

A CALL FOR REFORM OF INTERNATIONAL REFUGEE LAW:
*THE NEED FOR AN EXPANSION OF THE DEFINITION OF A REFUGEE UNDER THE
1951 REFUGEE CONVENTION*

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Declaration

I, DEBORAH NYANDUKO MOTAROKI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Allan Mukuki

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Abstract

In recent times, the UNHCR has been accused of failing in the fulfilment of its mandate as provided for under its statute. However, the entirety of fault is not to be borne by the UNHCR, owing to the fact that the Agency relies on laws drafted for a different time. The main aim of this research is to investigate whether there is a need for reform of the international refugee law regime. The objects of the study were to distinguish the circumstances that led to the formation of the 1951 Convention from the prevailing circumstances and to establish the role of the UNHCR in the enforcement and development of international refugee law, in a bid to determine the applicability of the existent laws to the modern refugee crisis.

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List of Abbreviations

UN	<i>United Nations</i>
UNHCR	<i>United Nations Office of the High Commissioner for Refugees</i>
EXCOM	<i>Executive Committee for the High Commissioner for Refugees</i>
CJEU	<i>Court of Justice for the European Union</i>
OAU	<i>Organization of African Unity</i>
UNRRA	<i>United Nations Relief and Rehabilitation Administration</i>
BIA	<i>Board of Immigration Appeals</i>
FGM	<i>Female Genital Mutilation</i>

List of Cases

Maslennikov v Mukasey, 2008.

Dunat v Hurney, 1961.

Kovac v Immigration and Naturalization Services, 1969.

Matter of Acosta, 1985.

Mirzoyan v Gonzales, 2006.

Avetova-Elisseva v Immigration and Naturalization Services, 2000.

In Re T-Z-, 2007.

Ioane Teitiota v The Chief Executive Ministry of Business, Innovation and Employment, 2015.

In Re Fauziya Kasinga, 1996.

Matter of R-A-, 2008.

Aguirre-Cervantes v INS, 1999

Matter of A-N-, 2000.

R v Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah, 1997.

Islam and Others v Secretary of State for the Home Department, 1999.

CHAPTER ONE

THE PRINCIPLE OF NON-REFOULEMENT AND REFUGEE REPATRIATION: *A Call for Reform of International Refugee Law*

1.1 Introduction

Refugee law first gained ground as a tenet of international law after World War II, with the 1951 Convention Relating to the Status of Refugees, which is the basis for the current regime.¹ It defines a refugee as a person who owing to the well-founded fear of persecution as a result of events occurring before January 1 1951.

One of the most fundamental provisions of the Convention is Article 33, which provides under sub—article 1 that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Refugee rights advocates argue that this definition of a refugee is too narrow and does not clearly spell out state obligations beyond the principle of non-refoulement. Further, it lacks an enforcement mechanism and its application largely relies on good faith of the States party to it.² This situation should have been remedied by the 1967 Protocol relating to the Status of Refugees, however the Protocol only does away with the restriction as regards scope of

¹ Siegfried K, *Time to reform the way we protect refugees?* Published on May 9, 2016, available online at <http://www.irinnews.org/analysis/2016/05/09/time-reform-way-we-protect-refugees>, on February 7, 2017.

² Siegfried K, *Time to reform the way we protect refugees?*

application but does not expand the scope of who a refugee is. The situation remains the same even after the OAU Convention³ and the Cartagena Declaration.⁴

Despite criticism by governments that the Convention is out of step with the current era of mass migration, the UNHCR, which is the body responsible for supervising the implementation of the Convention, has opposed any suggestion that the Convention needs amending.⁵ This might be for fear that the alternative will be worse.⁶

However, the current refugee crisis has shone a light on the pre-existing weaknesses in the international refugee regime.⁷ Set up to deal with post-World War II refugee flows, these rules are straining under the burden of unprecedented movements.⁸

Attempts at revamping the system have been futile. James Hathaway, director of the refugee law program at Michigan University, has taken the stance that the problem is not with the Convention. He alleges that the problem is a complete failure by States and the UNHCR to innovate ways to actually deliver protection.⁹ Similarly, it has been argued that reforms to the international refugee regime would have little meaning for the lived reality of many asylum seekers and refugees who are denied legal protection, even in countries with progressive

³ Article I, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

⁴ The Cartagena Declaration on Refugees, 1984.

⁵ Siegfried K, *Time to reform the way we protect refugees?*

⁶ Gallagher A and David F, *Refugee laws in need of reform*, published August 1, 2014, available online at www.theaustralian.com.au/opinion/refugee-laws-in-need-of-reform/news-story/0a7909c3d47cde19c88d05a71597eda5, on February 7, 2017.

⁷ Siegfried K, *Time to reform the way we protect refugees?*

⁸ Gallagher A and David F, *Refugee laws in need of reform*.

⁹ Siegfried K, *Time to reform the way we protect refugees?*

refugee laws.¹⁰ The future lies in embarking on a good-faith effort to revise the rules so causes are confronted and burdens shared more equally.¹¹

This dissertation will be dealing with the outdated nature of the 1951 Convention Relating to the Status of Refugees. It will explore efforts by the UNHCR to fulfil their mandate under the scope of the Convention, which excludes a majority of the migrant population. Further, it will explore the need for reform of the existing refugee regime with the adoption of a Convention that reflects the current situation. Additionally, it will examine the need for a change in the structure of the UNHCR, to better accomplish its mandate.

Chapter 2 will be an analysis of the 1951 Convention Relating to the Status of Refugees. It will focus on certain issues arising out of the definition of a refugee under Article 1 and the application of Article 33 of the Convention. This includes the factors that led to the formulation of the Convention, and how the circumstances differ; then versus now. Further, it will explore the expansion of the definition of a refugee in future treaties and examine whether these definitions are a reflection of the current situation on the ground.

The last part of Chapter 2 will inform the exploration of issues in Chapter 3, where this paper will examine the role of the United Nations in the development and enforcement of international refugee law. Specifically, the expansion of the UNHCR's mandate and its clash with the mandates of other UN organs in a bid to better accomplish its objectives.

Chapter 4 will be wholly focused on the need for reform of refugee law. Research will establish whether there is need to amend the 1951 Convention to allow other circumstances that lead to

¹⁰ Statement by Amit R, Senior Researcher at the African Centre for Migration and Society, Witwatersrand University, Johannesburg, to Siegfried K.

¹¹ Gallagher A and David F, *Refugee laws in need of reform*.

refugee movements, or whether the current refugee crisis calls for an overhaul of the entire body of law governing refugees. The paper will analyze the situation in Syria and Australia's denial of entry to refugees.

The answers to these questions are important because they build upon the existent body of law on refugee matters. They may also inform the adoption of sustainable and effective policies to address the current refugee predicament. Further, the answers to these questions may set precedent for how the world handles refugee crises in future or shed light on how to avoid a refugee crisis altogether.

1.2 Background to the study

The Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR) is the rationale for the existence of the UNHCR and the legal basis for its activities.¹² The Refugee Agency provides international protection to refugees and seeks a permanent solution to the refugee problem by working with governments, to facilitate the repatriation process, or the assimilation of refugees into new national communities.¹³ It informs what the UNHCR should do and who they should do it for.¹⁴

Lately however, it has been alleged that the organization supposed to be the watchdog of refugees has failed in its duties to protect them from violation of their rights,¹⁵ specifically, the refugees' right to not be refouled. Most states and humanitarian organizations believe that the signing of the tripartite agreement between the Federal Government of Somalia, the

¹² Chapter 1, General Provisions, Statute of the Office of the United Nations High Commissioner for Refugees.

¹³ Statute of the Office of the United Nations High Commissioner for Refugees.

¹⁴ Overview, UNHCR Emergency Handbook, available at <https://emergency.unhcr.org/entry/55601/unhcrs-mandate-for-refugees-stateless-persons-and-idps>, on January 29, 2017.

¹⁵ Howland T, 'Refoulement of Rwandan Refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law' *U.C. Davis Journal of International Law and Policy* (1998), 73-102.

Government of the Republic of Kenya and the United Nations High Commissioner for Refugees, was a breach of international law and Kenya's international obligations.¹⁶ This situation bears great similarity to the mass exodus of Rwandese refugees, where the UNHCR acquiesced to the repatriation of Rwandese refugees from the Democratic Republic of Congo. Shortly thereafter, Tanzania followed suit,¹⁷ with the help of the UNHCR.¹⁸

However, the UNHCR may not be wholly to blame for the current state of affairs. This is in consideration of the fact that they are working with outdated laws that do not apply to the modern refugee crisis, that is not based on war, but rather other calamities, for example economic conditions and climate change.

Further, the 1951 Convention and 1967 Protocol contain an agreement for state parties to cooperate with the UNHCR in the exercise of its functions and help supervise the implementation of provisions found in the treaties.¹⁹ However, this is difficult to do given some State parties' unwillingness to accept any more refugees and asylum seekers, for financial and security reasons. The fact that most of these migrants do not meet the threshold as set out in Article 1 of the Convention does not ease the UNHCR's burden.

1.3 Statement of the problem

The UNHCR is working with the definition of a refugee stipulated under Article 1 of the 1951 Convention Relating to the Status of Refugees. However, the situation is different from the

¹⁶ Kerrow B, *Government decision to shut down refugee camp ill advised*, published on May 8, 2016, available at <https://www.standardmedia.co.ke/article/2000201016/government-decision-to-shut-down-refugee-camps-ill-advised>, on December 6, 2016.

¹⁷ Amnesty International, *Rwanda: Human Rights Overlooked in Mass Repatriation*, published on January 14, 1997, available at <https://www.amnesty.org/en/documents/afr47/002/1997/en/>, on January 23, 2017

¹⁸ Howland T, *Refoulement of Rwandan Refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law* 73.

¹⁹ Article 35, Convention relating to the Status of Refugees, 1951 and 1967 Protocol.

circumstances then that necessitated the formulation of the Convention. There is need for refugee law and guiding principles, which provides a concise, yet unrestrictive definition of a refugee which fits the global dynamic that considers other factors that would result in persons seeking refuge in countries outside those of their habitual residence, such as climate change and harsh social and economic realities.

1.4 Justification of the study

This dissertation will criticize the enforcement of the UNHCR's mandate under the 1951 Convention. This study is important as it will establish whether the existent laws and measures put in place are adequate to handle the modern refugee crisis. It will further explore the need for reform of refugee laws and justify the formulation of sustainable policies to handle the refugee crisis. In a similar light, this study may call for a restructuring of the UNHCR for it to better enforce its mandate.

1.5 Aims and objectives of the study

The main objective of this dissertation is to examine the applicability of existing refugee law to the current refugee regime.

My specific objectives are:

- i. To distinguish the circumstances that led to the formulation of the 1951 Convention from the prevailing circumstances.
- ii. To establish the role of the UNHCR in the development and enforcement of the existing international refugee law.
- iii. To establish whether there is need for refugee law reform.

1.6 Research questions

In the course of this study, this dissertation will seek to establish how the Office of the United Nations High Commissioner for Refugees is carrying out its mandate to protect refugees from repatriation, given the limited definition of a refugee provided for in the 1951 Convention. This will be done by answering the following questions:

- i. How different are the prevailing circumstances from those that led to the formulation of the 1951 Convention?
- ii. What is the role of the UNHCR in development and enforcement of international refugee law?
- iii. Is there need for refugee law reform?

1.7 Literature review

1.7.1. The circumstances that led to the formulation of the 1951 Convention vis-à-vis the prevailing circumstances

Loescher, in his article, acknowledges the difficulties faced, not only by international institutions, but also by states, traditionally, in addressing refugee problems, particularly during times of great disorder and structural change within world politics. On the one hand, they have a fundamental self-serving interest in quickly resolving refugee crises,²⁰ and on the other, a matter of state independence, with their unwillingness to yield authority to international refugee agencies and institutions and impose financial and political limitations on their activities.²¹

²⁰ Loescher G, 'Refugee Movements and International Security' Adelphi Papers (268), Brassey's, for the International Institute for Strategic Studies (London), 1992.

²¹ Loescher G, 'The International Refugee Regime: Stretched to the Limit?' *Journal of International Affairs* (1994), 351-377.

Thus, states created the international refugee regime prompted not by purely altruistic motives, but by a desire to promote regional and international stability and to support functions which serve the interests of governments. However, they sought to limit once again the regime's responsibilities in the context of the emerging global refugee problem,²² resulting in a set of rules that cannot stand the test of time.

Nonetheless, despite state reservations, significant inter-governmental collaboration on the refugee issue did in fact occur, and the responsibilities accorded to the international refugee regime steadily expanded, with assistance and protection granted to a progressively larger number of refugees. In the post-Cold War era, however, the number of displaced people in situations of internal conflict, state disintegration and environmental degradation is growing rapidly. The refugee regime — ill equipped to address the causes of a crisis, the numbers caught up in it or its consequences — is once more in danger of being over whelmed.

Berg, in his article, “Why Cling on to an Outdated Refugee Convention?” postulates that the 1951 Convention Relating to the Status of Refugees is not fit for its purpose, having been designed for an era we no longer live in; an era where the causes and trajectories of global migration were quite different to today. The Convention deeply distorts our understanding of the 21st Century immigration, making humanitarian approaches to refugees harder, not easier. Having been developed in response to the World War II refugee crisis, the idea of coordinated global action on refugees was already outdated a few years later. By the time, refugee questions had already been subsumed into Cold War politics and migrants were those fleeing

²² Loescher G, *The International Refugee Regime: Stretched to the Limit?* 351.

communism. The Convention definition of a refugee was clearly a formula specifically designed for the Cold War, where states actively persecuted returning citizens.

“While the Convention was designed to handle those, who could not return home for political reasons, the contemporary requirements are vastly different,” he continues. The bulk of today’s refugees are displaced, not because of politics, but because of economic hardship or conflict; they do not flee totalitarianism, but poverty and insecurity. By any layperson’s definition, virtually all those who reside in 21st-century refugee camps would be considered “refugees” but it has been estimated the bulk would not fit the convention’s “well-founded fear of being persecuted” standard. The end of the Cold War undermined the political foundations of the refugee framework. We have now almost no genuinely totalitarian dictatorships persecuting their citizens, but we also have more refugees than at any time in the last half century. The distinction the Refugee Convention makes between political refugees and the rest is archaic and no longer makes any sense and badly distorts the popular understanding of refugee issues.

However, that is not the definition of a refugee stipulated in the Convention, but rather how the refugee convention misrepresents the common understanding of the entire immigration issue. Rather than viewing refugees as a subset of the general global migration, the Convention requires us to see them as a separate thing entirely, emulating a false dichotomy.

In a similar light, Quinn, acknowledges the continually changing nature and complexity of displacement. He identifies other international crises that would result in people seeking refuge from conflict and persecution, in the form of new forms of conflict, enforced movement of people from as a result of extreme weather events, natural disasters, environmental degradation and human trafficking.

Conversely, however, he positions the fact that the Refugee Convention faces significant challenges does not mean it is irrelevant or unworkable. “Even the strongest advocates for the Convention would not argue that it is, or was ever intended to be, a panacea for the complex reality and constantly evolving protection needs arising from forced displacement.”

The enduring value and relevance of the 1951 Refugee Convention is, first and foremost, that it is there. It is the foundation for refugee protection. Notwithstanding any actual or perceived limitations in the scope of the Convention, crucially for the first time it provided a formal legal framework and recognition that, where states are unable or unwilling to provide de jure or de facto protection for their citizens, the international community has an obligation to offer protection.

The Convention tells us who is a refugee. It also states who is not a refugee: its provisions do not apply to people who have committed war crimes or crimes against humanity, serious non-political crimes, or who are guilty of acts contrary to the purposes and principles of the United Nations. The Convention additionally articulates a number of fundamental principles underpinning refugee protection, namely, non-discrimination, non-penalization and non-refoulement, under article 3, 31 and 33. It further lays down basic minimum standards for the treatment of refugees. In the words of Erika Feller:²³

The 1951 Convention was drafted to confer a right to protection on persons made otherwise exceptionally vulnerable through being temporarily outside the normal framework of national state protection. Its object and purpose was to give voice and force to rights for refugees, and to responsibilities for their surrogate protection.

²³ Feller E, UNHCR Assistant High Commissioner (Protection), *The Refugee Convention at 60: Still fit for its Purpose?* Workshop on Refugees and the Refugee Convention 60 Years On.

Gill argues that the drafters of the 1951 Convention did not anticipate that the process of refugee determination would become institutional. It was not foreseen that there would be a requirement of due process by virtue of which the claimant would have a right to advice and legal representation. Furthermore, it was not anticipated that it would be required of decision-makers to understand the situation in the claimant's country of origin and make a reasoned and fair determination on the credibility of an individual's claim.²⁴

1.7.2. The role of the UNHCR in development and enforcement of international refugee law

In their book, Jastram and Achiron portray the UNHCR as a humanitarian and non-political organization, mandated by the United Nations to protect refugees and help them find long-term solutions to their plight. They help refugees repatriate to their home country, if conditions are conducive to return, integrate into their countries of asylum, or resettle in second countries of asylum. They indicate a step-up by the UNHCR in growing to meet the challenge that is displacement of persons from their homes and countries, with the Agency's expansion from a relatively small, specialized agency with an envisioned three-year lifespan to an organization of over 4,000 staff members with offices in nearly 120 countries and an annual budget of US\$1 billion.

In addition to offering legal protection, UNHCR now also provides material relief in major emergencies, either directly or through partner agencies. In its first fifty years, UNHCR has protected and assisted more than 50 million people and its work has earned two Nobel Peace Prizes.

²⁴ Chatham House, *'The Refugee Convention: Why Not Scrap It?'* A summary of discussion at the International Law Program Discussion Group at Chatham House on 20th October 2005; participants included lawyers, academics and representatives from Governments and NGOs.

Further, the UNHCR promotes international refugee agreements, both at the international and field (local) levels. This they do by monitoring government compliance with international refugee law and promoting refugee law among all involved in refugee protection. At the field level, UNHCR staff work to protect refugees through activities like responding to emergencies, relocating refugee camps away from border areas to improve safety; ensuring that refugee women have a say in food distribution and social services; reuniting separated families; providing information to refugees on conditions in their home country so they can make informed decisions about return; documenting a refugee's need for resettlement to a second country of asylum; visiting detention centres; and giving advice to governments on draft refugee laws, policies and practices.²⁵

They conclude by recognizing the extensive nature of the UNHCR's mandate as compared to the responsibilities assumed by States Parties to the Refugee Convention and Protocol. They identify the bridging of the "protection gap" which exists in situations where the UNHCR seeks to protect persons with respect to whom concerned States do not recognize as their responsibility under any refugee instruments as one of the challenges facing refugees and countries of asylum today.

Bank, in his article, *The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law*, purports that the Court of Justice of the European Union (CJEU) is under-utilizing its potential for shaping international refugee law to a great extent. He recommends the strengthening of the CJEU's role by giving an expert role before

²⁵ Jastram K, Achiron M, *Refugee Protection: A Guide to International Refugee Law*, UN High Commissioner for Refugees, 2001, 146.

the Court to the UNHCR as the organization that has been accorded the expert role in the 1951 Convention.²⁶

Pirjola, in his article, *Shadows in Paradise*, depicts the ideal downward slope. He purports that the content of the principle of non-refoulement is not established in international law. Consequently, States have committed to a principle with indeterminate content, hence, an open and ambiguous concept. This leads to problems in interpretation, as national and international bodies have extensive powers of discretion to give content to the term and promote their own “correct” interpretation of the principle.²⁷ This proves a challenge for the UNHCR, in enforcing their mandate, without a clearly distinguished definition of the term. This is despite the existence of an extrapolated definition under Article 33 of the 1951 Convention Relating to the Status of Refugees.²⁸

Ahlborn posits that as humanitarian organizations such as the UNHCR have become increasingly involved in countries of origin and zones of active conflict,²⁹ they have witnessed massive violations of human rights and international humanitarian law.³⁰ They have seen their assistance being manipulated for military strategies and their refugee camps being heavily militarized. The humanitarian space, first defined by the president of *Médecins sans Frontières* as a ‘space of freedom in which we [humanitarian organizations] are free to evaluate needs,

²⁶ Bank R, ‘The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law’ *International Journal of Refugee Law* (2015), 213.

²⁷ Pirjola J, ‘Shadows in Paradise: Exploring Non-Refoulement as an Open Concept’ *International Journal of Refugee Law* (2008), 639-660.

²⁸ “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Art. 33 (1) 1951 Convention Relating to the Status of Refugees.

²⁹ Newland K and Meyers D, ‘Peacekeeping and Refugee Relief,’ *Journal of International Security* (1998), 15-30.

³⁰ Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, S/1994/674 and Resolution 941 (1994) adopted by the Security Council at its 3428th meeting, on 23 September 1994.

free to monitor the distribution and use of relief goods and free to have a dialogue with the people',³¹ has shrunk over the past decades for a variety of reasons linked to an increasingly complex political and security situation.

As a result, the UNHCR has become more and more dependent on the guidance of the Security Council and the (military) support of UN peace operations when providing in-country protection and assistance to refugees and displaced persons. Although the necessity of this interaction has been widely acknowledged and even welcomed, the close co-operation between the UNHCR, with its humanitarian, non-political mandate, and the politically authorized peace operations has also provoked critical voices, in particular with regard to the creation of safe areas and the erosion of established principles of humanitarian action.³² She also acknowledges the question raised on whether the increased interaction of humanitarian organizations such as the UNHCR with the Security Council will compromise the humanitarian principles of impartiality, neutrality, independence, and the consent of the host state.³³

1.7.3. The need for refugee law reform

Millbank is of the opinion that the crux of criticism of the 1951 Convention Relating to the Status of Refugees is because of its anachronistic nature; developed in and for a different era. The mechanisms and systems outlined therein were not designed for the present day's mass refugee outflows and migratory movements. The Convention definition of a refugee has made less sense as the nature of refugee flows changes and numbers rise. This situation is not helped

³¹ Wagner Johanna, 'An IHL/ICRC perspective on 'humanitarian space' January 2006 <https://odihpn.org/magazine/an-ihlicrc-perspective-on-%C2%91humanitarian-space%C2%92/> on 16 January 2017.

³² Ahlborn C, 'The Normative Erosion of International Refugee Protection through UN Security Council Practice' *Leiden Journal of International Law* (2011), 1009–1027.

³³ Newland K and Meyers D, 'Peacekeeping and Refugee Relief', 15.

by the vague wording of the Convention. The result is that international refugee law has become both highly developed and at the same time, highly contentious. Consequently, it does not mirror the responsibilities of the UNHCR, and neither is it based on refugee realities.

He goes further to identify the principle of non-refoulement as the core of the Refugee Convention in contrast to a general obligation to refugees. He articulates the Convention has institutionalized the notion of exile as a solution to refugee problems, which is an inappropriate solution to modern refugee problems in an age of globalization or regionalization. This however, fails to take into account the potential impact on receiving countries; who are fully responsible for asylum seekers within their territories, while there is no limit to the number of people who can apply for asylum or who must be accepted. He recognizes the disparity present in the workings of the UNHCR, where their main objective is repatriation, not on the basis of those with the greatest need, but rather, those who are mobile and willing to pay, illustrating the misguided nature of the UNHCR in the accomplishment of its objectives.

Weiner, in his article, *The Clash of Norms*, examines the policy dilemmas confronting the UNHCR and other international humanitarian organizations. He believed these dilemmas are the consequence of having to choose between conflicting norms, which also happen to be competing international norms; the traditional legal mandates of the UNHCR, like support the principle of non-refoulement, or other international norms including the right to remain in one's own country.³⁴ Such conflicts may bring a debate between the restrictive legal and monistic view supporters and the instrumental humanitarian supporters,³⁵ leaving the UNHCR

³⁴ Weiner M, 'The Clash of Norms: Dilemmas in Refugee Policies' *Journal of Refugee Studies* (1998), 433-453.

³⁵ Weiner M, 'The Clash of Norms: Dilemmas in Refugee Policies' 433.

caught in the middle cross-eyed as to how to carry out their mandate, and which approach fully caters to the rights and interests of the refugees.

Rodger, in her article, *Defining the Parameters of the Non-refoulement Principle*, discourses that the parameters of the principle of non-refoulement need to be clarified if refugees are to be protected from refoulement. Further, the policies being implemented by states are endangering the principle of non-refoulement and the refugee regime itself.³⁶

Tugushi, in his article, *Principle of "non-refoulement"*, agrees that the principle of non-refoulement has played a key role in the protection of refugees, especially those fleeing persecution. However, it is ineffective in some cases, what with the use of gray areas by governments to get around their international obligations. He calls for changes that will result in the drafting of a new convention which will better define the status of refugees and offer them better protection, in the words of Sir Elihu Lauterpacht.³⁷ As an alternative, he recommends the adoption of a new resolution by the General Assembly that will give more clarification to the scope of the principle.³⁸ He recognizes that it is also the duty of the community to find durable solutions to the refugee crisis. He emphasizes the inviolability of the principle even in cases of mass influx, where the principle is most threatened.³⁹

In the same light, Howland, highlights the failure of the UNHCR to base its actions in the 1994 genocide in Rwanda and the subsequent refugee crisis in human rights law. He opines that the UNHCR relied on principles of refugee law which provided little useful guidance. He would

³⁶ Rodger J, 'Defining the Parameters of the Non-Refoulement Principle' LLM Thesis, Victoria University of Wellington, 2001.

³⁷ The Scope and Content of the Principle of Non-Refoulement, Opinion, UNHCR, June 20, 2001.

³⁸ Tugushi G, 'Principle of "Non-refoulement": Rule of customary international law,' *Lund University Papers*, 2004.

³⁹ Tugushi G, '*Principle of "Non-refoulement": Rule of customary international law*'.

rather an approach which integrated human rights law in the UNHCR's policy decisions regarding when and how to intervene, and when to facilitate return. He considers it a failure, on the part of the Agency, for not using a mandatory, coherent and helpful legal framework. Consequently, the UNHCR's actions were reduced to reactions, a development which can only harm the agency's ability to protect refugees.⁴⁰

1.7.4. Conclusion

There is a gap between the existing refugee law and their application to the refugee crisis. It is time for reform of the law and the structure of the UNHCR to enable the Refugee Agency to better fulfil their mandate and to alleviate the refugee crisis in the world. This dissertation will explore the nature of the 1951 Refugee Convention, the role of the UNHCR and the need for reform of refugee law.

1.8 Theoretical Framework

This dissertation will rely on the legal realist school of thought. Legal realists purport that because life and society are constantly changing, certain laws and doctrines have to be altered or modernized in order to remain current.⁴¹

In the context of this dissertation, this study is focusing on the need for international refugee law reform. This is because, the existent laws were created for another time, to handle another crisis, which bears little similarity to the current one. There is therefore need for laws which reflect this change in circumstance, to prevent the formation of a legal gap between the law and its applicability.

⁴⁰ Howland T, 'Refoulement of Rwandan Refugees' 15.

⁴¹ Mayer D, Warner D, Siedel G, Lieberman J, *Legal Aspects of Property, Estate Planning, and Insurance.* December 9, 2012.

1.9 Research hypothesis

The following hypotheses will be proved or disproved by the end of this dissertation:

- i. There is no relation between the guidelines of the 1951 Convention and the current mandate of the UNHCR.
- ii. There is no relation between the circumstances that led to the formulation of the 1951 Convention and the prevailing circumstances globally.
- iii. There is no relation between the criteria in play by the UNHCR to determine refugee status and the situations the refugees are seeking refuge from.

1.10 Assumptions

This paper works with the assumption that:

- i. The laws governing the treatment of refugees are outdated and should not apply to the current global refugee crisis.
- ii. The UNHCR lacks clear and uniform laws regarding the treatment of refugees and has to approach each refugee crisis on a case by case basis.
- iii. The UNHCR's agreement to the refoulement of refugees is not within their mandate as prescribed in the 1951 Convention.
- iv. The UNHCR's cooperation with other UN Organs in the effective enforcement of its mandate is a crash and burn affair, as such cooperation leads to clash of mandates and eventual breakdown of the UNHCR's operations.

1.11 Research design & methodology

This dissertation is an investigative study. As such, the author has undertaken to perform a desktop research, as the primary means of data collection.

A secondary study was also useful in establishing facts on the more substantive aspects as regards the work of the UNHCR; for instance, the extent to which the UNHCR has managed to successfully carry out its mandate.

1.12 Statement of limitations

In the course of my research, I anticipate the following challenges:

- i. *Time*: Refugee law is a vast field in international law. There is a lot of written material. I expect I will meet some challenges in collecting and effectively interpreting data to suit my needs, given the limited time frame.
- ii. *Inaccessibility of data*: Where it may require conducting an interview, there may be challenges contacting the appropriate officers and setting up interviews, hence difficulty accessing data.

1.13 Chapter breakdown

Chapter 1: Introduction. This is the introductory chapter of this dissertation.

Chapter 2: The inapplicability of the 1951 Convention to the modern refugee regime. This dissertation will focus on issues arising out of the definition of a refugee under Article 1 and the application of Article 33 of the Convention. Further, it will identify and expound on other factors that would result in migration of peoples from the countries of their habitual residence, like harsh economic and social realities.

Chapter 3: The role of the UN in the enforcement and development of international refugee law. This chapter will focus on how the UNHCR has managed to enforce their mandate despite the outdated laws. It will also look at the

UNHCR's milestones as regards the development of international refugee law.

Chapter 4: The need for refugee law reform. Having discussed the nature of the 1951 Refugee Convention and the role of the UNHCR in its application and development of international refugee law as a whole, this chapter will explore the need for reform of refugee law, given the difficulties faced by the UNHCR in the enforcement of its mandate, and the need for laws that accommodate all refugee interest groups, political, social and economic.

Chapter 5: Recommendations and conclusion. This will be the final chapter of this dissertation. It will highlight the conclusions the author made after conducting the research and succinct recommendations as to how the refugee crisis can be better handled in future.

CHAPTER TWO

AN ANALYSIS OF THE 1951 REFUGEE CONVENTION: *Prevailing Circumstances Vis-à-vis Past Circumstances*

2.1. Introduction

The 1951 Convention Relating to the Status of Refugees is the cornerstone and the center of the international legal framework for the protection of refugees. Its aim is to define certain basic human rights of refugees and establish certain minimum standards for their treatment,⁴² including the legal obligation of States to protect them.⁴³ It contains a 'conceptual' definition of the term 'refugee',⁴⁴ as a person who, as a result of events occurring before 1 January 1951, is outside his or her former home country because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁴⁵

This, it has been argued, is a very restrictive definition of a refugee in a global legal instrument, based on the fact that the time limitations it imposes are *stricto sensu* European,⁴⁶ and the basic outlook of the Convention is an embodiment of European practices. The Convention deeply

⁴² Article 1, Convention Relating to the Status of Refugees, 1951.

⁴³ The 1951 Refugee Convention, available online at <http://www.unhcr.org/1951-refugee-convention.html> on July 24th 2017.

⁴⁴ Jackson, I, 'the 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection' *International Journal of Refugee Law* (1991), 403-413.

⁴⁵ Article 1, *Convention Relating to the Status of Refugees*, 1951.

⁴⁶ The definition of a refugee as provided in the Convention is a reflection of the World War and Cold War effects on Europe, and the resulting displacement of people.

distorts our understanding of 21st Century immigration,⁴⁷ by misrepresenting the common understanding of the entire issue.⁴⁸

By any layperson's definition, virtually all those who reside in 21st-century refugee camps would be considered "refugees", but it has been estimated the bulk would not fit the convention's "well-founded fear of being persecuted" standard.⁴⁹

Legal and academic scholars have argued that the Refugee Convention is outdated and unsuitable for the current refugee regime. The distinction the Refugee Convention makes between political refugees and the rest is archaic.⁵⁰ It was designed for an era we no longer live in, where the causes and trajectories of global migration were quite different from the current ones.⁵¹ This position has been supported by Quinn, who identifies other international crises that would result in people seeking refuge from conflict and persecution, presenting as conflict, extreme weather events, natural disasters, environmental degradation and human trafficking.⁵²

In its defence, it has been reasoned that the drafters of the 1951 Convention did not anticipate that the process of refugee determination would become institutional.⁵³ The essence of the Convention lies in the fact that it exists. It contains fundamental principles that underpin refugee protection and lays down basic minimum standards for refugee protection.⁵⁴

⁴⁷ Loescher G, *Refugee Movements and International Security*.

⁴⁸ Berg C, *Why Cling on to an Outdated Refugee Convention?* Published on October 19, 2011, available at <http://www.abc.net.au/news/2011-10-19/berg-why-are-we-clinging-to-an-outdated-refugee-convention/3577538>, on August 28, 2017.

⁴⁹ Berg C, *Why Cling on to an Outdated Refugee Convention?*

⁵⁰ Berg C, *Why Cling on to an Outdated Refugee Convention?*

⁵¹ Berg C, *Why Cling on to an Outdated Refugee Convention?*

⁵² Quinn E, *The Refugee Convention Sixty Years On: Relevant or Redundant?* Working Notes, Issue 68, 2011.

⁵³ Chatham House, *'The Refugee Convention: Why Not Scrap It?'* A summary of discussion at the International Law Program Discussion Group at Chatham House on 20th October 2005; participants included lawyers, academics and representatives from Governments and NGOs.

⁵⁴ Feller E, UNHCR Assistant High Commissioner (Protection), *The Refugee Convention at 60: Still fit for its Purpose?* Workshop on Refugees and the Refugee Convention 60 Years On.

The essence of this Chapter is to prove the hypothesis that the Convention is outdated, and in need of reform, and consequently answer the question of its applicability to the contemporary refugee crises. This is achieved by giving a brief history of international refugee protection and contrasting the factors that led to the formation of the 1951 Convention with the current circumstances influencing cross-border migration. A brief analysis of these circumstances, which include climate change, economic hardship, and gender-based persecution will be conducted and a determination as to whether they are deserving of being included within the parameters of the definition of a refugee made. Lastly, the problems arising from the conventional definition of a refugee will be identified and recommendations made.

2.2. History of International Protection of Refugees

The history of international protection of refugees begun with the League of Nations, between 1921 and 1946.⁵⁵ Several institutions were created to perform the tasks of the High Commissioner for Refugees; basically, to afford international protection to refugees based on international legal instruments concluded within the framework of the League of Nations.⁵⁶

The most fundamental achievement of this time is the Convention relating to the International Status of Refugees of 1933, which was ratified by nine States, including France and the United Kingdom. The Convention dealt with administrative measures, refoulement, legal questions, labour conditions, education, welfare and relief, industrial accidents, fiscal regime and exemption from reciprocity and provided for the creation of “committees for refugees”.⁵⁷ It later served as the model for the 1951 Convention relating to the Status of Refugees.⁵⁸

⁵⁵ Jaeger G, ‘On the History of the International Protection of Refugees’ *International Review of the Red Cross* (2001), 727-738.

⁵⁶ Jaeger G, On the History of the International Protection of Refugees, 727.

⁵⁷ Jaeger G, On the History of the International Protection of Refugees, 727.

⁵⁸ The 1951 Convention relating to the Status of Refugees.

As the volume of refugee flows increased, an international conference was held in 1938 in France on the initiative of President Roosevelt to formulate comprehensive plans for dealing with the refugees, which resulted in the establishment of the Intergovernmental Committee on Refugees to coordinate relief work for refugees.⁵⁹

In 1943, a conference held in Washington, D.C. led to the establishment of the United Nations Relief and Rehabilitation Administration (UNRRA), aimed at dealing with humanitarian problems caused by the war. It was however dissolved in 1947 and the International Refugee Organization (IRO) set up. This replaced both the Intergovernmental Committee on Refugees and the United Nations Relief and Rehabilitation Administration.⁶⁰

All these organizations provided useful and practical experience that served as the foundations for the institution of the United Nations High Commissioner for Refugees (UNHCR) in 1951. It is the key institution engaged in humanitarian assistance to refugees.⁶¹ The Statute of the UNHCR⁶² identified as its objectives the provision of international protection to refugees and the seeking of a permanent solution to the refugee problem.⁶³

It was assumed that once the European refugees were settled, the jobs of the UNHCR and other related relevant organizations would be over. However, the ranks of refugees began to swell in the late fifties and sixties and more refugees appeared in Europe, Africa and Latin America. By the early seventies, refugees were a global affair.⁶⁴

⁵⁹ Rizvi H, 'United Nations and the Refugee Problem' *Pakistan Institute of International Affairs* (1985), 46-59.

⁶⁰ Rizvi H, *United Nations and the Refugee Problem*, 46.

⁶¹ Rizvi H, *United Nations and the Refugee Problem*, 48.

⁶² Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (v) of December 14, 1950.

⁶³ Article 1, *Statute of the Office of the United Nations High Commissioner for Refugees*, 1951.

⁶⁴ Rizvi H, *United Nations and the Refugee Problem*, 46.

2.3. Factors that Led to the Formation of the Convention

The 1951 Convention relating to the Status of Refugees was drawn up in the wake of World War II to protect Europeans who were forced to flee their homes.⁶⁵ When governments established the U.N. in 1945, war and persecution had displaced over forty million people in Europe alone.⁶⁶ The 1951 Convention was therefore a post war instrument originally constricted in application to only those peoples “fleeing events occurring before 1st January 1951 and within Europe.”⁶⁷ This time restriction was removed by the 1967 Protocol.⁶⁸

2.4. Prevailing Circumstances Vis-à-vis Past Circumstances

In the aftermath of World War II, States had a fundamental self-serving interest in quickly resolving refugee crises, and on the other, a matter of state independence, with their unwillingness to yield authority to international refugee agencies and institutions and impose financial and political limitations on their activities. States created the international refugee regime prompted by a desire to promote regional and international stability, but they sought to limit the regime’s responsibilities in the context of the emerging global refugee problem.⁶⁹

During the 1980s and the 1990s, the number of refugees grew exponentially due to a steep rise in interethnic conflicts in the newly independent states, fueled by superpower rivalry and aggravated by socioeconomic problems in developing countries.⁷⁰ The bulk of today’s refugees

⁶⁵ Muller N, *Refugee Convention of 1951 still Crucial Cornerstone of Human Rights*, Published on July 28, 2016, available online at <http://www.dw.com/en/refugee-convention-of-1951-still-crucial-cornerstone-of-human-rights/a-19429093>, on July 30, 2017.

⁶⁶ Schoenholtz A, ‘The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century’ *Chicago Journal of International Law* (2015), 81-126.

⁶⁷ UNHCR Publication, *Convention and Protocol relating to the Status of Refugees*.

⁶⁸ Article I (2) *New York Protocol Relating to the Status of Refugees*, 1967.

⁶⁹ Loescher G, *The International Refugee Regime: Stretched to the Limit?*

⁷⁰ Feller E, *The Evolution of the International Refugee Protection Regime*.

are displaced, not because of politics, but because of economic hardship or conflict; they do not flee totalitarianism, but poverty and insecurity.⁷¹

Weakened political will to support the Convention has at its root the growing numbers of asylum seekers, exacerbated both by disenchantment with them within civil societies and heightened government concerns about terrorism and transnational crime.⁷² Additionally, mass influx of refugees overburdens the structures States have put in place to handle claims and the rising costs of various types associated with running their systems.⁷³ As a result, States are applying the narrow definition of a refugee as stipulated in the Convention and its Protocol.

The scale of the current global refugee crisis, combined with the changing reasons prompting people to seek refuge, has led critics to call for the Convention to be updated.⁷⁴ It has been argued that the definition of a refugee is far too narrow at a time when scores of people have been displaced by many problems not just limited to persecution - from food insecurity in the Horn of Africa to gang violence in Central America and climate change.⁷⁵

2.4.1. Prevailing Circumstances

The nature of cross-border displacement has transformed dramatically since the establishment of international instruments aimed at protecting persons fleeing targeted persecution by their own governments in the aftermath of the Second World War.⁷⁶ Threats such as environmental change, food insecurity, and generalized violence force massive numbers of people to flee states that are unable or unwilling to ensure their basic rights, as do conditions in failed and

⁷¹ Berg C, *Why Cling on to an Outdated Refugee Convention?*

⁷² Feller E, *The Refugee Convention at 60: Still Fit for Its Purpose?*

⁷³ Feller E, *The Evolution of the International Refugee Protection Regime.*

⁷⁴ Muller N, *Refugee Convention of 1951 Still Crucial Cornerstone of Human Rights.*

⁷⁵ Muller N, *Refugee Convention of 1951 Still Crucial Cornerstone of Human Rights.*

⁷⁶ Betts A, *Survival Migration: Failed Governance and the Crisis of Displacement*, Cornell University Press, 2013.

fragile states that make possible human rights deprivations.⁷⁷ Because these reasons do not meet the legal understanding of persecution, the victims of these circumstances are not usually recognized as “refugees,” preventing current institutions from ensuring their protection.⁷⁸

This section analyzes the most prevalent forms of persecution that are not of a political nature that ought to be covered under the Convention.

2.4.1.1. Economic Hardships and Poverty

Asylum claims based on non-physical forms of persecution, specifically social and economic deprivation, have received increased attention in recent years.⁷⁹ The idea that persecution can be economic in nature 'is not a modern construct or radical notion; rather there is evidence that from the earliest days of its operation some types of socio-economic claims were considered to fall within the purview of the Refugee Convention definition'.⁸⁰

Historically, foreign courts tended to automatically dismiss asylum claims that were based exclusively on economic disadvantage.⁸¹ Recently however, they have relaxed their stringent stance against such economic claims of persecution.⁸² In the case of *Maslennikov v. Mukasey*, the United States Court of Appeal for the Second Circuit held that limitation of persecution to physical abuse was an incorrect formulation of the standard.⁸³

⁷⁷ Betts A, *Survival Migration: Failed Governance and the Crisis of Displacement*.

⁷⁸ Betts A, *Survival Migration: Failed Governance and the Crisis of Displacement*.

⁷⁹ Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge University Press, 2007.

⁸⁰ Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*.

⁸¹ Ramos L, Economic Persecution under the Refugee Convention: A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees' *Vanderbilt Journal of Transnational Law* (2011), 499-525.

⁸² Ramos L, *Economic Persecution under the Refugee Convention: A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees*.

⁸³ *Maslennikov v. Mukasey*, 291 F. App'x 446, 447-48 (2d Cir. 2008).

In the United States, a body of jurisprudence has developed addressing and validating asylum claims based on non-physical forms of persecution.⁸⁴ In the case of *Dunat v Hurney*, the Third Circuit recognized that economic proscription so severe as to deprive of all means of earning a livelihood may amount to physical persecution,⁸⁵ establishing the requirement of extreme physical circumstances before economic hardship rises to the level of persecution.⁸⁶

The Ninth Circuit in the case of *Kovac v Immigration and Naturalization Services*,⁸⁷ held that a probability of deliberate imposition of substantial economic disadvantage upon an alien may constitute persecution.⁸⁸ In the *Matter of Acosta*, in characterizing persecution the BIA included economic deprivation so severe that it constituted a threat to an individual's life or freedom.⁸⁹

However, Courts identified that due to this inconsistent construction of economic persecution in precedent set by the Board of Immigration Appeals (BIA), there was no standard established by the BIA for the Courts to apply. This challenge is evident case of *Mirzoyan v Gonzales*, where the BIA could not identify the standard they applied in denying Mirzoyan asylum.⁹⁰ In the case of *In Re T-Z*- the Board of Immigration Appeals held that the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, was the right standard to determine economic persecution.⁹¹

⁸⁴ Ramos L, Economic Persecution under the Refugee Convention: A New Standard for Evaluating Claims of Economic Persecution under the 1951 Convention Relating to the Status of Refugees' 515.

⁸⁵ *Dunat v Hurney*, 297 F.2d 744, 746 (3d Cir. 1961).

⁸⁶ *Dunat v Hurney*.

⁸⁷ *Kovac v I.N.S.*, 407 F.2d 102 (9th Cir. 1969).

⁸⁸ *Avetova-Elisseva v I.N.S.*, 213 F.3d 1192 (9th Cir. 2000)

⁸⁹ *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985.

⁹⁰ *Mirzoyan v Gonzales*, 457 F.3d 217, 218 (2d Cir. 2006).

⁹¹ *In Re T-Z*-, 24 I&N Dec. 163 (BIA 2007), United States Board of Immigration Appeals, 9 May 2007.

Without a provision set in stone for the needs of the economically disadvantaged, Courts are free to apply as restrictive an interpretation to the term “persecution” as stipulated in the Convention as they wish. This is regardless of the fact that this goes against the social and economic rights inherent in human beings.

According to the legal realism theory of law, it is not just the role of the law to reflect the current circumstances, but to marry the society’s competing needs and interests, to ensure its development and that of the law in a fair, just and equitable manner. In this regard, it is essential for the law, the Refugee Convention, to provide for the economically disadvantaged. This is to eliminate the discretion the Courts have in allowing or denying claims sought on the grounds of economic persecution.

2.4.1.2 The Environment and Climate Change

The concept of “environmental refugees” has gained new importance in recent times.⁹² Due to the complexities of migration dynamics, environmentally-related migrants cannot be included in a clear-cut definition.⁹³ They have been described as “persons who no longer gain a secure livelihood in their traditional homelands because of what are primarily environmental factors of unusual scope.”⁹⁴

The International Organization for Migration defines environmental migrants as “persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their

⁹² Globalization 101, *Environmental Refugees*, available online at <http://www.globalization101.org/environmental-refugees/>, on August 12, 2017.

⁹³ Mayer B, Boas I, Ewing J.J, Baillat A, Das K.U, ‘Governing Environmentally-Related Migration in Bangladesh: Responsibilities, Security and the Causality Problem’ *Asian and Pacific Migration Journal* (2013), 177-198.

⁹⁴ Myers N, Kent J, ‘Environmental Exodus: An Emergent Crisis in the Global Arena’ *Climate Institute* (1995).

habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.” The 1951 United Nations Convention relating to the Status of Refugees does not provide long-term legal protection to environmental change refugees.⁹⁵

For a long time, the question has been raised as to whether environmental refugees can be considered under the ambit of the 1951 Refugee Convention. Unlike persecution, environmental stress does not distinguish between people from different perceived “groups”.⁹⁶ Nonetheless, its consequences pose a harsh reality to the social lives and economic livelihoods of people.⁹⁷ Global climate change and desertification have threatened the livelihoods of millions of people, spurring large-scale movement across international borders.⁹⁸

Since 2008, an average of 26.4 million people per year have been displaced by natural disasters, according to an estimate by the Internal Displacement Monitoring Center.⁹⁹ By 2012, this number had risen tremendously to 32.4 million, ninety eight percent of which was caused by climate and weather-related disasters.¹⁰⁰

There are three broad categories of environmental refugees; those who have been temporarily displaced because of an environmental stress, those who have to be permanently displaced and re-settled in a new area and individuals or groups of people who migrate from their original

⁹⁵ United Nations Regional Information Centre for Western Europe, *The Invisible Climate Refugees*, published on December 2, 2013, available online at <http://www.unric.org/en/latest-un-buzz/28883-the-invisible-climate-refugees>, on August 12, 2017.

⁹⁶ Mayer B, Boas I, and Ewing J.J, Baillat A, Das K.U, *Governing Environmentally-Related Migration in Bangladesh: Responsibilities, Security and the Causality Problem*.

⁹⁷ Mayer B, Boas I, and Ewing J.J, Baillat A, Das K.U, *Governing Environmentally-Related Migration in Bangladesh: Responsibilities, Security and the Causality Problem*.

⁹⁸ Mayer B, Boas I, and Ewing J.J, Baillat A, Das K.U, *Governing Environmentally-Related Migration in Bangladesh: Responsibilities, Security and the Causality Problem*.

⁹⁹ Hollifield J, Salehyan I, *Environmental Refugees*, published on December 21, 2015, available online at <https://www.wilsoncenter.org/article/environmental-refugees>, on August 12, 2017.

¹⁰⁰ Globalization 101, *Environmental Refugees*, available online at <http://www.globalization101.org/environmental-refugees/>, on August 12, 2017.

habitat, temporarily or permanently, in search of a better quality of life.¹⁰¹ Environmental refugees are generally agreed to result from three main causes; those fleeing desertification, those displaced (or potentially displaced) by sea level rise and victims of environmental conflict.¹⁰²

Despite this reality, little or no research has been undertaken to address the resulting increase in migration.¹⁰³ No international agreement exists that explicitly accounts for climate change-induced migrants,¹⁰⁴ whose legal needs vary greatly, depending on the form of migration and the different socio-economic or cultural settings from which they originate.¹⁰⁵ They face many social and economic hurdles to integrating in new communities, which increases their vulnerability to exploitation, financial hardship and discrimination.¹⁰⁶

Jane McAdam, however, offers arguments for why “climate refugees” should not warrant the expansion of the Conventional definition of a refugee. In her opinion, (i) disaster displacement will occur within countries and not across international borders; (ii) movement will be gradual as conditions deteriorate over time, rather than in the nature of refugee flight; (iii) climate change and disasters overlay drivers like conflict, human rights abuses, poverty and poor governance; a complexity that would be difficult to express in a treaty definition; (iv) the existence of other factors equally attributable to global structural insecurities, for example

¹⁰¹ El-Hinnawi E, *Environmental Refugees*, United Nations Environment Programme, 1985.

¹⁰² Black R, ‘Environmental Refugees: Myth or Reality’ *New Issues in Refugee Research, Working Paper No. 34* 2001.

¹⁰³ Mukuki A, *Reimagining the Concept of Forced Migration in the Face of Climate Change*, published on November 26, 2016.

¹⁰⁴ Mukuki A, *Reimagining the Concept of Forced Migration in the Face of Climate Change*.

¹⁰⁵ Mayer B, Boas I, and Ewing J.J, Baillat A, Das K.U, *Governing Environmentally-Related Migration in Bangladesh: Responsibilities, Security and the Causality Problem*, 179.

¹⁰⁶ Lambert K, *The Paris Agreement: Spotlight on Climate Migrants*, published on December 29, 2015, available online at <https://environment.yale.edu/blog/2015/12/the-paris-agreement-spotlight-on-climate-migrants/>, on August 16, 2017.

abject poverty; (v) little political appetite to expand the Convention currently; (vi) lack of political will to implement and enforce the law; and (vii) the availability of more creative preemptive responses to displacement linked to the impacts of climate change, for instance, implementation of disaster risk reduction and climate change adoption measures.¹⁰⁷ In September 2015, a man and his family lost their appeal for asylum before a New Zealand Supreme Court, sought on the grounds of being an environmental refugee.¹⁰⁸ The Court rejected the argument that he faced persecution because of climate change, since no such category is listed under the 1951 Refugee Convention. He was deported to his native island, which regularly witnesses environmental problems including storm surges, flooding and water contamination.¹⁰⁹

The Paris Agreement, with its aim being to address climate change, was expected to herald a new dawn for environmental refugees by defining environmental refugees and addressing the handling of their displacement. Members of the panel of the Paris Agreement wanted acknowledgement that those facing extreme environmental risks would have the right to receive preventative assistance to avoid being displaced, the right to get support if they're forced to flee, and the right to build, live, work and integrate in new communities if they cannot return to their homes.¹¹⁰ However, it does not address the legal status of refugees or mandate their protection and assistance.¹¹¹ It has been argued that the Agreement lacks the urgency,

¹⁰⁷ Mc Adam J, Seven Reasons the UN Refugee Convention Should Not Include "Climate Refugees", published online on June 6, 2017, available at <http://www.smh.com.au/comment/seven-reasons-the-un-refugee-convention-should-not-include-climate-refugees-20170606-gwl8b4.html>, on January 16, 2018.

¹⁰⁸ Ioane Teitiota v The Chief Executive Ministry of Business, Innovation and Employment, NZSC 107, New Zealand: Supreme Court, 20 July 2015.

¹⁰⁹ Jauhar A. *The Nowhere People*, published on December 6, 2016, available online at <http://www.thehindu.com/opinion/op-ed/The-nowhere-people/article16765025.ece>, on August 13, 2017.

¹¹⁰ Lambert K, *The Paris Agreement: Spotlight on Climate Migrants*.

¹¹¹ Lambert K, *The Paris Agreement: Spotlight on Climate Migrants*.

depth and coordinated framework necessary for addressing the immense challenges of climate-induced migration.¹¹²

This links back to the need for a regulatory framework that exclusively addresses issues of environmental refugees, or expansion of the existing Convention to provide for climate-induced refugees. Alternatively, a collective international effort for better international accountability, cooperation and feasible environmental protection standards.¹¹³

2.4.1.3. Gender-based Persecution

Refugee conventions do not explicitly include gender-based crimes or fears as one of the acceptable reasons for flight qualifying women for asylum.¹¹⁴ The absence of consideration of gender issues from discourse owes mainly to the circumstances surrounding the drafting and adoption of the 1951 Convention relating to the Status of Refugees, where questions of gender equality and women's rights were far from the center stage of politics.¹¹⁵ The failure of the definition to include a reference to sex or gender raises the question as to whether this means that women are missing out on protection due to a failure of decision makers to understand their claims as coming within the scope of the definition.¹¹⁶

Academic scholars have argued that whereas it is assumed that the definition of a refugee is gender neutral, it has negative implications for women when its application is based on gender assumptions.¹¹⁷ Further, although international law is gender-neutral in theory, in practice “it

¹¹² Lambert K, *The Paris Agreement: Spotlight on Climate Migrants*.

¹¹³ Stavropoulou M, *Drowned in Definitions? Forced Migration Review*, published online in October 2008, available at <http://www.fmreview.org/climatechange/stavropoulou.html>, on August 16, 2017.

¹¹⁴ Schafer L, 'True Survivors: East African Refugee Women' *Africa Today* (2002), 29-48.

¹¹⁵ Freedman J, *Mainstreaming Gender in Refugee Protection*.

¹¹⁶ Crawley H, *Refugees and Gender: Law and Process*, Jordans, Bristol, 2002, 7.

¹¹⁷ Ankenbrand B, 'Refugee Women under German Asylum Law' *International Journal of Refugee Law* (2002), 45-56.

interacts with gender-based domestic laws and social structures which relegate women and men to separate spheres of existence.”¹¹⁸

While women were persecuted for the same reasons as men, that is, because of their race, religion, nationality, membership in a particular social group, or political opinion, women are also persecuted because of their gender.¹¹⁹ This position has been affirmed by Binder, who identifies two concepts of gender-based persecution; that of women persecuted *as* women, which relates to the types and forms of persecution that are gender-specific, for example rape and female genital mutilation. The other is that of women persecuted *because* they are women, which addresses the causal relationship between gender and persecution.¹²⁰

Despite the reality of women as victims of gender-based violence and sexual discrimination,¹²¹ violations and persecutions pertinent primarily to women are often left out of the spectrum of things considered valid reasons for granting refugee status.¹²² The lack of a specific provision recognizing gender as a reason for flight means that asylum officers may not recognize crimes against women, including rape, as constituting persecution. Therefore, female asylum seekers who leave their countries to escape violence directed primarily at women may fail to obtain asylum unless their claim of fear of persecution also includes one of the reasons for flight established in the 1951 Refugee Convention.¹²³

¹¹⁸ Crawley H, *Refugees and Gender: Law and Process*.

¹¹⁹ Binder A, ‘Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention’ *Columbia Journal of Gender and Law* (2001), 167-194.

¹²⁰ Binder A, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 168.

¹²¹ Nogradi N.W., ‘Should she be granted asylum? Examining the Justifiability of the Persecution Criterion and Nexus Clause in Asylum Law’ *School of Politics and International Studies* (2016), 41-57.

¹²² Freedman J, ‘Mainstreaming Gender in Refugee Protection’ *Cambridge Review of International Affairs* (2011), 589-607.

¹²³ Schafer L, *True Survivors: East African Refugee Women*.

Women who suffer gender-based persecution are disadvantaged because they must structure their claims under one of the five enumerated grounds of persecution included in the refugee definition of the 1951 Convention; that is, women must claim that their prosecution is on account of race, religion, nationality, social group membership or political opinion.¹²⁴ Recognition of gender as an enumerated ground of persecution is seen by some as potentially unleashing the spectre of hordes of prospective claimants seeking asylum simply by virtue of their membership to a social category which is feared as being far too large.¹²⁵ This however, has not prohibited the recognition of other enumerated grounds which encompass huge populations, for example, race and nationality.¹²⁶

In the absence of an international standard, individual states have applied different criteria for determining claims based on gender-related persecution.¹²⁷ Lord Hoffmann stated that the concept of social group is perfectly adequate to accommodate women as a group in a society that discriminates against on grounds of sex; that perceives women as not being entitled to the same fundamental rights as men.¹²⁸

U.S courts have granted relief to some women fleeing gender persecution by framing their claims in terms of the enumerated grounds of “political opinion” or “religion”. These involve

¹²⁴ Patel K, ‘Recognizing the Rape of Bosnian Women as Gender-based Persecution’ *Brooklyn Law Review* (1994), 929-958.

¹²⁵ Randall M, ‘Refugee Law and State Accountability for Violence against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims based on Gender Persecution’ *Harvard Women’s Law Journal* (2002), 281-318.

¹²⁶ Randall M, ‘Refugee Law and State Accountability for Violence against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims based on Gender Persecution’, 283.

¹²⁷ Schafer L, *True Survivors: East African Refugee Women*.

¹²⁸ *R v Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah*, United Kingdom: Court of Appeal (England and Wales), 23 July 1997. *Islam and Others v Secretary of State for the Home Department*.

women fleeing oppressive gender-based practices ostensibly legitimated by religion or fleeing domestic violence, whose claims have been understood to be based on their political opinion.¹²⁹

In the case of *In Re Kasinga*, the appellant was a young woman who was forced to subject herself to her tribe's practice of female genital mutilation (FGM), a practice imposed on all female members, either in childhood or adolescence.¹³⁰ Board of Immigration Appeals found that the practice of female genital mutilation constituted persecution on account of her membership in the particular social group of young women of the Tchamba-Kunsuntu tribe, who had not had FGM and opposed the practice.¹³¹

In the *Matter of R-A-*, the BIA denied asylum to a Guatemalan woman who had been subjected to a decade of extreme physical and sexual abuse by her husband. The Board identified the abuse as persecution but found that her persecution was not on account of a cognizable ground.¹³²

In the case of *Aguirre-Cervantes v INS*, the appellant was a young woman from Mexico who suffered extreme physical abuse perpetrated by her father. She was granted relief on the grounds that the persecution she suffered was on account of her membership in the particular social group of her own family of origin.¹³³

¹²⁹ Randall M, *Refugee Law and State Accountability for Violence against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims based on Gender Persecution*.

¹³⁰ *In Re Fauziya Kasinga* 3278 United States Board of Immigration Appeals, June 13 1996, available online at on August 21, 2017.

¹³¹ *In Re Fauziya Kasinga*.

¹³² *Matter of R-A-*, 24 I&N Dec. 629 (A.G. 2008), United States Attorney-General, 25 September 2008.

¹³³ *Aguirre-Cervantes v INS*, 526 US 415, 3 May 1999.

In the *Matter of A-N-*, a woman who fled abuse from her husband in Jordan was granted asylum on the basis that she was part of the particular social group comprising married, educated, career-oriented Jordanian women.¹³⁴

2.5. Issues arising out of the 1951 Definition of a Refugee

The most pernicious effects of the Cold War model of refugee protection are structural.¹³⁵ The framers of the system created after World War II envisioned individualized refugee determinations based on the particular characteristics and situations of individuals applying for refugee status.¹³⁶ The 1951 Convention relating to the Status of Refugees was designed for an era where the causes and trajectories of global migration were quite different from today.¹³⁷ It was an instrument of rather limited intent as it only addresses the status of refugees and does not explore causes or solutions. This might be because it was never conceived of as an instrument of migration control, although its terms impact the rights of States to regulate entry across borders.¹³⁸ However, as its standing as the keystone of refugee protection grows more grounded, it is vital to highlight some of the issues that arise from its definition of a refugee.

2.5.1. Parameters of the Definition

It has been argued by a vast number of scholars that the definition of a refugee as provided for in the 1951 Convention relating to the Status of Refugees is outdated. The system put into place was not designed to deal with cases where thousands of people are subject to persecution based on their ethnic background.¹³⁹ The definition fails to address the concerns of those people

¹³⁴ *In the Matter of A-N-*, IJ Dec. Dec. 22, 2000.

¹³⁵ Arulanantham A, 'A Proposal for Reform of the Refugee Protection System' *Human Rights Quarterly* (2000).

¹³⁶ Arulanantham A, *A Proposal for Reform of the Refugee Protection System*.

¹³⁷ Berg C, *Why Cling on to an Outdated Refugee Convention?*

¹³⁸ Feller E, *the Evolution of the International Refugee Protection Regime*.

¹³⁹ Arulanantham A, *A Proposal for Reform of the Refugee Protection System*.

who are fleeing war, civil strife¹⁴⁰, and environmental catastrophe, or in essence those who have become “stateless”.¹⁴¹ Furthermore, the definition requires that an individual be outside their country and ignores the plight of the internally displaced,¹⁴² defined as “people who have been forced from their homes, but who do not fall within the definition because they are still within their native country.”¹⁴³

The vague wording of the 1951 Convention relating to the Status of Refugees is an imitation of European experience of Nazi war-time persecution and Western political interests.¹⁴⁴ The definition of a refugee provided for under the Convention¹⁴⁵ has made less sense as the nature of refugee flows has changed and as numbers have risen.¹⁴⁶

The definition of a refugee provided for in the 1951 Convention and its subsequent protocol, has been criticized for its limitation on the grounds of civil and political rights, excluding any reference to economic, social and cultural rights.¹⁴⁷ While the 1951 Convention addresses the protection of persecuted refugees, it does not deal with the protection of refugees fleeing conflict that does not involve targeted, individual persecution.¹⁴⁸

¹⁴⁰ This has been accommodated for under Article I (2) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa, 1969.

¹⁴¹ Benheis, *Broadening the Definition of a Refugee*, published online, available at <https://benheis.wordpress.com/essays/broadening-the-definition-of-refugee/>, on August 23, 2017.

¹⁴² Benheis, *Broadening the Definition of a Refugee*.

¹⁴³ Siskind Susser Bland Immigration Lawyers, ‘United Nations Debates the Meaning of “refugee”’ *Immigration Law Portal*, 2011.

¹⁴⁴ Millbank A, *The Problem with the 1951 Refugee Convention*, Research Paper 5 2000-01, Social Policy Group, published online on September 5, 2000, available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/0_IRP05#problems, on August 21, 2017.

¹⁴⁵ Millbank A, *The Problem with the 1951 Refugee Convention*.

¹⁴⁶ Millbank A, *The Problem with the 1951 Refugee Convention*.

¹⁴⁷ Sainz-Pardo P.V., ‘The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees’ *International Journal of Human Rights* (2002), 23-34.

¹⁴⁸ Schoenholtz A, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*.

The current system also suffers from an inadequacy in the scope of legal protection.¹⁴⁹ The refugee definition places a burden on the state party in the event of a large-scale influx.¹⁵⁰ The Convention's absence of burden-sharing provisions is a clear liability when it comes to mass influx.¹⁵¹ In most cases of mass influx, refugees are fleeing political persecution, usually persecution by the State. Therefore, any system that seriously attempts to control the "refugee problem" ought to recognize that it is not refugees who create the problem.¹⁵²

2.5.2. *Interpretation and application*

Regardless of more States accession to the Convention, the position of refugees has not changed.¹⁵³ If anything, States are interpreting and applying the provisions of the Convention in a more restrictive manner.¹⁵⁴ States have allowed fears and pressures to cloud perceptions here, sometimes leading to an "either/or", or rather a "neither/nor", approach to implementing the Convention.¹⁵⁵

Interpretation of the Convention's vaguely worded grounds and criteria vary widely.¹⁵⁶ The Convention in practice, serves more as an aspirational basis for extending protection than the blueprint for what is needed.¹⁵⁷

¹⁴⁹ Arulanantham A, *A Proposal for Reform of the Refugee Protection System*.

¹⁵⁰ Chatham House, *The Refugee Convention: Why Not Scrap It?* A summary of discussion at the International Law Program Discussion Group at Chatham House on 20th October 2005; participants included lawyers, academics and representatives from Governments and NGOs.

¹⁵¹ Feller E, *The Refugee Convention at 60: Still Fit for Its Purpose?* Statement by Erika Feller, Assistant High Commissioner (Protection), UNHCR at the Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity, May 2011.

¹⁵² Arulanantham A, *A Proposal for Reform of the Refugee Protection System*.

¹⁵³ Grahl-Madsen A, 'Identifying the World's Refugees' *The Annals of the American Academy of Political and Social Science* (1983), 11-23.

¹⁵⁴ Grahl-Madsen A, *Identifying the World's Refugees*, 12.

¹⁵⁵ Feller E, *The Refugee Convention at 60: Still Fit for Its Purpose?*

¹⁵⁶ Millbank A, *The Problem with the 1951 Refugee Convention*.

¹⁵⁷ Feller E, *The Refugee Convention at 60: Still Fit for Its Purpose?*

2.6. Legal Realism and the 1951 Convention relating to the Status of Refugees

Legal realism purports that because life and society are constantly changing, certain laws and doctrines have to be altered or modernized in order to remain current.¹⁵⁸ The fundamental tenet of legal realism is that all law is made by human beings and thus subject to human imperfections.¹⁵⁹ One of its essential beliefs is in legal instrumentalism, which is the view that the law should be used as a tool to achieve social purposes and to balance competing societal interests.¹⁶⁰ It further argues that the real-world practice of law is what determines what law is.¹⁶¹

The argument has been raised time and time again in the context of this dissertation that the trajectories of global migration are different from the factors that resulted in the 1951 Convention. There is a gap between the existing refugee law and its application to the refugee crisis. There are other grounds which drive migration and lead to forced displacement that ought to be enumerated in the Convention as qualifying persons for asylum and protection as refugees. In this way, the Convention would offer a comprehensive reflection of the current refugee situation globally.

A proper example of legal realism in practice would be the OAU Convention, which was a conception of African States, intended to cure the Eurocentric nature of the 1951 Refugee Convention. It offers provisions which provide, exclusively, for the plight of African refugees, and thus provides for persons who are compelled to leave their countries of origin owing to

¹⁵⁸ Mayer D, Warner D, Siedel G, Lieberman J, *Legal Aspects of Property, Estate Planning, and Insurance*. December 9, 2012.

¹⁵⁹ Ebo Nnamdi, *The Realist School of Law*, published October 3, 2014, available at <http://www.nnamdiebo.com/the-realist-school-of-law/>, on September 2, 2017.

¹⁶⁰ Ebo Nnamdi, *The Realist School of Law*.

¹⁶¹ Ebo Nnamdi, *The Realist School of Law*.

external aggression, occupation, or foreign domination,¹⁶² which is a reflection of the events that were dominant in Africa at the time.

Similarly, the Cartagena Declaration recognizes the need to consider enlarging the concept of a refugee in light of the situation prevalent in the region and recommends that the definition of a refugee to be used in the region include persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, and massive violations of human rights.¹⁶³

2.7. Conclusion

The end of the Cold War brought about major changes in the general pattern of refugee emergencies and challenges posed to the international refugee regime in providing relief and protection.¹⁶⁴ The 1951 convention is the cornerstone for the protection of refugees, defining certain basic human rights for refugees and establishing minimum standards for their treatment.

The legal implications of displacement driven by forces other than persecution, serious human rights violations and ongoing conflict have not been sufficiently examined,¹⁶⁵ and this is clearly reflected in the provisions of the 1951 Refugee Convention relating to the Status of Refugees.

Scholars are majorly in agreement that the Convention is anachronistic, euro-centric and outdated. The definition of a refugee provided in the Convention reflects the Cold War era and the European experience of persecution. It does not express the current dominant causes of

¹⁶² Article I (2), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

¹⁶³ Article 3, Cartagena Declaration of Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.

¹⁶⁴ Loescher G, 'The International Refugee Regime: Stretched to the Limit?'

¹⁶⁵ Chatham House, *The Refugee Convention: Why Not Scrap It?*

forced migration.¹⁶⁶ The Convention was not designed to withstand situations of mass influx and is proving insufficient in addressing the modern refugee regime.

However, it is imperative to bear in mind the youth of the UN and consequently the UNHCR at the time of the drafting of the Convention. It was important for the UN and all its organs to uphold some of the more fundamental principles under the UN Charter, which may have posed challenges in implementing some of the more stringent provisions of the Refugee Convention. A more in-depth examination of the role of the UNHCR in the enforcement of the Convention will be conducted in the next Chapter.

¹⁶⁶ Gunning I, 'Expanding the International Definition of Refugee: A Multicultural View' *Fordham International Law Journal* (1989), 35-85.

CHAPTER THREE

DEVELOPMENT AND ENFORCEMENT OF INTERNATIONAL REFUGEE LAW: *The Role of the UNHCR*

3.1. Introduction

In Resolution 319 A (IV) of 3 December 1949, the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees as of 1 January 1951.¹⁶⁷ On 14th December 1950, the Statute of the United Nations High Commissioner for Refugees was adopted by the General Assembly, as Annex to Resolution 428 (V). Since its establishment, it has played a unique and pivotal role in relation to international refugee law.

Chapter II of the Statute provides the functions of the High Commissioner and the ways in which the High Commissioner shall provide for the protection of refugees.¹⁶⁸ Under Article 6 of the Statute of the Office of the UN High Commissioner for Refugees, it is provided that the competence of the High Commissioner shall extend to **(i)** Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization, and **(ii)** 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 or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having

¹⁶⁷ General Assembly Resolution 428 (V) of 14 December 1950.

¹⁶⁸ Article 8, Statute of the Office of the United Nations High Commissioner for Refugees, 1950.

a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.¹⁶⁹

The mandate of the UNHCR, *ratione personae* was limited to the Convention, Statute, and consequently, the 1967 Protocol.¹⁷⁰ A mandate that has been gradually expanded due to the emergence of new categories of refugees, who did not fall within the statutory mandate of the Agency. The entrustment of such additional responsibilities has in turn redefined the role of the UNHCR, as well as its functions, and activities.¹⁷¹ This was done by the U.N General Assembly, under the umbrella of the “good offices” formula, when it became apparent that there were other factors that were driving forced displacement in Africa and Latin America, and the 1951 Refugee Convention was not well-suited to handle it.¹⁷²

The UNHCR’s mandate *ratione materiae* was to provide international protection to refugees and seek durable solutions to the refugee problem. Essentially, the Agency was created as a protection agency.¹⁷³ Along the same mandate lines, the Agency’s mandate *ratione temporis* was to begin with the crossing of an international border, by persons fleeing their countries due to persecution, as stipulated in the Statute of the Office of the UNHCR, and consequently, in the Refugee Convention. However, an expansion in the mandate of the Agency *ratione personae*, and *ratione materiae*, bears implications for the Agency’s mandate *ratione temporis*.¹⁷⁴

¹⁶⁹ Article 6, Statute of the Office of the United Nations High Commissioner for Refugees, 1950.

¹⁷⁰ Nirmal B.C., ‘UNHCR after Six Decades and Beyond’ *ISIL Y.B. International Human & Refugee Law* (2010), 182-243.

¹⁷¹ Nirmal B.C., UNHCR after Six Decades and Beyond.

¹⁷² Nirmal B.C., UNHCR after Six Decades and Beyond.

¹⁷³ Nirmal B.C., UNHCR after Six Decades and Beyond.

¹⁷⁴ Nirmal B.C., UNHCR after Six Decades and Beyond.

This competence provides for the refugees resulting from all crises prior to World War II. However, it does not provide for the modern-day refugee. As was stated in Chapter 2, in the modern dynamic, there are plenty other factors that result in the creation of a refugee.

The essence of this Chapter is to explore how the United Nations Office of the High Commissioner for Refugees protects the rights of these individuals, whose rights are not provided for under the Statute. In a light similar to Chapter two, it will examine whether the failures on the part of the UNHCR are demanding of amendments to its founding Statute in a bid to expand its mandate.

3.2. The Statute of the Office of the United Nations High Commissioner for Refugees

The Office of the United Nations High Commissioner for Refugees was created during the aftermath of the Second World War, with an aim of resettling the people who had fled or lost their homes.¹⁷⁵ However, it was not the first international organization to be tasked with the care of refugees.¹⁷⁶ The mandates and work of the predecessors of the UNHCR significantly influenced the formulation of UNHCR's responsibilities, including the organization's responsibilities related to international refugee law,¹⁷⁷ which are contained in the UNHCR Statute, which was adopted by the General Assembly on December, 14th 1950.¹⁷⁸

The Statute establishes the work of the High Commissioner to be of an entirely non-political character, relating to groups and categories of refugees.¹⁷⁹ Its task is to provide protection for refugees by putting together international treaties and supervising their application. The provisions of Article 2 are fundamental in that they distinguish between the political and the

¹⁷⁵ History of UNHCR, available online at <http://www.unhcr.org/history-of-unhcr.html>, on September 27, 2017.

¹⁷⁶ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*,

¹⁷⁷ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

¹⁷⁸ General Assembly Resolution 428 (V) of 14 December 1950.

¹⁷⁹ Article 2, Statute of the Office of the United Nations High Commissioner for Refugees, 1950.

humanitarian aspects of UN organs, in order to define the character of the work of the UNHCR.¹⁸⁰ The UNHCR's authority is moral and contains no significant legal sanctions.¹⁸¹

The UNHCR's role in relation to the development of international refugee law is covered under Article 8 of the Statute, which provides that the UNHCR shall provide for the protection of refugees falling under its competence by promoting the conclusion and ratification of international conventions, supervising their application and proposing amendments thereto.¹⁸²

According to Lewis, four distinct responsibilities arise from the wording of this article; (i) the promotion of the conclusion of international treaties concerning refugees; (ii) the proposal of amendments to such treaties; (iii) the promotion of ratifications to such treaties; and (iv) the supervision of the application by States of such treaties.¹⁸³ The ultimate purpose of the UNHCR's responsibilities with regard to international refugee law is to ensure international protection.¹⁸⁴ These responsibilities allow the UNHCR to work towards securing the existence of international refugee law standards and their effectiveness.¹⁸⁵

UNHCR's statutory provisions related to international refugee law reflect the intention of the Statute's drafters to balance the ability of States to retain ultimate control over the organization with UNHCR's ability to determine how to carry out its responsibilities within a changing

¹⁸⁰ Kyoichi S., 'The "Non-political and Humanitarian" Clause in UNHCR's Statute' *Refugee Survey Quarterly* (1998), 33-59.

¹⁸¹ Maynard P.D., 'The Legal Competence of the United Nations High Commissioner for Refugees' *The International and Comparative Law Quarterly* (1982).

¹⁸² Article 8, Statute of the Office of the United Nations High Commissioner for Refugees, 1950.

¹⁸³ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁸⁴ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁸⁵ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

political context.¹⁸⁶ Theoretically, this means that the role of the UNHCR, with regard to international refugee protection, is complimentary to that of States.¹⁸⁷

States are responsible for taking the necessary steps to ensure the creation of international refugee law standards, which are to be effected effectively at the national level.¹⁸⁸ It also means that the effectiveness of the UNHCR in fulfilling its mandate of protecting refugees depends on the cooperation of the countries it is working with.¹⁸⁹ The extent of the UNHCR's activities and influence is delineated by political constraints.¹⁹⁰ It has been argued that the euro-centric orientation of this agency could be reflected in the international political environment and the foreign policy priorities of the major powers.¹⁹¹ This has been attributed to the fact that the UNHCR, a post-Cold War construction, was created in such a way that it would neither pose a threat to the sovereignty of its creators, nor challenge the policies of its funders and host governments, nor impose new financial obligations.¹⁹² Thus, it comes as no surprise that even as UNHCR tries to widen the scope of the refugee regime, states narrow it again by increasing domestic restrictions.¹⁹³

However, Rushingwa posits that it would be naïve to think that institutions like the UNHCR are without significant power and influence,¹⁹⁴ even though States remain the predominant actors in the international political system. This is regardless of the fact that the UNHCR was

¹⁸⁶ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁸⁷ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁸⁸ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁸⁹ Chiusiwa J, *How Effective has the UN Been in Fulfilling Its Mandate to Protect Refugees?*

¹⁹⁰ Chiusiwa J, *How Effective has the UN Been in Fulfilling Its Mandate to Protect Refugees?*

¹⁹¹ Loescher G, 'The UNHCR and World Politics: State Interests vs. Institutional Autonomy' *International Migration Review* (2001), 33-56.

¹⁹² Loescher G, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*.

¹⁹³ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

¹⁹⁴ Rushingwa C, *The Perilous Path of the UNHCR*.

carefully constructed under conditions that inhibited its capacity to act independently.¹⁹⁵ According to Lewis, the UNHCR is not a passive recipient of changes to its mandate, but rather an active participant in articulating the changes that should be made as well as the formulation of those changes, both by the General Assembly and EXCOM.¹⁹⁶ Its authority in determining the content of its responsibilities with regard to international refugee law has been manifested through the adoption of several techniques by the UNHCR,¹⁹⁷ which are one of the tools which the UNHCR uses in addressing the refugee crisis.¹⁹⁸

3.3. Fulfilment of the UNHCR's Mandate under the Statute

In undertaking its mandate, the UNHCR uses a number of international instruments, which contain a range of fundamental principles and obligations crucial for the protection of refugees. It fulfils its mandate by ensuring and promoting the adoption of these instruments.¹⁹⁹ The initial and foundational link between UNHCR's statutory responsibilities and international refugee law would be laid with the adoption of the 1951 Convention relating to the Status of Refugees,²⁰⁰ which was intended "to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement".²⁰¹

However, the 1951 Refugee Convention was not drafted as a universal agreement intended to cover all refugee situations, but instead, was created to meet the needs of States dealing with a

¹⁹⁵ Jones M, *Refugee Politics: The Efficacy of the UNHCR*.

¹⁹⁶ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁹⁷ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁹⁸ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

¹⁹⁹ Chiusiwa J, 'How Effective has the UNHCR Been in Fulfilling its Mandate to Protect Refugees?' *Asia Pacific School of Economics and Management, Working Papers*, (1999).

²⁰⁰ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

²⁰¹ Preamble, Convention relating to the Status of Refugees, 1951.

particular group of refugees; casualties of the Second World War.²⁰² Despite this, the UNHCR continues to use the Convention as the cornerstone for its work with regard to international refugee law. Consequentially, the emergence of new refugee crises highlights the challenges in the application of the Convention to all refugee situations globally.

A number of significant developments, structurally and otherwise, have come to characterize UNHCR in the post-Cold War world, emphasizing the changing nature of the international system; one of which is Russia's joining of the organization, after nearly a century of refusing to cooperate with the refugee regime.²⁰³

The need for a modification of the definition of a refugee as provided for in the 1951 Refugee Convention became increasingly apparent during the terms of the first three High Commissioners.²⁰⁴ The first High Commissioner, Gerrit Jan van Heuven Goedhart, observed the inconsistency between the definition of a refugee under the Refugee Convention and the definition of a refugee provided under the Statute of the Office of the UNHCR.²⁰⁵ Under the second High Commissioner, the UNHCR's determination, of which groups would receive its protection and which only assistance, became increasingly irregular. The UNHCR applied its mandate and the 1951 Refugee Convention to certain European groups based on an event-effect argument; where the events that led to the flight occurred prior to 1951.²⁰⁶

Felix Schnyder, the third High Commissioner of the UNHCR continued to expand the use of the "good offices" of the UNHCR to provide assistance to refugees in Africa. As a result, the

²⁰² Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

²⁰³ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

²⁰⁴ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

²⁰⁵ Van Heuven Goedhart G.J, 'The Problem of Refugees' 82 *Recueil des Cours, Hague Academy of International Law* (1953).

²⁰⁶ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

majority of refugees assisted by the UNHCR, by the mid-1960s were not provided for under the 1951 Refugee Convention.²⁰⁷ He began to view this as a significant problem and wanted to ensure that the 1951 Convention relating to the Status of Refugees would serve as a universal refugee instrument.²⁰⁸ UNHCR's subsequent efforts to modify this definition and thereby give it a truly international scope constituted an extremely significant contribution to the development of international refugee law.²⁰⁹

3.4. Expansion of the mandate of the UNHCR

The drafters of the Statute of the Office of the United Nations High Commissioner for Refugees provided the UNHCR with several means to allow the evolution of its statutory role.²¹⁰ Under Article 9, the Statute provides for the engagement of the High Commissioner in additional activities as determined by the General Assembly.²¹¹ This has allowed the Office of the High Commissioner for Refugees to protect refugees who are not covered under any formal refugee law.

In addition to direction from the General Assembly, the UNHCR receives guidance from the Executive Committee of the High Commissioner's Programme (EXCOM), which was created to provide advice to the UNHCR at the request of the General Assembly. It has provided advice related to groups of refugees, including refugee women, children and elderly persons.²¹²

²⁰⁷ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

²⁰⁸ Holborn L, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees*, 1975.

²⁰⁹ The result of the modification of the definition of a refugee by the UNHCR to give it a truly international scope was the New York Protocol Relating to the Status of Refugees, 1967. The Protocol removed the date clause and territorial limitations in the Convention and gave the UNHCR mandate over all refugee situations, and not just those that occurred in Europe prior to January, 1951. See Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

²¹⁰ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

²¹¹ Article 9, Statute of the Office of the United Nations High Commissioner for Refugees, 1950.

²¹² Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

Over the years, the General Assembly has expanded the UNHCR's responsibility to include the protection of various groups of people who are not covered by the Refugee Convention or its 1967 Protocol.²¹³ There have been considerable implementation efforts on this front, which have in turn grown and widened the mandate of the UNHCR. In addition to offering legal protection to refugees as provided in its Statute,²¹⁴ it provides material relief, directly or indirectly, in major emergencies.²¹⁵ This protection extends to persons fleeing conflict, returnees, internally displaced persons and stateless persons.²¹⁶

In 1992, a General Assembly resolution welcomed the efforts by the High Commissioner to undertake activities in favour of internally displaced persons.²¹⁷ Further, General Assembly Resolution 48 of 1993 reaffirmed the General Assembly's support for the High Commissioner's efforts to provide humanitarian assistance and protection to persons displaced within their own country.²¹⁸

In the 1994 United Nations (U.N) General Assembly, a resolution was passed which called upon States to assist and support the High Commissioner's efforts to continue to provide international assistance and protection to persons who have been forced to flee or to remain outside their countries of origin as a result of danger to their lives or freedom owing to situations of conflict.²¹⁹ The same resolution also calls upon the High Commissioner, in

²¹³ Jastram K, Achiron M, '*Refugee Protection: A Guide to International Refugee Law*'.

²¹⁴ Article 2, Statute of the Office of the United Nations High Commissioner for Refugees, 1950.

²¹⁵ Jastram K, Achiron M, '*Refugee Protection: A Guide to International Refugee Law*'.

²¹⁶ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²¹⁷ General Assembly Resolution 47/105, U.N. Doc. A/RES/47/105 (December 16, 1992).

²¹⁸ General Assembly Resolution 48/116, U.N. Doc. A/RES/48/116 (December 20, 1993).

²¹⁹ General Assembly Resolution 49/169, U.N. Doc. A/RES/49/169 (December 23, 1994).

cooperation with concerned States, to promote, facilitate and coordinate the voluntary repatriation of refugees, including the monitoring of their safety and well-being on return.²²⁰

The UNHCR has continued to ensure that the 1951 Refugee Convention remains relevant to pertinent refugee matters by employing the provisions of existing international instruments, especially in the purview of human rights law.²²¹ The employment of the provisions of regional refugee law, other human rights instruments, for instance, the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Rights of the Child, extend the content of the refugee law framework beyond the provisions of the 1951 Refugee Convention.

3.5. Successes and Failures of the UNHCR in the Fulfilment of its Mandate

In fulfilling said mandate, the UNHCR has encountered a multiplicity of challenges, both socially and politically, which have served to broaden or limit the application of the 1951 Refugee Convention, which is the key instrument offering refugee protection.

This is regardless of the argument advanced by scholars that it is of limited continuing vitality, despite the fundamental importance of the Convention to the refugee law and the practice of the UNHCR.²²² This has in turn influenced the evolution of the international refugee law regime. This section shall give a brief overview of the successes and failures of the UNHCR with regard to the development of international refugee law, a responsibility outlined for the organization under its Statute.²²³

²²⁰ General Assembly Resolution 46/169, U.N. Doc. A/RES/49/169 (December 23, 1994).

²²¹ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²²² Maynard P.D., *The Legal Competence of the United Nations High Commissioner for Refugees*.

²²³ Article 8, Statute of the Office of the United Nations High Commissioner for Refugees, 1950.

3.5.1. Successes of the UNHCR

1. *Its existence*

In a similar manner to the 1951 Refugee Convention, one of the key strengths of the UNHCR lies in the fact that it exists. When the UNHCR was created, it was to be a temporary organization, with an operational duration of three years, mandated to protect and find durable solutions to the two million refugees, resulting from the Second World War.²²⁴ A few decades after its establishment, the Agency is still a vital and robust organization, which has adapted and expanded its operations and mandate significantly alongside the rising refugee crises.²²⁵ Its existence guarantees the protection of various groups and categories of refugees, who fall under the auspices of the organization's mandate.

2. *The New York Protocol Relating to the Status of Refugees*

By the mid-1960s, the Office of the United Nations High Commissioner for Refugees had grown increasingly frustrated with its limited mandate, with growing refugee problems in Europe and Africa that were beyond the technical reach of the Convention, and with a lower than expected number of accessions to the Convention, especially among recently decolonized African States.²²⁶

In 1964, UNHCR's Executive Committee recommended that the possibility of deleting the time limitation clause of the Refugee Convention be examined. A Protocol based upon recommendations of an international colloquium of legal experts was approved by UNHCR's

²²⁴ Jones M, *Refugee Politics: The Efficacy of the UNHCR*,

²²⁵ Jones M, *Refugee Politics: The Efficacy of the UNHCR*.

²²⁶ Davies S.E., 'Redundant or Essential: How Politics Shaped the Outcome of the 1967 Protocol' *International Journal of Refugee Law* (2007), 703-728.

Executive Committee and forwarded to the General Assembly in 1966.²²⁷ The removal of the time and geographical limitations eliminated the central anomaly between the Statute of UNHCR and the Refugee Convention.²²⁸

Davies advances the argument that it was necessary for the UNHCR to create the 1967 Protocol, in order to dispel the growing concerns by developing States about the applicability of the 1951 Refugee Convention to their refugee situations, and to enable them to build a universal profile across all regions, which would in turn forestall the proliferation of regional refugee instruments.²²⁹

3. The drafting of policy guidelines with regard to refugee law

Because the UNHCR is the sole organization responsible for addressing refugee crises, it has had to handle contemporary refugee movements, which arise from circumstances not envisioned in the Refugee Convention. While the Convention is a universal humanitarian treaty designed to offer universal protection, the interpretation of the treaty differs from country to country,²³⁰ which in some cases propagates the violations of human rights.²³¹ In this regard, to allow its staff to effectively carry out their duties, especially in terms of refugee status determination, it has produced guidelines which are intended to provide them with legal

²²⁷ Gallagher D, 'The Evolution of the International Refugee System' *The International Migration Review* (1989), 579-598.

²²⁸ Gallagher D, *The Evolution of the International Refugee System*.

²²⁹ Davies S.E., *Redundant or Essential: How Politics Shaped the Outcome of the 1967 Protocol*.

²³⁰ North A.M, Chia J, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' *Australian Year book of International Law* (2006), 214-256.

²³¹ Dejevsky M, *The Geneva Refugee Convention Can't Cope with this Crisis. Time for a Rethink*, Published on January 18, 2016, available online at <https://www.theguardian.com/commentisfree/2016/jan/18/geneva-refugee-convention-crisis-demand-eu>, on January 15, 2018.

interpretative guidance.²³² This paper brings up these Guidelines with particular concern for groups of people, who do not fall under the protection of the Convention.

In 1991, the High Commissioner for Refugees adopted Guidelines on the Protection of Refugee Women.²³³ These guidelines acknowledge the problems experienced by women as refugees, but also the plight they face as women, which reflect their gender. This includes protection against sexual assault, and physical abuse, exploitation, and protection against sexual discrimination.²³⁴ These guidelines enforce the place of the 1951 Refugee Convention, in that, they require compliance with the Convention, and its Protocol, alongside other international instruments, in ensuring the protection of refugee women.

In 2002, the UNHCR published guidelines intended to provide legal interpretative guidance for parties involved in refugee status determination with regard to persons fleeing gender-related persecution. These guidelines adopt a gender-sensitive interpretation of the 1951 Convention, by acknowledging that even though gender is not specifically referenced in the refugee definition, it can influence, or dictate the type of persecution or harm suffered and the reasons for this treatment. It therefore asserts that a proper interpretation of the definition of a refugee, as provided in the Refugee Convention, covers gender-related claims.²³⁵

Acknowledging the fundamental nature of the right to freedom of thought, conscience, and religion, and admitting the complexity of claims to refugee status based on religion, the

²³² Guidelines on International Protection.

²³³ UNHCR Policy on Refugee Women and Guidelines on their Protection: An Assessment of Ten Years of Implementation, An Independent Assessment by the Women's Commission for Refugee Women and Children, 2002.

²³⁴ UNHCR, Information Note on UNHCR's Guidelines on the Protection of Refugee Women, EC/SCP/67, published online on July 22, 1991, available at <http://www.unhcr.org/excom/scip/3ae68cd08/information-note-unhcrs-guidelines-protection-refugee-women.html>, on January 18, 2018.

²³⁵ UNHCR, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002.

UNHCR, in 2004, published Guidelines to enable the effective determination of refugee status. These Guidelines realize the importance of religion in some individuals' way of life, and how it influences how they relate to the world. They assert that persecution for reasons of religion may take various forms, including prohibition of worship, or serious measures of discrimination imposed on an individual for practicing certain religions.²³⁶

In 2009, the UNHCR issued Guidelines on how to carry out refugee status determinations in a child-sensitive manner. The Guidelines highlight the specific rights and protection needs of children in asylum procedures, by acknowledging the fact that traditionally, the provisions of the Refugee Convention have been interpreted in light of adult experiences, meaning that refugee claims made by children have been incorrectly assessed or overlooked.²³⁷

In recognition of the fact that individuals in many parts of the world experience serious human rights abuses and other forms of persecution due to their actual, or perceived sexual orientation, the UNHCR came up with guidelines in 2012, which are intended to aid in the determination of refugee status for persons fleeing such a form of persecution.²³⁸

4. The flexibility and adaptability of the Agency

In the face of the ineffectiveness and inadequacy of the traditional refugee status determination procedures, the Agency adopted prima facie eligibility criteria for the status determination of group refugees.²³⁹

²³⁶ Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 2004.

²³⁷ Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1A (2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 2009.

²³⁸ Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2012.

²³⁹ Nirmal B.C., UNHCR after Six Decades and Beyond.

3.5.2. Failures of the UNHCR

The period of the 1980s witnessed a significant change in the treatment of refugees by States. During this time, the legal competence of the UNHCR rested on the Statute of the Office of the UNHCR and the 1967 Protocol Relating to the Status of Refugees.²⁴⁰ The institutions of refugee protection were under tremendous strain, given the political and ideological shifts in the perception of the refugee problem following the end of the Cold War.²⁴¹ Due to the increasing pressure on the asylum institutions in Europe and North America,²⁴² restrictive measures began to apply to groups of refugees, with special attention paid to the definition of a refugee provided in the 1951 Convention relating to the Status of Refugees. This period has been described as a period of new wars, focused on traditional identities; nation, tribe and religion.²⁴³ Kaldor argues that this resulted in a changed dynamic in forced migration from that witnessed during the Second World War.²⁴⁴

In 1983, the UNHCR acknowledged the insufficiency of standards relating to the obligation of governments towards refugees and asylum seekers.²⁴⁵ States' treatment of asylum seekers and refugees resulted in new legal issues which exposed gaps in the 1951 Convention.²⁴⁶ This can be majorly attributed to the ambiguous nature of some of the key provisions of the 1951

²⁴⁰ Maynard P.D., *The Legal Competence of the United Nations High Commissioner for Refugees*.

²⁴¹ Franco L, *The Problem of Refugees in The Light of Contemporary International Law Issues: Legal Issues Arising from UNHCR Recent Operations*, Papers presented at the Colloquium organized by the Graduate Institute of International Studies in collaboration with the Office of the United Nations High Commissioner for Refugees, Geneva, 1994.

²⁴² Chiusiwa J, *How Effective has the UNHCR Been in Fulfilling its Mandate to Protect Refugees?*

²⁴³ Kaldor M, *New and Old Wars*, 2006.

²⁴⁴ Kaldor M, *New and Old Wars*.

²⁴⁵ UNHCR, *Note on International Protection*, U.N. Doc. A/AC.96/623 (July 31, 1983).

²⁴⁶ Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*.

Refugee Convention, which were highlighted when States adopted narrow interpretations of the Statute in an effort to limit the number of refugees coming into their territories.²⁴⁷

States capitalized on the weaknesses of the refugee regime in their policy directives and the actions they took.²⁴⁸ The UNHCR had difficulty in alleging that such State actions were in breach of specific provisions in the Convention.²⁴⁹ As a result, it could no longer fulfil its supervisory and advisory role, as provided for under Article 8 of the Statute of the Office of the UNHCR, as it could not count on the cooperation of States to take its advice on how to remedy refugee issues.²⁵⁰ Thus, the points of contention between States and the UNHCR were grounded on the content of refugee law.²⁵¹ This problem was compounded by the fact that the Convention relating to the Status of Refugees does not provide a mechanism for the further development of its standards.²⁵²

However, there is a remedy somewhat with the adoption of regional Conventions, which apply different standards to refugees, based on geographical considerations.²⁵³ Regardless, the problem still persists for the lack of an international Convention enshrining the broader definition of a refugee. This means that despite UNHCR's acknowledgement of such regionally recognized refugees,²⁵⁴ the treatment of such persons is still primarily hinged on their location, as opposed to the universality of their identity as refugees. This further

²⁴⁷ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²⁴⁸ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²⁴⁹ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²⁵⁰ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²⁵¹ Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²⁵² Lewis C, UNHCR and International Refugee Law: *From Treaties to Innovation*.

²⁵³ The Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; the Cartagena Declaration of 1984.

²⁵⁴ UNHCR, Note on International Protection, U.N. Doc. A/AC.96/593 (July 31, 1981).

accentuates the inconsistent standards which are to be applied by the Office of the High Commissioner in the fulfilment of its mandate.

Given the complexities of UNHCR's task in providing international protection, one of the major issues confronting the Office is the adequacy of the available tools of protection, in particular the legal tools.²⁵⁵ It has been argued that the mandate of the UNHCR is a very specific and unique tool available to the international community to respond to very specific and limited aspects of humanitarian emergencies.²⁵⁶ In this sense, it is argued that the substitute protection offered by the UNHCR and the whole regime of international refugee law is positions precisely where national protection and prevention have failed. Thus, the mandate of the UNHCR was intended to serve a very strictly and precisely defined need.²⁵⁷

The stiff and fierce competition in which UNHCR finds itself in the humanitarian market in recent years is another major challenge to the successful working and operations of UNHCR in today's globalized world which is marked currently by the deepening global financial crisis and unstable and unpredictable national economies of many of donor countries,²⁵⁸ which created it and continue to support its work through voluntary donations, and whose interests it continues to serve, alongside those of refugees.²⁵⁹

²⁵⁵ Franco L, *The Problem of Refugees in The Light of Contemporary International Law Issues: Legal Issues Arising from UNHCR Recent Operations.*

²⁵⁶ Franco L, *The Problem of Refugees in The Light of Contemporary International Law Issues: Legal Issues Arising from UNHCR Recent Operations.*

²⁵⁷ Franco L, *The Problem of Refugees in The Light of Contemporary International Law Issues: Legal Issues Arising from UNHCR Recent Operations.*

²⁵⁸ Nirmal B.C., *UNHCR after Six Decades and Beyond.*

²⁵⁹ Jones M, *Refugee Politics: The Efficacy of the UNHCR.*

3.5.3. Conclusion

It is extremely difficult to measure the effectiveness of the UNHCR, given the highly politicized environment surrounding its work.²⁶⁰ 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.²⁶¹ UNHCR not only stretched its traditional mandate, of course, with the authorization of the competent organs of the UN, but it also forged new tools, engineered innovative and imaginative strategies and adopted flexible, realistic and pragmatic approaches to the refugee problem.²⁶²

Today, the refugee regime faces a period of transition, forced to adapt to increasing refugee flows and enhanced restrictions among its member states. According to Barnett, the problem that underlies the entire nature of this regime is that 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; a paradox which has brought the refugee regime to an abrupt halt.²⁶³

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.⁹⁴ 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

²⁶⁰ Loescher G, *Beyond Charity: International Cooperation and the Global Refugee Crisis*,

²⁶¹ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

²⁶² Nirmal B.C., *UNHCR after Six Decades and Beyond*.

²⁶³ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

years.²⁶⁴ 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.²⁶⁵

The problem of the mandate gap in the protective activities of the UNHCR exists in the case of some forms of displacement, particularly, natural disasters and calls for the development of a framework to enable the UNHCR or any other humanitarian organization to respond to the protection needs of the persons affected by disaster-induced displacement.²⁶⁶

Given the nature, gravity, and magnitude of the prominent global crises, it is not possible for UNHCR to cope on its own, without the involvement of the greater international community, through the UN and other specialized agencies.²⁶⁷

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.²⁶⁸ 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.²⁶⁹

3.6. Expansion of the Mandate of the UNHCR within its Statute

It can, and has been, argued that finding a balance between the UNHCR's core mandate, and the extending request from the General Assembly in the 1990s and early twenty-first century

²⁶⁴ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

²⁶⁵ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

²⁶⁶ Nirmal B.C., *UNHCR after Six Decades and Beyond*.

²⁶⁷ Nirmal B.C., *UNHCR after Six Decades and Beyond*.

²⁶⁸ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

²⁶⁹ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

has pulled the Agency in ways that contradict and at times undermine its refugee protection mandate.²⁷⁰

The UNHCR has been diverted from its sole responsibility, which was refugee protection. Instead, it focuses on human rights protection and the provision of humanitarian aid in certain circumstances.²⁷¹ But the UNHCR is not a humanitarian relief agency; and there are other specialized international agencies which are better-suited to perform such tasks. This further translates to the fading away of the Agency's non-political character, with its increased activities in in-country protection which is in its nature political and has political consequences.²⁷²

According to Barnett, an expansion of the mandate of the UNHCR to include IDPs could involve a shift in the meaning of what the refugee regime represents, necessitating a deconstruction of the entire refugee issue.²⁷³ Further, arguments have been furthered that the new mandate of the UNHCR fosters the non-admission policies of the affluent Western States; which became particularly apparent after the Cold War period when refugee admission policies lost their political importance.²⁷⁴

The UNHCR in itself is unreceptive to suggestions to broaden its mandate,²⁷⁵ notwithstanding suggestions that 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.²⁷⁶

²⁷⁰ Rushingwa C, *The Perilous Path of the UNHCR*, published on July 19, 2011, available online at <http://www.e-ir.info/2011/07/19/the-perilous-path-of-the-unhcr/>, on November 21, 2017.

²⁷¹ Bakircioglu O, *The Evolving Role of the UNHCR: Should the Conventional Role of the UNHCR Be Expanded?*

²⁷² Bakircioglu O, *The Evolving Role of the UNHCR: Should the Conventional Role of the UNHCR Be Expanded?*

²⁷³ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

²⁷⁴ Bakircioglu O, 'The Evolving Role of the UNHCR: Should the Conventional Role of the UNHCR Be Expanded?' *Ankara Law Review* (2008), 101-110.

²⁷⁵ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

²⁷⁶ Barnett L, *New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime*.

CHAPTER FOUR

THE NEED FOR REFUGEE LAW REFORM

4.1 Introduction

When peaceful protesters calling for government reform took to the streets in Southern Syria on March, 15th 2011,²⁷⁷ they did not anticipate the instigation of civil war. The ensuing conflict in the country has since been internationally recognized as the largest refugee and displacement crisis of this century, with hundreds of thousands of people dead, 5.2 million Syrian refugees and 6.3 million internally displaced Syrians.²⁷⁸

The decades old system of international laws and agreements intended to facilitate the safe and dignified processing of refugees is now clearly broken.²⁷⁹ Kimberly Curtis hypothesizes that the Syrian refugee crisis is a symptom of a much larger problem.²⁸⁰ Part of the problem is the unwillingness of most countries to address the issue of refugees unless it appears directly on their doorstep; an approach which places undue strain on the countries nearest a conflict, such as Lebanon and Jordan, leaving the issue to fester until it explodes.²⁸¹

According to Hathaway, this is the first time the developed world experienced a little bit of what the less developed world has had to routinely put up with.²⁸² Policies that had been fairly

²⁷⁷ Jonson B, and Mouamar P, World Vision staff in Lebanon and Jordan; Huber C, Reid K, and Koenig D, World Vision U.S. staff, Syrian Refugee Crisis: Facts, FAQs, and How to Help, published online on July, 13th 2017, available at <https://www.worldvision.org/refugees-news-stories/syrian-refugee-crisis-facts>, on January 11, 2018.

²⁷⁸ Jonson B, and Mouamar P, World Vision staff in Lebanon and Jordan; Huber C, Reid K, and Koenig D, World Vision U.S. staff, Syrian Refugee Crisis: Facts, FAQs, and How to Help.

²⁷⁹ Curtis K, A "Refugee Convention" for the 21st Century, published on January 5, 2016, available at <https://www.undispatch.com/a-refugee-convention-for-the-21st-century/>, on January 15, 2018.

²⁸⁰ Curtis K, A "Refugee Convention" for the 21st Century.

²⁸¹ Curtis K, A "Refugee Convention" for the 21st Century.

²⁸² Siegfried K, Time to Reform the Way We Protect Refugees? Published online on May 9, 2016, available at <http://www.irinnews.org/analysis/2016/05/09/time-reform-way-we-protect-refugees>, on January 11, 2018.

effective at ensuring that refugees never reached European borders have broken down under the pressure of mass movements from Syria and European governments have gone into crisis mode.²⁸³ This has further drawn attention to the pre-existing weaknesses in the international refugee regime, which isn't delivering results for refugees or States.²⁸⁴ Other States have reacted to the refugee crisis, both in Syria and globally, by enforcing more stringent refugee policies and measures intended to curb the inflow of refugees. This is the case most notably in Australia.

Since World War II, and by 2013, Australia had accepted 7.4 million migrants, and 800,000 refugees, the highest number of per capita refugees of the 195 UN countries. With preference for an "open door" policy, this meant that anyone who arrived could stay. This in turn placed pressure on almost every part of Australia's economic, social, cultural and political structures, stretching our traditional tolerance, acceptance and bipartisanship to the limit. This further translated in high financial costs owing to the financial costs incurred by States that host or resettle refugees.²⁸⁵

It has been suggested that perhaps the only way to find a lasting solution is to look to the 1951 Convention Relating to the Status of Refugees. In light of the argument that the conditions that made it necessary to draw up the 1951 Convention and its protocols have changed enormously since then, it is suggested that the UN draw up new protocols that take into account facts on the ground now, as opposed to those of 60 years ago.²⁸⁶ The essence of this chapter is to

²⁸³ Siegfried K, Time to Reform the Way We Protect Refugees?

²⁸⁴ Siegfried K, Time to Reform the Way We Protect Refugees?

²⁸⁵ Cohen B, We Need to Overhaul Refugee Convention, published online on July 19, 2013, available at <http://www.theaustralian.com.au/opinion/columnists/we-need-to-overhaul-refugee-convention/news-story/57cef4cc12b3f6ba2ad45728d63240e6>, on January 15, 2018.

²⁸⁶ Cohen B, We Need to Overhaul Refugee Convention.

determine the necessity of amending the 1951 Convention and consider the volatility of overhauling the entire refugee law regime.

4.2 Debates Surrounding the Current Refugee Regime

As the global community continues to strain under the weight of the current global crisis, questions have been raised over whether the document is still relevant, or whether the obligation of signatory states too great.²⁸⁷ What the current refugee crisis has shown is that the UN Refugee Convention and the rights and obligations which flow from it are inadequate and need to be fundamentally revised.²⁸⁸ The 1951 Convention does not provide States with the conceptual and normative tools necessary for adequately protecting many vulnerable individuals in the current international climate.²⁸⁹ However, it being the only universal refugee instrument, challenging the Convention poses a threat to the international protection framework built up over a long duration of time.²⁹⁰

4.2.1. The Office of the United Nations High Commissioner for Refugees

The United Nations Office of the High Commissioner of Refugees is the guardian of the 1951 Convention Relating to the Status of Refugees, and its mandate is crucial to the proper functioning of the entire refugee regime. As such, there cannot be a proper discussion on refugee law reform, without a consideration of the necessity of the expansion of the mandate of the UNHCR.

²⁸⁷ Muller N, and Anke R, Refugee Convention of 1951 Still Crucial Cornerstone of Human Rights, published online on July 28, 2016, available at <http://www.dw.com/en/refugee-convention-of-1951-still-crucial-cornerstone-of-human-rights/a-19429093>, on January 15, 2018.

²⁸⁸ Cole P, What's Wrong with the Refugee Convention?

²⁸⁹ Ferracioli L, 'The Appeal and Danger of a New Refugee Convention' *Social Theory and Practice* (2014), 123-144.

²⁹⁰ Millbank A, The Problem with the 1951 Refugee Convention.

The Statute of the UNHCR establishes the organization and its mandate as humanitarian in nature.²⁹¹ It has been argued that the institutional apparatus for dealing with refugee crises suffers from the same infirmities as the substantive principles of international refugee law.²⁹²

However, the UNHCR has found it necessary to avoid its humanitarian roots and extends itself beyond the legal definition of a refugee and operates on its own criterion of “well-founded fear of persecution”.²⁹³ Outside its direct mandate, it has supported innovative responses, working to provide protection for asylum-seekers and refugees protection through safe havens, and acknowledging the value of supplementary forms of protection for persons not covered under the Convention.²⁹⁴

The Agency has been applauded for the manner in which it has continually recognized the changing realities of displacement, and the fluctuating nature of States’ interests, and for how it has adapted accordingly, continually broadening its remit.²⁹⁵ Consequently, while the refugee regime buckles under the current crisis, the UNHCR continues to function, promoting the respect and upholding of refugees’ rights.²⁹⁶

On the other hand, it has come under direct criticism by governments for taking on an advocacy cum prosecuting judge role, rather than assisting States to cope with the altered refugee situation.²⁹⁷ This argument has largely been vocalized by States supporting large refugee

²⁹¹ Article 2, Statute of the Office of the UNHCR, 1950.

²⁹² Garvey J.I., *Toward a Reformulation of International Refugee Law*.

²⁹³ Garvey J.I., *Toward a Reformulation of International Refugee Law*.

²⁹⁴ Koser K., *Australia and the 1951 Refugee Convention*.

²⁹⁵ Koser K., *Australia and the 1951 Refugee Convention*.

²⁹⁶ Koser K., *Australia and the 1951 Refugee Convention*.

²⁹⁷ Millbank A., *The Problem with the 1951 Refugee Convention*.

populations, who cite their indignation over the lack of progress through the UNHCR on burden sharing.²⁹⁸

These arguments require a closer examination of the role of the UNHCR, especially in light of contemporary refugee movements. According to Khalid Koser, some of the issues that would be up for consideration include the interplay between the UNHCR, the International Organization for Migration and other UN agencies. Similarly, the interaction between the UNHCR and other institutions that deal with issues that impact displacement, on the premise that in some cases the UNHCR may be better suited to take action at the international level, rather than assume direct responsibility, and vice versa.²⁹⁹

4.2.2. The 1951 Convention relating to the Status of Refugees

The 1951 Convention Relating to the Status of Refugees superseded older forms of international protection which were aimed at marginalized groups at odds with the power structures of their homelands. They were largely designed to offer absolute protection to victims of upheaval, displaced by cataclysmic historical events; and as such, these regimes conferred relief on designated classes based largely on their unprotected status.³⁰⁰

It has been argued that even if the 1951 Convention Relating to the Status of Refugees were to be replaced by a new Convention today, there is no guarantee that the latter would have fewer problems or that it would be more generous in either its definition of a refugee, or its scope, as compared to the current Convention.³⁰¹

²⁹⁸ Millbank A, *The Problem with the 1951 Refugee Convention*.

²⁹⁹ Koser K, *Australia and the 1951 Refugee Convention*.

³⁰⁰ Von Sternberg, 'The Evolving Law of Non-Refoulement and its Influence on the Convention Definition of a Refugee' *In Defense of the Alien* (2001), 205-223.

³⁰¹ Fontaine M, 'The Relevance of the 1951 Geneva Convention Relating to the Status of Refugees' *Australian International Law Journal* (1996), 69-79.

The notion has been raised that, in principal, the codification of refugee status in the Convention looks as relevant today as it was when it was first drafted, and as it consequently appears in the 1967 Protocol. On the other hand, this gives rise to the contention that if the definition of a refugee remains as valid as it was, then the whole system of refugee law would be at risk, because of the degree of change in the international context.³⁰²

According to Guy Goodwin-Gill, the danger of attempting to negotiate a new Convention is that there will be loss of what is already there; with the effort itself proving detrimental to a system which has brought a certain measure of protection to millions of people over the years.³⁰³ This position has been supported by Phil Cole, who is of the opinion that if the definition is opened up for renegotiation, powerful States with an interest in limiting freedom of movement will make it less, rather than more, generous.³⁰⁴ This would in turn jeopardize the rights, principles and standards it enshrines.³⁰⁵ In any case, opening up the Convention may have implications for other treaties which offer a basis for refugee rights,³⁰⁶ like the Universal Declaration of Human Rights, which serves as a common standard of achievement for all persons and nations.³⁰⁷

First and foremost, it is imperative that this dissertation acknowledge the vitality of the 1951 Convention Relating to the Status of Refugees. To begin with, owing to the fact that it is both

³⁰² Dejevsky M, The Geneva Refugee Convention Can't Cope with this Crisis. Time for a Rethink, Published on January 18, 2016, available online at <https://www.theguardian.com/commentisfree/2016/jan/18/geneva-refugee-convention-crisis-demand-eu>, on January 15, 2018.

³⁰³ BBC News, would a New UN Convention Help Refugees?

³⁰⁴ Cole P, What's Wrong with the Refugee Convention? Published online on November 6, 2015, available at <http://www.e-ir.info/2015/11/06/whats-wrong-with-the-refugee-convention/>, on January 15, 2018.

³⁰⁵ Koser K, Australia and the 1951 Refugee Convention.

³⁰⁶ Koser K, Australia and the 1951 Refugee Convention.

³⁰⁷ Preamble, Universal Declaration of Human Rights, 1948.

a status, and rights-based instrument,³⁰⁸ the Convention is fortified by a number of fundamental principles, predominantly non-discrimination, non-penalization and non-refoulement, which set the minimum standard of treatment by host States towards refugees, and ensure that protection is afforded to all refugees without discrimination.³⁰⁹

Secondly, the Convention enumerates a set of rights for refugees, which recognize the fact that these people have fled their homes and no longer enjoy the legal protection afforded by their home governments, for example, the rights to access to courts,³¹⁰ education,³¹¹ and employment,³¹² among other economic, civil and social rights.³¹³ Along the same lines, it also provides for rights specific to refugees, which include protection from penalties for illegal entry³¹⁴ and the right not to be sent back to their home countries.³¹⁵

Speaking to BBC News, Cathryn Costello³¹⁶ opined that regardless of its shortcomings, the Convention is relevant and plays a vital role insofar as being the benchmark by which treatment of refugees by States is assessed.³¹⁷ She does not contemplate that a new Convention would be the best response,³¹⁸ owing majorly to the current global climate.

³⁰⁸ Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR) to the Convention Relating to the Status of Refugees, 1951.

³⁰⁹ UNHCR Presentation on the Basic Principles of the Protection of Refugees and the UNHCR's Role, on March 13, 2014.

³¹⁰ Article 16, Convention Relating to the Status of Refugees, 1951.

³¹¹ Article 22, Convention Relating to the Status of Refugees, 1951.

³¹² Chapter III on gainful employment; Article 17, 18, and 19, Convention Relating to the Status of Refugees, 1951.

³¹³ These include the right to own property (both movable and immovable) under Article 13 of the Convention, right to own intellectual property (artistic rights and industrial property) under Article 14, and the right to association under Article 15. See also Koser K, Australia and the 1951 Refugee Convention, published online on April 30, 2015, available at <https://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention>, on January 16, 2018.

³¹⁴ Article 31, Convention Relating to the Status of Refugees, 1951.

³¹⁵ Article 33, Convention Relating to the Status of Refugees, 1951.

³¹⁶ Andrew W Mellon Associate Professor of International Human Rights and Refugee Law at Oxford University.

³¹⁷ BBC News, would a New UN Convention Help Refugees? Published on May 25, 2016, available online at <http://www.bbc.com/news/world-36321685>, on January 15, 2018.

³¹⁸ BBC News, would a New UN Convention Help Refugees?

Additionally, Jane Mc Adam³¹⁹ argues that the Convention was not designed to protect every displaced person in the world, and neither was it meant as a means to bypass migration controls, but rather poses a careful balance of the needs of refugees and governments.³²⁰ She further says that the Convention just needs political will to do its job, positing that as it is, the Convention provides a principled, predictable, universal, and solutions-oriented system; and remains fit for its purpose.³²¹ A similar position has been held by Erika Feller, who argues that the fact that there are so many refugees in the world today without protection is not the fault of the Convention, but rather the lack of political will to implement it.³²²

This has been owed majorly to the Convention's exilic bias, where it imposes obligations on the host States and governments, which are increasingly burdensome to realize, but none on the States of origin, either to address the conditions that cause refugees to flee their homes, or concerning the rights of returnees.³²³ The Convention provides protection after flight, but does not address the initial causes for flight making it a reactive rather than a proactive instrument.³²⁴

4.2.3. Recommendations

When answering questions about the new UNHCR Guidelines on International Protection, Volker Turk, postulates that the Guidelines show that it is not about a broadening of the refugee definition, but rather an explaining and updating of the understanding of the definition in

³¹⁹ Scientia Professor of law and director of the Kaldor Centre for International Refugee Law.

³²⁰ Mc Adam J, Seven Reasons the UN Refugee Convention Should Not Include "Climate Refugees".

³²¹ Mc Adam J, Seven Reasons the UN Refugee Convention Should Not Include "Climate Refugees".

³²² Kaldor Centre for International Refugee Law, Time to Retire the 1951 Refugee Convention? Published online on June 27, 2016, available at <http://www.kaldorcentre.unsw.edu.au/news/time-retire-1951-refugee-convention>, on January 15, 2018.

³²³ Koser K, Australia and the 1951 Refugee Convention.

³²⁴ Koser K, Australia and the 1951 Refugee Convention.

today's context.³²⁵ In the same light, UNHCR Chief Spokesman, Adrian Edwards, is of the opinion that the 1951 Refugee Convention is a flexible and adaptable instrument; so much so that, even if the harsh realities are not explicitly acknowledged in the text of the Convention, the instrument in itself is capable of taking on more meanings. As such, it should be viewed as something to build on, rather than to be reconstructed.³²⁶

While it is true that the Convention's focus on solutions is one of its strengths, it also reflects the situation of the refugees for whom it was established; people who had already been forced from their homes.³²⁷ Further, neither the Convention, nor the UNHCR, whose work is grounded on the Convention, were envisaged to deal with new refugees after solutions had been found for those displaced across Europe after the Second World War.³²⁸

According to Laura Ferracioli, there are three key elements which must be met in a Refugee Convention; (i) its specification of who qualifies for protection must be appropriately inclusive; (ii) its assignment of legal responsibility to States must adequately track their prior moral responsibility, and (iii) its text must give clear guidance on how migration sits with other moral responsibilities that recipient States typically have.³²⁹

To begin with, the Conventional definition of a refugee is problematic because it is under-inclusive.³³⁰ A proper definition of a refugee ought to acknowledge the different ways in which citizens become dependent upon migration in order to protect and promote human rights that

³²⁵ UNHCR Website, Q&A: The 1951 Refugee Convention 'is as relevant today as it was at the time', published on December, 2 2016, available at <http://www.unhcr.org/news/latest/2016/12/584036047/qa-1951-refugee-convention-relevant-today-time.html>, on January 15, 2018.

³²⁶ Muller N. and Anke R, Refugee Convention of 1951 Still Crucial Cornerstone of Human Rights.

³²⁷ Koser K, Australia and the 1951 Refugee Convention.

³²⁸ Koser K, Australia and the 1951 Refugee Convention.

³²⁹ Ferracioli L, The Appeal and Danger of a New Refugee Convention.

³³⁰ Ferracioli L, The Appeal and Danger of a New Refugee Convention.

are necessary for a minimally decent life.³³¹ The thrust of this argument being that, aside from political persecution, there are other sources of vulnerability that push people out of their countries of origin.³³² Costello highlights the problematic distinction between persons fleeing political types of persecution and persons fleeing indiscriminate risks, owing to the narrow definition of a refugee as provided in the Convention.³³³

One of the more unfortunate, and unintended consequences of the narrow interpretation of the Conventional definition of a refugee is the growth in people smuggling, which exposes refugees to risk and vulnerability.³³⁴ Because the Refugee Convention no longer provides protection for a sizeable portion of those fleeing their homes, nor is it able to adequately protect states' rights to manage migration and their borders with requisite integrity,³³⁵ the refugee movement has become a hub of profit for the illegally thriving people smuggling business.³³⁶

On this basis therefore, an inclusive definition of a refugee is as a person who cannot secure their most fundamental human rights without migration.³³⁷ This introduces the concept of human rights to the refugee discussion; a notion which is the subject of intense discussion among scholars of both fields. A suggestion has been raised that the new Convention lists the human rights considered fundamental for the conduct of a minimally decent life and accepts a presumptive right to immigrate on the part of those who cannot access such rights without immigration.³³⁸

³³¹ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³³² Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³³³ BBC News, *Would A New Convention Help Refugees?*

³³⁴ Koser K, *Australia and the 1951 Refugee Convention*.

³³⁵ McAuliffe M, Koser K, *Unintended Consequences: How migrant smugglers are exploiting the international protection system*, *Advance Essays, Opinions and Ideas on Public Policy*, 2015.

³³⁶ Koser K, *Australia and the 1951 Refugee Convention*.

³³⁷ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³³⁸ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

Further, rather than allow the conception of migration as the solution to problems, a new Convention should promote the role of the UNHCR as the lighthouse of the refugee regime. This is by explicitly acknowledging the role of the UNHCR in developing policies and guidelines that relate to all groups of persons, who, in layman's terms would qualify as refugees, including asylum-seekers and the internally displaced. This would enable the UNHCR to develop better protection mechanisms for all groups falling under the refugee regime.

Secondly, with regard to moral responsibility, Ferracioli suggests the consideration of costs which will be incurred in the inclusion of refugees. Taking the example of poor, and developing countries, she argues that such States are constrained in their ability to appropriately include large numbers of refugees, majorly due to the costs involved.³³⁹ The worry is that it could become too burdensome for each individual State to provide membership to all genuine refugees who make their way into their borders,³⁴⁰ a position that has been avidly supported by Cathryn Costello, who identifies the lack of international responsibility sharing as the real deficit in the refugee regime.³⁴¹ In this regard, what is needed in terms of reform, is a refugee regime that strives for accountability and imposes sanctions on States that cause displacement.³⁴²

The conception of a form of burden sharing, streamlining criteria for refugee status determination would reduce the asylum burden on host States,³⁴³ meaning that, States can accept a presumptive right to immigrate on the part of refugees, and a right not to bear

³³⁹ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³⁴⁰ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³⁴¹ BBC News, *Would A New UN Convention Help Refugees?*

³⁴² Koser K, *Australia and the 1951 Refugee Convention*.

³⁴³ Koser K, *Australia and the 1951 Refugee Convention*.

unreasonable costs when providing membership to those entitled to international protection.³⁴⁴ In this way, a new Convention would accommodate the concerns of both refugees and host governments,³⁴⁵ which includes provisions for legal protections which would balance the needs of refugees escaping conflict and persecution, with governments' security concerns.³⁴⁶

In the same vein, the new Convention ought to be explicit about and sufficiently sensitive to the fact that some vulnerable individuals can be helped in their own State of citizenship, while others can be helped by integration into new political communities.³⁴⁷ It is therefore the duty of States to find a way to discern between vulnerabilities that trigger a duty of inclusion and those that do not, to create a priority system to avoid the incurring of high costs.³⁴⁸

In the end this translates to the acquisition of a more nuanced understanding of States' moral responsibility towards foreigners in need.³⁴⁹ This argument has been supported by Philip Cole,³⁵⁰ who feels that if there is a new Convention in international law which States have signed up to, it translates to a clear picture on who has rights and who needs to meet them.³⁵¹

A new Convention would be the foundation of the refugee protection regime, where the actions of States would be guided, and they would not have discretion on how to treat refugees.³⁵²

³⁴⁴ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³⁴⁵ Curtis K, *A "Refugee Convention" for the 21st Century*.

³⁴⁶ Curtis K, *A "Refugee Convention" for the 21st Century*. Additionally, consider the situation in the Arab Gulf States, where, despite their not being signatories to the Convention or its Protocol, they contribute monetarily to the U.N to help the Syrian refugees, but have not accommodated any of them, principally because of the fact that accommodating refugees feeds into the ISIS appeal, which would risk the security and stability of the Gulf States, which are the most stable and secure globally. See Yan H, *Are Countries Obligated to Take in Refugees? In Some Cases, Yes*, published online on December, 29, 2015, available at <http://edition.cnn.com/2015/09/08/world/refugee-obligation/index.html>, on January 16, 2018.

³⁴⁷ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³⁴⁸ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³⁴⁹ Ferracioli L, *The Appeal and Danger of a New Refugee Convention*.

³⁵⁰ Professor, refugee and migration expert at the University of the West of England.

³⁵¹ BBC News, *would a New UN Convention Help Refugees?*

³⁵² BBC News, *would a New UN Convention Help Refugees?*

refugee law rights accrue from a legally recognized status.³⁵⁸ Despite this, it is imperative to note that refugee protection is a rights-based, and rights-driven concept, and as such refers to the act of respecting and upholding the core human rights of refugees and means elimination of any disability which may arise for the lack of national protection through the conferment of refugee status on the individuals taking refuge in another country.³⁵⁹

The debates surrounding the contested interaction between human rights law and refugee law are of profound significance because they significantly impact on the approach to be taken to current arrangements and future reform.³⁶⁰ This is despite the view of some human rights lawyers and scholars of refugee law as too embedded in domestic immigration law and institutions.³⁶¹ National and regional jurisdiction has been applied to overcome some of the stipulations of the Convention in law; and where these cannot be easily overcome legally, States flout the Convention to try reshape it to contemporary settings, meaning that the standards set in the Convention are no longer applied consistently.³⁶² According to Khalid Koser, this risks triggering a “race to the bottom”, where the “winner” is the country that can interpret the Convention most restrictively, reducing its appeal to asylum-seekers.³⁶³

According to Harvey, if refugee law is tired, anachronistic and a distraction, then it may mean that strategic energy is directed elsewhere.³⁶⁴ However, if it is regarded as of fundamental and ongoing relevance, then tactical thought might be invested in its reconstruction and

³⁵⁸ Ogg K, ‘A Sometimes-Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of Effective Protection’ *Macquarie Law Journal* (2013), 109-130.

³⁵⁹ Nirmal B.C., UNHCR after Six Decades and Beyond.

³⁶⁰ Harvey C, ‘Time for Reform? Refugees, Asylum-seekers, and Protection under International Human Rights Law’ *Refugee Survey Quarterly* (2015), 43-60.

³⁶¹ Anker D, *Refugee Law, Gender and the Human Rights Paradigm*.

³⁶² Koser K, *Australia and the 1951 Refugee Convention*.

³⁶³ Koser K, *Australia and the 1951 Refugee Convention*.

³⁶⁴ Harvey C, *Time for Reform? Refugees, Asylum-seekers, and Protection under International Human Rights Law*.

promotion.³⁶⁵ He further posits that human rights law informs refugee law to the extent that the relevance of the latter is questioned, by shifting the focus towards human rights abuses and violations. However, even the human rights agenda out of which the UNHCR was born is increasingly coming under strain.³⁶⁶

Such reform would integrate human rights advances more fully into existing international refugee law. There remains a worry that the potential strength and specificity of refugee protection might be undermined in well-meaning efforts to promote human rights. In this understanding, human rights law is vital, but has instrumental value in keeping the refugee definition relevant and objectively delimited, developing the interpretation of specific guarantees of refugee law, and securing additional protections to refugees in general and to specific groups of refugees.

As is, refugee law is a limited regime, because of the lack of tenability of the fetishism of the Geneva Conventions. The effective implementation and enforcement of international standards is a core element in the tackling of the root cause of refugee movements. The potential normative reach of international human rights law does not mean that States are ready to welcome and accept a new and expanded approach to the definition of a refugee.

Human rights law and refugee law are limited mechanisms for the protection of refugees, asylum seekers and the forcibly displaced. Refugees do not only benefit from the rights contained in the 1951 Refugee Convention, but like all those forcibly displaced, also exist within a framework of human rights standards and institutions. The “every one” of

³⁶⁵ Harvey C. Time for Reform? Refugees, Asylum-seekers, and Protection under International Human Rights Law.

³⁶⁶ Chetail V, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law.

international human rights, underpinned by the principles of equality and non-discrimination, suggest that what matters as a starting point is the fact of being human.

Assuming refugee law as an integral part of human rights law has both legal and political implications which are intrinsically interconnected; acknowledgement of which paves the way towards radical change in perception.³⁶⁷ However, it reaches a dead-end as human rights law because it collides with the principle of national sovereignty, a reality which consistently compromises human rights law.³⁶⁸

4.3.2. Hathaway's Model for Refugee Law Reform

Hathaway posits that the normative foundation of the 1951 Convention remains sound and is a sufficient basis for the revitalization of the refugee regime.³⁶⁹ He argues that there is a misunderstanding as to the authentic framework of the international refugee law regime which leads to an assumption that it is unsuitable in handling contemporary refugee flows.³⁷⁰ The problem, he further argues, is in the complete failure by the UNHCR and States to innovate the way we actually deliver protection.³⁷¹

He proposes a model which utilizes the flexibility afforded by the existing body of law to retool the refugee law regime at an operational level,³⁷² where the Convention is retained in its current form but its implementation mechanisms are completely overhauled.³⁷³ This would require a

³⁶⁷ Chetail V, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law.

³⁶⁸ Garvey J.I., Toward a Reformulation of International Refugee Law.

³⁶⁹ Hathaway J, 'Why Refugee Law Still Matters' *Melbourne Journal of International Law* (2007), 89-103.

³⁷⁰ Hathaway J, Why Refugee Law Still Matters.

³⁷¹ Siegfried K, Time to Reform the Way We Protect Refugees?

³⁷² Hathaway J, Why Refugee Law Still Matters.

³⁷³ Siegfried K, Time to Reform the Way We Protect Refugees?

revitalization of the UNHCR, where it would have authority to allocate funds and responsibilities and to administer an international refugee status determination system.

4.4 Conclusion

The fundamental importance of the international refugee law regime is not in doubt, especially with the overwhelming global refugee crisis. States and international organizations recognize the important role played by the Refugee Convention and the even more challenging one played by the UNHCR. However, even as these instruments are applauded for their resilience, they have also been acknowledged as imperfect, from the way they are constructed, and interpreted, to the manner in which they are applied. Such imperfection has had ramifications for all parties involved, including a notable rise in cases of human trafficking.

While the idea of an overhaul of the entire regime sounds necessary, and appealing, scholars and experts in the field of refugee law feel that the current global climate would not foster an accommodating State practice. Bearing in mind the complimentary role of the UNHCR to the activities of States, such reform would serve to hinder the UNHCR's fulfilment of its mandate, leading to the eventual collapse of the entire regime.

The UNHCR recommend the visualization of the Refugee Convention as an adaptable, and flexible tool, which has the potential to apply to diverse situations, depending on how its provisions are construed. This means that even though the Convention does not expressly provide for certain groups of persons, if its terms are generously applied, then such persons would fall under the ambit of the Convention.

This is a very confusing position, particularly with regard to State practice. Literature on the drafting of the Convention suggests that the Convention was not designed to protect refugees

arising from all displacement-causing events; rather it was a means of protection for the displaced victims of the Cold War.

In light of the existing refugee crisis, it is prudent to take on a humane position, and view the provisions of the Convention with regard to human rights norms, which are ultimately, the backbone of refugee law. In this manner, the definition of a refugee would broadly apply to persons who are unable to access the fundamental, basic, human rights necessary to achieve a minimally decent life; an application which calls to the innate humanity in every individual, and the generosity of each State.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Conclusion

The 1951 Convention relating to the Status of Refugees is the cornerstone and the center of the international legal framework for the protection of refugees. It offers the definition of a refugee and provides for the basic minimum standards for their treatment.

However, in the wake of the current global refugee crisis, the system of international laws and agreements intended to facilitate the protection of refugees is falling apart. To begin with, the Convention's definition of a refugee does not cater for a majority of today's displaced population. In the twenty-first century, factors driving migration are vastly different from the factors that prompted the drafting of the Convention, and consequently, the 1967 Protocol.

Under the threat of collapse of their national systems, social, economic and political, States are unwilling to open up their borders to refugees; instead, adopting a restrictive interpretation of the Convention's provisions. This decision cannot be held against them, as accommodating refugees involves a number of challenges, some of which the international community cannot begin to comprehend.

The United Nations Office of the High Commissioner for Refugees (UNHCR), in accordance with its mandate, has stepped in, in its complimentary role to ease the burden of States. The Statute of the UNHCR provides for the extension of the competence of the Agency to the promotion of Governments' execution of measures intended to improve the situation of refugees. However, the restrictive application of the provisions of the Convention poses a problem to the UNHCR's accomplishment of its mandate.

This is primarily because, there is a separation between the Convention's provision for the role of the UNHCR, and the role of the UNHCR provided for in the Agency's Statute. This means that some of the specific vulnerable groups provided for under the UNHCR Statute, are not covered under the Convention. Consequently, States are adamant to allow UNHCR activities in their territories with regard to such persons.

This is one of the challenges that necessitates discourse on the reform of the international refugee law regime, an issue that is the subject of much debate by both scholars, and practitioners of refugee law. On the one hand, there is no guarantee that an overhaul of the regime will bring about the change, both States, and refugees direly need. On the other, it is possible that a new legal regime regarding refugees could offer protection reflective of the challenges refugees face in this century. In broad terms, this refers to security, and basic human rights, which includes children's, and women's rights.

Further, the UNHCR bears heavy criticism, with particular regard to its mandate. It has been postulated that the Agency acts *ultra vires* because of the means it implements in fulfilling its mandate, where it, at times goes beyond its stipulated humanitarian, non-political nature in cases where it cannot rely on the cooperation of States. While this dissertation is not opposed to a healthy coloring outside the lines, it is cautious of the position such actions leave the Agency, where it is open to exploitation by States, especially donor States who use its activities to further their own agenda, which further means that the UNHCR's role, with regard to the development of international law, will be biased in favour of such States.

Some of these critics recommend the amendment of the foundational Statute, a position this dissertation supports, with reasonable justification. Being the watchdog of the refugee regime, the success of the Convention hinges strongly on the existence of a feasible organizational

structure of the parent body, which envisions the challenges the organization would face in light of the contemporary refugee problem, and propose durable, and sustainable solutions.

5.2 Recommendations

5.2.1. To the UNHCR

As the core of refugee law's institutional framework, the UNHCR is in a unique position to facilitate the change in perception of the Refugee Convention and promote a deeper understanding of its provisions. It is important, that aside from fostering State activities in relation to refugees, the UNHCR also take it upon itself to sensitize States on the fundamental importance of the Convention. This would be through highlighting the strengths of the Convention, chiefly, the fact that it is an existent instrument, capable of evolution to suit the current crisis.

In line with this sensitization agenda, the UNHCR, being a humanitarian organization, should approach the refugee dilemma from a humanitarian perspective. Bearing in mind that the UNHCR is not a helpless victim to the evolution of refugee law, either through the General Assembly resolutions, or the Executive Committee directives, it should subscribe to the ideals theorized in international human rights instruments in fulfilling its extended mandate. This implies that the Agency should not be blind in its pursuit of its elusive mandate, but rather, should be open to the principles and ideals which form the heart of the regime. Such principles, being acceptable, and applicable universally, are international customary law. This means that the UNHCR has the ability to quash all States' denial to the performance of its mandate in their sovereign territories, by virtue of the fact that they subscribe to these higher ideals.

Additionally, refugees being human beings are subjects of human rights law; thus, all human rights instruments apply to them. The UNHCR should endorse the enlightenment of refugees

on their rights, both under the Convention, and under international human rights law. This is premised on the fact that one cannot fight for something they do not know they have or are bound to lose. Hence, if refugees were educated on their rights, then they would be in a better position to defend themselves, and their rights, in turn making the work of the Agency easier.

In line with this supposition, the Agency has been the subject of much criticism regarding its expansion of its mandate, particularly when it does this of its own accord. Being the established guardian of refugee law, its need to keep a hold of all matters pertaining to refugees is understandable. Additionally, the magnitude of the Agency allows it to diversify, so to speak, albeit ineffectively. As the number of refugees has grown globally, there have come into existence other humanitarian organizations, which address refugee issues, some of which may be in a better position to address some of the issues that arise pertaining to refugee law. On this note, the Agency should adopt a specialization mechanism, where it utilizes its magnitude to accomplish its set objectives. Alternatively, it could operate within the parameters set in the Statute of the UNHCR and allow other organizations to address issues that are outside its scope.

This could imply the Agency taking on a supervisory role, where it works with civil societies, domestic courts and governments, to find policies that facilitate respect for international obligations, and attempt to resolve refugee issues locally. This involves the formation of local committees, tasked with conducting research on factors that cause displacement within their localities, and recommend means through which such could be vitiated. This would rectify the criticism that the Convention acts reactively, as opposed to proactively.

The UNHCR's claim that the Convention is still as fit for its purpose in present day, as it was in 1951, elucidates the Agency's anti-reform stance. The foundation of this argument on the adaptability, and flexibility of the Convention is however misleading, owing to the fact that it

does not take into account States' reactions to the burdens the Convention places upon them' and neither does it provide a margin for lack of political will. Therefore, the Agency needs to revisit its idealistic perception of the Convention as the be-all and end-all of refugee legislation.

5.2.2. To States

It would be imprudent to undermine the role of States in the vast field of refugee law. After all, they are the major actors in the vast field of international law. To allow the integrated application of refugee law universally, it is a prerequisite that States ratify the legislative instruments, on which the refugee regime is based. Given the unpredictability of events causing displacement, the ratification of the Convention and the UNHCR Statute would guarantee that in the event of a displacement-causing catastrophic occurrence, refugees would have safe haven in neighboring countries.

On a similar note, the ratification of refugee law instruments would have a significant impact on the formulation of burden-sharing mechanisms between States, where each State's capacity to offer refuge is recognized, from both an economic, and social standpoint. This will ease the burden on developing States which lack the necessary tools, both legislatively and institutionally, to facilitate the safe hosting of refugee populations.

State actions with regard to refugees are complemented by those of the UNHCR, meaning that, there cannot be effective UNHCR, humanitarian action within the sovereign territories of States if there is no action on their part. Therefore, this dissertation recommends the adoption of proactive measures by both the displacing States and the host governments, in finding speedy and durable solutions to the refugee crisis. In the same way the UNHCR is advised to come up with local committees focused solely on the factors causing displacement within

States, such action is also recommended to States, where committees establish the causes of displacement within their countries and find durable measures to curb such influences.

BIBLIOGRAPHY

International Instruments

Statute of the Office of the United Nations High Commissioner for Refugees 1950.

Convention Relating to the Status of Refugees 1951.

Additional Protocol Relating to the Status of Refugees 1967.

Universal Declaration of Human Rights 1948.

Regional Instruments

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969.

Cartagena Declaration of Refugees 1984.

United Nations Security Council

United Nations Security Council Resolution 941 of 1994, UNSC S/RES/941 (1994).

Other UN Documents

United Nations Security Council, Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, S/1994/674.

United Nations High Commissioner for Refugees Emergency Handbook.

UNHCR Opinion on the Scope and Content of the Principle of Non-Refoulement 2001.

General Assembly Resolution 47/105, U.N. Doc. A/RES/47/105 (December 16, 1992).

General Assembly Resolution 48/116, U.N. Doc. A/RES/48/116 (December 20, 1993).

General Assembly Resolution 46/169, U.N. Doc. A/RES/49/169 (December 23, 1994).

El-Hinnawi E, Environmental Refugees, United Nations Environmental Programme, 1985.

UNHCR Guidelines on International Protection.

UNHCR Policy on Refugee Women and Guidelines on their Protection: An Assessment of Ten Years of Implementation, An Independent Assessment by the Women's Commission for Refugee Women and Children, 2002.

UNHCR, Information Note on UNHCR's Guidelines on the Protection of Refugee Women, EC/SCP/67, published online on July 22, 1991, available at <http://www.unhcr.org/excom/scip/3ae68cd08/information-note-unhcrs-guidelines-protection-refugee-women.html>, accessed on January 18, 2018.

UNHCR, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002.

Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 2004.

Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1A (2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 2009.

Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2012.

UNHCR, Note on International Protection, U.N. Doc. A/AC.96/623 (July 31, 1983).

UNHCR, Note on International Protection, U.N. Doc. A/AC.96/593 (July 31, 1981).

Books

Marx K, Engels F, "Marx & Engels Collected Works," 1845-47, Volume 5, published by Lawrence & Wishart, 2010.

Loescher G, *Refugee Movements and International Security*, Adelphi Papers (268), Brassey's, for the International Institute for Strategic Studies, London, 1992.

Jastram K, Achiron M, *Refugee Protection: A Guide to International Refugee Law*, Published by the Inter-Parliamentary Union with the Office of the United Nations High Commissioner for Refugees, 2001.

Mayer D, Warner D, Siedel G, Lieberman J, *Legal Aspects of Property, Estate Planning, and Insurance*, published under Creative Commons attribution to the original publisher, 2012.

Betts A, *Survival Migration: Failed Governance and the Crisis of Displacement, Global Governance*, Cornell University Press, 2013.

Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge University Press, 2007.

Myers N, Kent J, *Environmental Exodus: An Emergent Crisis in the Global Arena*, Climate Institute, Washington D.C., 1995.

Holborn L, *Refugees- A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees*, Scarecrow Press, 1975.

Kaldor M, *New and Old Wars: Organized Violence in a Global Era*, Stanford University Press, 1999.

Loescher G, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, Oxford University Press, 1995.

Chetail V, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law, Human Rights and Immigration*, Oxford University Press, 2014.

Articles

Jaeger G, "On the History of the International Protection of Refugees," *International Review of the Red Cross* (2001).

Howland T, "Refoulement of Rwandan Refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law," *Journal of International Law and Policy* (1998)

Loescher G, "The International Refugee Regime: Stretched to the Limit?" *Journal of International Affairs* (1994).

Bank R, "The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law," *International Journal of Refugee Law* (2015).

Pirjola J, "Shadows in Paradise: Exploring Non-Refoulement as an Open Concept," *International Journal of Refugee Law* (2008).

Ahlborn C, "The Normative Erosion of International Refugee Protection through UN Security Council Practice," *Leiden Journal of International Law* (2011).

Weiner M, "The Clash of Norms: Dilemmas in Refugee Policies," *Journal of Refugee Studies* (1998).

K. Newland, D.W. Meyers, "Peacekeeping and Refugee Relief," *Journal of International Peacekeeping* (1998).

Jackson I., "The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection," *International Journal of Refugee Law* (1991).

- Eugene Quinn, "The Refugee Convention Sixty Years On: Relevant or Redundant?" *Working Notes*, 2011.
- Rizvi H, "United Nations and the Refugee Problem," *Pakistan Institute of International Affairs* (1985).
- Schoenholtz A, "The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century," *Chicago Journal of International Law* (2015).
- Feller E, "The Evolution of the International Refugee Protection Regime," *Journal of Law and Policy* (2001).
- Ramos L, "Economic Persecution under the Refugee Convention: A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees," *Vanderbilt Journal of Transnational Law* (2011).
- Mayer B, Boas I, Ewing J.J, Baillat A, Das K.U, "Governing Environmentally-Related Migration in Bangladesh: Responsibilities, Security and the Causality Problem," *Asian and Pacific Migration Journal* (2013).
- Black R, "Environmental Refugees: Myth or Reality," *New Issues in Refugee Research* (2001).
- Mukuki A, "Reimagining the Concept of Forced Migration in the Face of Climate Change," (2016).
- Stavropoulou M, "Drowned in Definitions?" *Forced Migration Review* (2008).
- Schafer L, "True Survivors: East African Refugee Women," *Africa Today* (2002).
- Freedman J, "Mainstreaming Gender in Refugee Protection," *Cambridge Review of International Affairs* (2011).
- Crawley H, "Refugees and Gender: Law and Process," *Current Issues in Criminal Justice*, 2002.

- Ankenbrand B, "Refugee Women under German Asylum Law," *International Journal of Refugee Law* (2002).
- Binder A, "Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention," *Columbia Journal of Gender and Law* (2001).
- Nogradi N.W., "Should she be granted asylum? Examining the Justifiability of the Persecution Criterion and Nexus Clause in Asylum Law," *School of Politics and International Studies* (2016).
- Patel K, "Recognizing the Rape of Bosnian Women as Gender-based Persecution," *Brooklyn Law Review* (1994).
- Randall M, "Refugee Law and State Accountability for Violence against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims based on Gender Persecution," *Harvard Women's Law Journal* (2002).
- Arulanantham A, "A Proposal for Reform of the Refugee Protection System," *Human Rights Quarterly* (2000).
- Millbank A, *The Problem with the 1951 Refugee Convention*, Research Paper 5, Social Policy Group, 2000.
- Sainz-Pardo P.V., "The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees," *International Journal of Human Rights* (2002).
- Grahl-Madsen A, "Identifying the World's Refugees," *The Annals of the American Academy of Political and Social Science* (1983).
- Gunning I, "Expanding the International Definition of Refugee: A Multicultural View," *Fordham International Law Journal* (1989).

- Nirmal B.C., "UNHCR after Six Decades and Beyond," *ISIL Year Book of International Humanitarian & Refugee Law* (2010).
- Kyoichi S., "The "Non-political and Humanitarian" Clause in UNHCR's Statute," *Refugee Survey Quarterly* (1998).
- Maynard P.D., "The Legal Competence of the United Nations High Commissioner for Refugees," *The International and Comparative Law Quarterly* (1982).
- Chiusiwa J., "How Effective has the UN Been in Fulfilling Its Mandate to Protect Refugees?" *Working Papers, Asia Pacific School of Economics and Management* (1999).
- Loescher G., "The UNHCR and World Politics: State Interests vs. Institutional Autonomy," *International Migration Review* (2001).
- Barnett L., "New Issues in Refugee Research: Global Governance and the Evolution of the International Refugee Regime," *International Journal of Refugee Law* (2002).
- Van Heuven Goedhart G.J., "The Problem of Refugees," 82 *Recueil des Cours, Hague Academy of International Law* (1953).
- Davies S.E., "Redundant or Essential: How Politics Shaped the Outcome of the 1967 Protocol," *International Journal of Refugee Law* (2007).
- Gallagher D., "The Evolution of the International Refugee System," *The International Migration Review* (1989).
- North A.M, Chia J., "Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees," *Australian Year book of International Law* (2006).
- Bakircioglu O., "The Evolving Role of the UNHCR: Should the Conventional Role of the UNHCR Be Expanded?" *Ankara Law Review* (2008).

Ferracioli L, "The Appeal and Danger of a New Refugee Convention," *Social Theory and Practice* (2014).

Garvey J.I., "Toward a Reformulation of International Refugee Law," *Harvard International Law Journal* (1985).

Von Sternberg, "The Evolving Law of Non-Refoulement and its Influence on the Convention Definition of a Refugee," *In Defense of the Alien* (2001).

Fontaine M, "The Relevance of the 1951 Geneva Convention Relating to the Status of Refugees," *Australian International Law Journal* (1996).

McAuliffe M, Koser K, "Unintended Consequences: How migrant smugglers are exploiting the international protection system," *Advance Essays, Opinions and Ideas on Public Policy* (2015).

Anker D, "Refugee Law, Gender and the Human Rights Paradigm," *Harvard Human Rights Journal* (2002).

Ogg K, "A Sometimes-Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of Effective Protection," *Macquarie Law Journal* (2013).

Harvey C, "Time for Reform? Refugees, Asylum-seekers, and Protection under International Human Rights Law," *Refugee Survey Quarterly* (2015).

Hathaway J, "Why Refugee Law Still Matters," *Melbourne Journal of International Law* (2007).

Conference Papers

Statement by Erika Feller, UNHCR Assistant High Commissioner (Protection), *The Refugee Convention at 60: Still fit for its Purpose?* Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity Prato, 2 May 2011.

Chatham House, *The Refugee Convention: Why Not Scrap It?* A summary of discussion at the International Law Program Discussion Group at Chatham House on 20th October 2005; participants included lawyers, academics and representatives from Governments and NGOs.

Franco L, *The Problem of Refugees in The Light of Contemporary International Law Issues: Legal Issues Arising from UNHCR Recent Operations*, Papers presented at the Colloquium organized by the Graduate Institute of International Studies in collaboration with the Office of the United Nations High Commissioner for Refugees, Geneva, 1994.

UNHCR Presentation on the Basic Principles of the Protection of Refugees and the UNHCR's Role, on March 13, 2014.

Dissertations

Rodger J, *Defining the Parameters of the Non-Refoulement Principle*, LLM Research Paper International Law, Victoria University of Wellington, 2001.

Tugushi G, *Principle of "Non-refoulement": Rule of customary international law*, LLM Thesis Study, Lund University, 2004.

Lewis C, *UNHCR and International Refugee Law: From Treaties to Innovation*, LLD Dissertation, London School of Economics and Political Science, 2010.

Jones M, *Refugee Politics: The Efficacy of the UNHCR*, Published Essay.

Internet Resources

Kristy Siegfried, *Time to reform the way we protect refugees?* May 9, 2016, <http://www.irinnews.org/analysis/2016/05/09/time-reform-way-we-protect-refugees>, on February 7, 2017.

Anne Gallagher and Fiona David, *Refugee laws in need of reform*, August 1, 2014, www.theaustralian.com.au/opinion/refugee-laws-in-need-of-reform/news-story/0a7909c3d47cde19c88d05a71597eda5, on February 7, 2017.

Billow Kerrow, *Government decision to shut down refugee camp ill advised*, May 8, 2016, <https://www.standardmedia.co.ke/article/2000201016/government-decision-to-shut-down-refugee-camps-ill-advised>, on December 6, 2016.

Amnesty International, *Rwanda: Human Rights Overlooked in Mass Repatriation*, January 14, 1997, <https://www.amnesty.org/en/documents/afr47/002/1997/en/>, on January 23, 2017.

Ben Rawlence, *How not to close a refugee camp*, September 15, 2016, <https://www.newsdeeply.com/refugees/community/2016/09/15/kenyas-dadaab-how-not-to-close-a-refugee-camp>, on November 22, 2016.

Johanna Grombach Wagner, An IHL/ICRC perspective on 'humanitarian space', published in January 2006, available online at <https://www.humanitarianresponse.info/en/operations/pakistan/document/ihlicrc-perspective-humanitarian-space>, on February 7, 2017.

Chris Berg, "Why Cling on to an Outdated Refugee Convention?" October 19, 2011, <http://www.abc.net.au/news/2011-10-19/berg-why-are-we-clinging-to-an-outdated-refugee-convention/3577538>, on August 28, 2017.

Natalie Muller, "Refugee Convention of 1951 still Crucial Cornerstone of Human Rights," July 28 2016, <http://www.dw.com/en/refugee-convention-of-1951-still-crucial-cornerstone-of-human-rights/a-19429093>, on July 30, 2017.

Globalization 101, "Environmental Refugees," <http://www.globalization101.org/environmental-refugees/>, on August 12, 2017.

United Nations Regional Information Centre for Western Europe, "The Invisible Climate Refugees," December 2, 2013, <http://www.unric.org/en/latest-un-buzz/28883-the-invisible-climate-refugees>, on August 12, 2017.

Hollifield J, Salehyan I, "Environmental Refugees," December 21, 2015, <https://www.wilsoncenter.org/article/environmental-refugees>, August 12, 2017.

Lambert K, "The Paris Agreement: Spotlight on Climate Migrants," December 29, 2015, <https://environment.yale.edu/blog/2015/12/the-paris-agreement-spotlight-on-climate-migrants/>, on August 16, 2017.

McAdam J, "Seven Reasons the UN Refugee Convention Should Not Include "Climate Refugees"," June 6, 2017, <http://www.smh.com.au/comment/seven-reasons-the-un-refugee-convention-should-not-include-climate-refugees-20170606-gwl8b4.html>, on January 16, 2018.

Jauhar A, "The Nowhere People," December 6, 2016, <http://www.thehindu.com/opinion/op-ed/The-nowhere-people/article16765025.ece>, August 13, 2017.

Benheis, "Broadening the Definition of a Refugee," <https://benheis.wordpress.com/essays/broadening-the-definition-of-refugee/>, on August 23, 2017.

Siskind Susser Bland Immigration Lawyers, *United Nations Debates the Meaning of "refugee"*, Immigration Law Portal, <https://benheis.wordpress.com/essays/broadening-the-definition-of-refugee/>, 2011.

Ebo Nnamdi, *The Realist School of Law*, October 3, 2014, <http://www.nnamdiebo.com/the-realist-school-of-law/>, on September 2, 2017.

History of UNHCR, <http://www.unhcr.org/history-of-unhcr.html>, September 27, 2017.

Cole P, "What's Wrong with the Refugee Convention?" November 6, 2015, <http://www.e-ir.info/2015/11/06/whats-wrong-with-the-refugee-convention/>, on January 15, 2018.

Koser K, "Australia and the 1951 Refugee Convention," April 30, 2015, <https://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention>, on January 15, 2018.

BBC News, "Would a New UN Convention Help Refugees?" May 25, 2016, <http://www.bbc.com/news/world-36321685>, on January 15, 2018.

Kaldor Centre for International Refugee Law, "Time to Retire the 1951 Refugee Convention?" June 27, 2016, <http://www.kaldorcentre.unsw.edu.au/news/time-retire-1951-refugee-convention>, on January 15, 2018.

UNHCR Website, "Q&A: The 1951 Refugee Convention 'is as relevant today as it was at the time'," December, 2 2016, <http://www.unhcr.org/news/latest/2016/12/584036047/qa-1951-refugee-convention-relevant-today-time.html>, on January 15, 2018.

Yan H, "Are Countries Obligated to Take in Refugees? In Some Cases, Yes," December, 29, 2015, <http://edition.cnn.com/2015/09/08/world/refugee-obligation/index.html>, on January 16, 2018.