food is distributed.¹¹³ However, although gender issues are increasingly recognized within the refugee regime, there is still no legally binding instrument that focuses on the specific needs of female refugees. Such measures are still at an evolutionary stage and given the complexity of the issue it will be some time before the gender and refugee problem can be entirely deconstructed.¹¹⁴

5. Global Governance — The Future of the International Refugee Regime

Since its *ad hoc* beginnings in the seventeenth century, the modern refugee regime has been progressively implemented, becoming increasingly more operational and international in scope until finally reaching its current embodiment in the post-Cold War UNHCR. Today, the regime faces a period of transition, forced to adapt to increasing refugee flows and enhanced restrictions among its member states. The problem that

¹¹⁰ Spijkerboer, n. 38 above at 5 + 163.

¹¹¹ *Ibid.* at 2 + 176. Canada, the US, Australia, the Netherlands, the UK.

¹¹² Sztucki, n. 48 above at 64.

¹¹³ Omelaniuk, n. 98 above.

¹¹⁴ Kourula, n. 15 above at 132 + 139.

underlies the entire nature of this regime is that the individual refugee is subject to the right of the state to grant asylum — it is not the right of the individual to gain that status. UNHCR is caught in a difficult position between traditional notions of respect for territorial sovereignty and the need for international responsibility.¹¹⁵ This is a paradox that must be resolved if the regime is to progress any further. In order to do so, UNHCR will have to reinforce and rework many of its policies in order to adapt to the changing realities of the international system.

At its most basic and fundamentally influential level, UNHCR must recognize that the traditional refugee definition no longer applies to many of today's problems. Although the organization has made numerous changes in interpretation, evolving to adapt to the international context, this definition still only applies to those who cross national borders. In an international system that is currently experiencing disintegrating borders and significant internal displacement, such a strictly territorial view of the refugee dilemma is no longer very relevant.¹¹⁶ However, UNHCR also has to contend with the likelihood that broadening the refugee definition will render it meaningless, including a risk that states will shut their doors faster at the threat of massive population influx.¹¹⁷ Jeff Crisp points out that when defining refugees a 'hard and fast line [must be drawn] between refugees and others in need of protection who are entering European and other Western states.' This distinction must be preserved in order to 'maintain the integrity of the refugee regime.' Crisp also refutes pressure to instigate a broader OAU type definition in UNHCR's international mandate. Certain aspects of the definition are only feasible in a regional context.

The OAU definition makes sense in Africa, but not in industrialized states. Taking the pragmatic line, you need public opinion on your side and the European Western context is not ready for an OAU refugee definition . . . Pragmatically, no new definition will be accepted and agreed upon [by all the relevant actors.]¹¹⁸

Further, Gervais Appave, Director of the Migration Policy Research at IOM Geneva, contends that no country even wants to reopen the debate on the Convention refugee definition.¹¹⁹

Another possibility would be for the UN General Assembly to expand UNHCR's mandate to include IDPs. This could involve a shift in the meaning of what the refugee regime represents, necessitating a

¹¹⁵ Kushner and Knox, n. 5 above at 12.

¹¹⁶ Jean-Yves Carlier, 'The Geneva Refugee Definition and the "Theory of the Three Scales"' in Nicholson and Twomey (eds.), *Refugee Rights and Realities* 37 at 37–39.

¹¹⁷ Kushner and Knox, n. 5 above at 13.

¹¹⁸ Crisp, note 72 above.

¹¹⁹ Interview with Gervais Appave, 13 July 2001.

deconstruction of the entire refugee issue.¹²⁰ UNHCR however, has proved unreceptive to suggestions for a broadened mandate, and there are few other such supranational organizations that could effectively fill its shoes.¹²¹ The Organization for the Coordination of Humanitarian Affairs is one possibility, but one UNHCR source points out that although OCHA ‘would like to have an operational role, it is not given that mandate by the international community.’¹²² Some officers in the migration field feel that working together organizations such as IOM, UNHCR, the United Nations Development Programme, and the International Committee of the Red Cross should be able to effectively cover IDPs.¹²³ As for creating a new organization, Janice Marshall is sceptical that this would work. Recognizing that ‘IDP issues are not adequately dealt with at all’, she feels that a new organization ‘should not be created to deal with them, as this would only give states a new scapegoat like UNHCR.’¹²⁴ Gervais Appave also feels that ‘we are past the point where governments want to create new international organizations.’¹²⁵

UNHCR must enhance the state-to-international body relationship that it presently maintains. The refugee problem today is founded on the dual nature of the international system, made up of a complex interplay of interstate and international bonds. Currently the solidarity of the refugee regime is not backed by the state but by the close links among civil society, NGOs, the media, and UNHCR itself. In order to properly regulate the international refugee regime, UNHCR must go beyond its traditional state-centric focus to assume a more universal perspective that goes some way towards rejecting absolute notions of state sovereignty.¹²⁶ Currently states have the best opportunity to choose the legal setting and to determine UNHCR’s influence within it.¹²⁷ The international

¹²⁰ Gervais Appave pushes this idea even further by suggesting that in order ‘to come up with a better system of responses to refugee needs, the question should no longer be “who is a refugee and who is not?” With such a question we will end up with a quarrel over the interpretation of the 1951 Convention . . . to which there is no solution. It is better to ask “who is in genuine need of international protection today?” This is a provocative and tricky question — one that forces us to think. It might even force us to define other categories of persons in need of protection. With the Convention definition so narrow we are trying to push it to include too much — this isn’t necessarily the way to go about it. The international community has an obligation to provide protection to other situations as well. Each of these possibilities is problematic. For example, victims of war. . . , victims of the collapse of social order within a country, or victims of catastrophic environmental disasters . . . What about victims of famine? Or victims of abject poverty? This is an outline of a broad spectrum [and may at least open thinking as to] who has a case for international protection.’

¹²¹ Roberta Cohen, ‘Recent Trends in Protection and Assistance for IDPs’ in Hampton (ed.), *Internally Displaced People* 3 at 5.

¹²² Interview, July 2001.

¹²³ Omelaniuk, n. 98 above.

¹²⁴ Marshall, n. 70 above.

¹²⁵ Appave, n. 119 above.

¹²⁶ Hassner, n. 64 above at 274–281.

¹²⁷ Efonyi-Mäder, n. 91 above.

supervisory agency is a creature of the state alone,¹²⁸ and within this framework will never be able to achieve its international goals; is already losing authority in the post-Cold War world. Peter Schatzer, Director of the External Relations and Information Department at IOM Geneva, holds that 'today governments tend to listen to UNHCR but often do what they want regardless.'¹²⁹ Efonayi-Mäder points out that 'UNHCR is more and more on the defensive, facing political pressure on all sides ... with many states contesting the recommendations made by the international body.'¹³⁰

Refugees are a problematic area for a cosmopolitan model of global governance due to the inherent power of states to control their own borders and thwart international efforts.¹³¹ This creates obstacles similar to those outlined by an UNHCR source in relation to IDPs:

It is more convenient for UNHCR to work with a customizable IDP policy. This way, we are able to channel our energies into dealing with 'easy' solutions, such as those that prevail in failed or cooperative states. A universal mandate would require us to intervene in strong and guarded states — China and India, for example — that would be unlikely to accept international actions in their domestic sphere.¹³²

Although one option might be for the Security Council to play a larger role, this is unlikely given the political tensions involved. Many in the international refugee community see such a move as unwarranted, holding that UNHCR can operate effectively without such aid. Security Council action on behalf of refugees is 'exceptional, and should not be the norm.' Most want a more comprehensive move towards consensus building, and customary and binding international law, representing a more effective solution.¹³³

UNHCR's recent shift towards defensive problem solving is one way in which the organization has recognized the limits of its supranational framework and is using its particular form of power in new and effective ways.¹³⁴ In the absence of any formal supervisory body, many domestic courts have also begun to use international law to interpret their domestic statutes, thus coming some way to incorporating international values into domestic refugee law.¹³⁵ However, such domestic judicial powers can go either way. Efonayi-Mäder indicates that the 'great difficulty is in

¹²⁸ James C Hathaway, 'Reconceiving Refugee Law as Human Rights Protection,' (1991) 4(2) *Journal of Refugee Studies* 113 at 127.

¹²⁹ Interview with Peter Schatzer, 23 July 2001.

¹³⁰ Efonayi-Mäder, n. 91 above.

¹³¹ Lecture by David Held, 16 Mar. 2001.

¹³² Interview, July 2001.

¹³³ *Ibid.*

¹³⁴ Hassner, n. 64 above at 282.

¹³⁵ Lecture by Guy Goodwin-Gill, 23 Feb. 2001.

recognizing the actual repercussions of international law — how law is realized in practice. Courts have enormous control over the interpretation of international refugee law.¹³⁶ In order for UNHCR to be of significant value as an operational refugee regime, it must retain support from domestic courts while enhancing its own supervisory capacities. To fill the gaps where national governments refuse to comply with international law, civil society must continue to play a prominent role, both in lobbying and as actual players in the refugee regime. Jeff Crisp points out that

there is a difference between advocacy and operations — a necessary contradiction. Advocacy can afford to be absolutist while organizations like UNHCR have to compromise and make choices, sometimes having to accept the ‘least worst solution.’¹³⁷

In the post-Cold War world, NGOs have a key role in the conflict management strategies of the international community because of their unprecedented access to conflict areas.¹³⁸ This is a capacity that UNHCR must utilize to maximize its capacity within domestic jurisdictions.

The problem is that if states remain inactive, then UNHCR will have to stretch its resources to cover the new functions and situations that have become a *de facto* part of the refugee regime in recent years. Yet, as each new piece fits into this refugee puzzle, states face compassion fatigue at home and are increasingly unwilling to get involved.¹³⁹ As realist theory predicts, short-term state goals often prevail over long-term collective interest, and experience has shown that many states are unwilling to incorporate international obligations into their national policies.¹⁴⁰ Governments try to frame issues to cater to their own interests.¹⁴¹ Efonayi-Mäder points out that states may ‘try to create a public impression that they have done something for refugees, while most often they have not done very much.’ This may be a function of the fact that the

refugee situation in Europe has been badly explained and publicized. States pretend to have the situation under control but the people still have the impression that the refugee system is abused. Thus states are constantly obliged to deal with public opinion.¹⁴²

When developing their refugee law and eligibility criteria, states are obliged to consider principles of human rights, economics, foreign policy, public opinion, security, and social issues. Such policy decisions often

¹³⁶ Efonayi-Mäder, n. 91 above.

¹³⁷ Crisp, n. 72 above.

¹³⁸ Louise Ludlam-Taylor, ‘Recent Literature on IDPs’ in Hampton (ed.), *Internally Displaced People* 31 at 34.

¹³⁹ Lee, n. 3 above at 39.

¹⁴⁰ Hassner, n. 64 above at 279.

¹⁴¹ Crisp, n. 72 above.

¹⁴² Efonayi-Mäder, n. 91 above.

conflict with fundamental principles of international law and thus necessitate an international body to manage the regime, coordinating international action, supervising national responsibilities, and determining whether domestic laws are 'purely cosmetic or have actually effected change'.¹⁴³ The model of global governance that best suits the refugee regime is that already represented by UNHCR, complemented by various regional networks. But this is a model that needs to be reworked to recognize the changing realities of the international system.

Emerging from a century of 'extraordinary movement and upheaval' the international refugee regime has survived a tumultuous process of creation and evolution and is still forging a clear path ahead. International bodies have implemented increasingly inclusive refugee definitions, until today the refugee regime is in some need of deconstruction and reinforcement. Confronting the dual nature of the international system head-on, the United Nations High Commissioner for Refugees must enhance the supervisory framework of the regime, working with civil society, domestic courts, and governments to find policies that facilitate respect for international obligations and attempt to resolve refugee issues at home. Throughout history, the refugee regime has reflected the evolution of the international system and its complex interplay of ideology, economics, and balance of power politics — it remains to be seen where such considerations will lead the refugee regime in the turbulent years to come.

¹⁴³ *Ibid.*