The Aftermath of the NATO Bombing: Approaches for Addressing the Problem of Serbian Conscientious Objectors

Alexandra McGinley*
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Abstract

This Note will address the plight of Serbian conscientious objectors who fled Serbia in the aftermath of NATO’s involvement in Kosovo. Part I discusses refugee definitions and mechanisms for managing the refugee crises. Part I also examines the Balkan conflict, focusing on the NATO bombings, the exodus of refugees from the region and the subgroup of Serbian draft evaders to Hungary. Part II compares two legal methods for managing refugee crises. Part III argues for a hybrid solution, combining the individualized and collectivized approaches, to handle Serbian conscientious objector refugees.
NOTES

THE AFTERMATH OF THE NATO BOMBING:
APPROACHES FOR ADDRESSING
THE PROBLEM OF SERBIAN
CONSCIENTIOUS OBJECTORS

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"Unfortunately, the one thing historical experience has
taught . . . is that nobody ever seems to learn from it. Still we
must go on trying."

—Eric Hobsbawm

INTRODUCTION

Milan was a shopkeeper in Serbia. One afternoon, in April
1999, he voiced his opposition to the war in Kosovo during a
gathering outside his store. Within twenty-four hours military
police detained and interrogated Milan at the local police sta-
tion. Twenty-four hours later, Milan received a draft notice. In
order to avoid conscription, requiring him to fight in a war he

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thank her parents and her brother for their encouragement and support. The author
also acknowledges Sanu Thomas and Robin Gise for their helpful suggestions and advice. This Note is dedicated to the memory of Thomas and Marian Imperato.


2. Amnesty International Report, Federal Republic of Yugoslavia, The Forgotten Resist-
ners: The Flight of Conscientious Objectors to Military Service After the Conflict in Kosovo, EUR/
70/111/99, 10 (1999), also in Amnesty International (visited Nov. 13, 1999) <http://
www.amnesty.org/allib/aipub/1999/EUR/47011199.htm> (on file with the Fordham In-
ternational Law Journal) [hereinafter Amnesty Report].

3. See generally Noel Malcolm, Kosovo 1-2 (1998) (describing Kosovo as autono-
mous province within Serbia, bordering on Albania, Montenegro, and Serbia).

4. See Amnesty Report, supra note 2, at 10 (noting that Milan stated publicly that
President Slobodan Milosevic "is always pushing us into wars," and that Serbians were
"becoming genocidal people").

5. See id. (stating that Milan was slapped by Serbian police officer while in custody
and told not to make such comments during wartime).

6. See id. (describing that call-up notice was delivered to Milan's house). Milan's
wife was home and refused to sign for the notice. Id. Officials left the papers pinned to
the door. Id.
opposed, the shopkeeper embarked on an odyssey. He went into hiding in Serbia until the military police discovered his whereabouts and placed him in prison. He escaped while being transferred to another prison and slipped back into hiding. Finally he crossed the border from Serbia to Hungary after bribing the border patrol. At the time of his interview with Amnesty International, Milan was living in temporary housing in Hungary.

Prior to residing in Debrecen, a refugee camp in eastern Hungary, Goran lived in the Yugoslav countryside. An ethnic Serbian, he was a technician by trade and had been building a ranch with his family. On March 31, 1999, seven days after the North Atlantic Treaty Organisation began Operation Allied Force, the Serbian military police appeared at Goran’s house to notify him that he had been called up for ser-

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7. See id. (recounting details of Milan’s escape into hiding).

8. See id. (describing that Milan was detained in prison along with three other conscientious objectors).

9. See id. (detailing Milan’s escape from prison). Serbian police boarded detainees on a truck, and Milan jumped off and ran off into hiding. Id. After Milan escaped police custody, the police searched his home. Id.

10. See id. (claiming that Milan drove across Serbian border with false registration plates).


12. See Amnesty Report, supra note 2, at 10 (stating that Milan’s wife and children have joined him in Hungary). He told Amnesty investigators that he did not know of his options as a refugee. Id.

13. See Mark Schapiro, Serbia’s Lost Generation, MOTHER JONES, Sept. 1, 1999 (noting that Debrecen, located in eastern Hungary, was Soviet army camp). Now, it is the largest of the three main Hungarian reception centers for refugees. Id.; see also Hungarian Refugee Centres Virtually Full, BBC WORLDWIDE MONITORING, Apr. 20, 1999 (reporting that other two camps are Bicske, located west of Budapest, and Bekescsaba in southeastern Hungary). Vese, is a smaller camp located in southwestern Hungary.

14. See Veronique Mistiaen, An Army in No Man’s Land: As Bombs Fell on Belgrade, NATO Called for Yugoslav Soldiers To Turn Against Milosevic, GUARDIAN, Dec. 29, 1999 (stating that Goran was 28 years old).

15. See id. (stating that home was for himself, his mother, father, and sister).


17. See Jane Perlez, NATO Authorizes Air Attacks; Primakov Angry, Drops U.S. Visit,
He was not at home, and his sister alerted him to the notice by telephone. Immediately, he fled north to Hungary. Once in Hungary, he moved to two different camps before settling at Debrecen.

Milan and Goran are part of a group of over 15,000 Serbian military deserters, who fled Serbia in opposition to Serbian aggression in Kosovo. Currently, no country involved in

N.Y. Times, Mar. 24, 1999 at A1 (reporting that NATO military intervention against Serbia began on Wednesday, March 24, 1999).

18. See David J. Lynch, Neutral Montenegro Becomes Haven for Young Men Opposed to War, USA Today, Apr. 13, 1999, at 5A (stating that males age 18 to 65 were draft eligible during NATO war).

19. See Mistiaen, supra note 14, at A17 (explaining that Goran did not agree with Milosevic's policies).

20. See id. (discussing that immediately after Goran’s sister told him of draft notice, he crossed border to Hungary).

21. See id. (explaining that officials at Debrecen denied Goran’s asylum application). He is awaiting an appeal. Id. There are also many former Serbian political activists, student demonstrators, and young male draft dodgers living in exile in Budapest. Id.; see also Adam Lebor, History Repeats Itself for Serbs in Exile, Scotsman, Apr. 24, 1999, at 9 (reporting that Milos, student, sensing that he would be drafted once NATO strikes began, fled to Budapest, where there is informal network in place for young, educated, former opposition members to find housing and employment). Milos noted, I knew what was coming. I already had a lot of problems with the state and the police because of my political activities. I was repeatedly arrested, harassed and advised it would be best not to be involved in politics any more . . . . I got out just in time, my call-up papers for the army arrived a few days later.

Lebor, supra.

22. See Schapiro, supra note 13 (citing to Refugee Action Project, Budapest-based organization, statistics estimating that 15,000 to 20,000 of 50,000 Serbians who fled during bombings were draft evaders).

23. See Uli Schmetzer, On the Beach with Yugoslav Draft Dodgers; Unpopular War Leaves Thousands Hiding from Police in Montenegro, Chi. Trib., July 28, 1999, at 4 (estimating that approximately 40,000 men across Yugoslavia refused to be called up by Serbian military).

24. See Europe’s Roughest Neighbourhood, Economist, Jan. 24, 1998, at 3 (noting irregular Balkan nomenclature since 1989). Currently, two republics, Montenegro and Serbia, comprise the federal entity called Yugoslavia. Id. Serbia refers to the republic within Yugoslavia. Id.; see also Montenegrin Assembly Adopts Amnesty Law for Draft-Dodgers, Agence France Presse, Nov. 12, 1999 (reporting that Montenegro granted amnesty to draft evaders from war in Kosovo, in defiance of Serbia’s laws).

25. See Lynch, supra note 18, at 5A (discussing that in addition to Hungary, thousands of deserters fled to Montenegro); see also John Phillips, Deserters Refused Refuge by Struggling Italians, Times (London), Apr. 30, 1999 (describing plight of Yugoslav army deserters in Italy); Schmetzer, supra note 23, at 4 (detailing locations to which deserters have fled). Still other Serbian conscientious objectors, already in the United States, fought removal during the conflict because they fear the draft. Schmetzer, supra; see Neil MacFarquhar, Crisis in the Balkans: The U.S. Haven; Albanians and Serbs Seek To Halt Deportation, N.Y. Times, Apr. 5, 1999, at 9 (recognizing that many evaders
the Kosovo conflict has offered Serbians conscientious objectors who fled Serbia a permanent settlement option, despite the fact that the objectors face severe penalties if they returned home.26 Their futures are uncertain if they remain in refugee camps or in inadequate temporary housing.27 The international community's inaction, particularly the NATO States,28 is significant since during the bombings, NATO agents dropped leaflets and launched a propaganda campaign, aimed at encouraging Serbians to desert the military.29

This Note will address the plight of Serbian conscientious objectors who fled Serbia in the aftermath of NATO's involvement in Kosovo. Currently, they are unable to find permanent resettlement in other states. Part I discusses refugee definitions and mechanisms for managing the refugee crises. It outlines current protections afforded conscientious objectors in international law. Finally, Part I examines the Balkan conflict, focusing on the NATO bombings, the exodus of refugees from the region, and the subgroup of Serbian draft evaders to Hungary. Part II compares two legal methods for managing refugee crises:

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26. See The Plight of Kosovo's Displaced and Imprisoned Detailed by Commission on Security and Cooperation in Europe, PR Newswire, Feb. 28, 2000 (urging United States to recognize plight of Serbian conscientious objectors and to assist them in resettling in United States). Bill Frelick, Director of Policy, U.S. Committee for Refugees stated:

[t]he U.S. Government and other donors should direct bilateral funding to international nongovernmental organizations to develop alternative networks to deliver humanitarian assistance in Serbia. . . . President Clinton should issue a presidential determination permitting the United States to consider admitting certain categories of internally displaced persons in the FRY as refugees for purposes of the U.S. resettlement program; and the following vulnerable groups such as . . . Serbian conscientious objectors.

Id.

27. See generally Amnesty Report, supra note 2, at 4-5 (discussing that conscientious objectors have no long-term security in refugee camps and face long prison sentences if returned to Yugoslavia).

28. See generally id. at 2 (contending NATO dropped millions of leaflets over Yugoslav countryside).

29. See Testimony of Carlos M. Salinas, Advocacy Director Latin America and the Caribbean House International Relations International Economic Policy and Trade Human Rights Report, FDCH CONGRESSIONAL TESTIMONY, Mar. 7, 2000 (declaring "the failure to provide a full picture of the danger of prosecution facing Serbian conscientious objectors is particularly reprehensible, considering that the U.S. government and . . . North Atlantic Treaty Organization [sic] (NATO) allies vigorously encouraged Serb men to resist military service during the NATO campaign in Kosovo"); see also Amnesty Report, supra note 2 (itemizing various methods NATO actors used to coax Serbians to resist draft).
the individualized approach and the collectivized approach. Part III argues for a hybrid solution, combining the individualized and collectivized approaches, to handle Serbian conscientious objector refugees. The hybrid approach recognizes the Serbian conscientious objectors' right to object to service, and it shares the burden of their care among NATO States. This proposal, although derived from the Serbian refugee predicament, applies to future groups of conscientious objectors, uprooted and forced from their homeland because of generalized violence or civil war.

I. INTERNATIONAL PRINCIPLES ON THE TREATMENT OF REFUGEES, THE CONSCIENTIOUS OBJECTOR, AND THE BALKAN CONFLICT

Experts note that the 1948 Universal Declarations of Human Rights (or "UDHR"), sets out basic rights and freedoms for all individuals. The right to seek asylum was included among the UDHR enumerated rights. Three years later the 1951 Convention Relating to the Status of Refugees (or "1951 Convention") entered into force on April 21, 1954. It entered into force on April 21, 1954. Office of the United Nations High Commissioner for Refugees, supra; see Deborah E. Anker, Law of Asylum in the United States 9, 10 n.44 (1999) (discussing that U.N. High Commissioner for Human Rights (or "UNHCHR") wrote booklet to provide guidance to government officials in determining refugee status).
Convention"), defined who may be classified as a refugee (or "Convention refugee") and thus qualify for asylum protection.\textsuperscript{34} The 1967 Protocol Relating to the Status of Refugees,\textsuperscript{35} (or "1967 Protocol") further refined the 1951 Convention definition.\textsuperscript{36} Other organizations have expanded the basic Convention refugee definition to include those who face generalized persecution as a result of civil war.\textsuperscript{37} Just as the refugee definition has evolved over the last half-century so too have non-refoulement,\textsuperscript{38} asylum\textsuperscript{39} and temporary protection,\textsuperscript{40} and the basic mechanisms for refugee protection.\textsuperscript{41} Under this international refugee protection canopy rests recognized principles for managing wartime conscientious objectors.\textsuperscript{42} As a general rule,

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\item 34. See \textsc{Goodwin-Gill, supra} note 31, at 3 (discussing restrictive criteria used by states to identify who benefits from refugee status and asylum).
\item 35. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (stating that "new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the [1951] Convention").
\item 37. See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45, pmbl. (stating that commission was concerned over "the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future") [hereinafter OAU Convention]; see also Richard A.C. Cort, Comment, \textit{Resettlement of Refugees: National or International Duty?}, 32 \textit{Tex. Int'l L.J.} 307, 316-17 (1997) (observing that regional approaches, such as Organization of African Unity (or "OAU"), recognize that refugees, for whatever reason, pose threat to stability of region and that nations of each region have duty to assist regional refugees); Susan Martin, et. al., \textit{Temporary Protection: Towards a New Regional and Domestic Framework}, 12 \textit{Geo. Immigr. L.J.} 543, 560 (1998) (noting that 42 African governments were signatories to this convention).
\item 38. See \textsc{Atle Grahl-Madsen, The Status of Refugees in International Law} 6 (1966) (discussing non-refoulement principle as one that provides refugees with protection against forcible return to territory where they face political persecution); see also \textsc{Goodwin-Gill, supra} note 31, at 117 (detailing contours of non-refoulement).
\item 39. See \textsc{Goodwin-Gill, supra} note 31, at 173 (discussing asylum as protection given by state to foreign national against exercise of jurisdiction by another state).
\item 40. See Joan Fitzpatrick, \textit{Flight from Asylum: Trends Towards Temporary "Refuge" and Local Responses to Forced Migration}, 35 \textit{Va. J. Int'l L.} 13, 16 (1994) (describing temporary protection as generally applying to non-1951 Convention refugees, identified by government in which they seek asylum and who will be returned home eventually).
\item 41. See \textit{id.} (discussing how immigration policies have evolved in European states).
\item 42. See Karen Musalo, \textit{Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse To Bear Arms for Reasons of Conscience}, 26 \textit{San Diego L.R.} 849, 850 n.9 (1989) (defining conscientious objector as one who refuses to participate in armed conflict, and bases his or her objection to military service on religious, moral,
although states have the power to conscript their citizens for active military duty, conscientious objectors may still qualify for refugee status if the objector would be persecuted because of his or her anti-war beliefs. Many Serbians, war-weary from a decade of civil turmoil and cognizant of Serbian military atrocities in the former Yugoslavia, have fled Serbia because they refused to participate in another conflict.

A. The U.N. Definition of Refugees and Regional Alternatives

Commentators note that the 1951 Convention refugee definition significantly impacted the treatment of refugees in international law. Some critics have charged, however, that the 1951 Convention definition is not as viable in a post-Cold War world because it is limited to individualized cases of persecu-

ethical, humanitarian, or philosophical convictions); see also Matthew Lippman, The Recognition of Conscientious Objection to Military Service as an International Human Right, 21 CAL. W. INT'L L.J. 31, 31 (1991) (defining conscientious objection as refusal to participate in armed services due to opposition to war); see also Russell Wolff, Conscientious Objection: Time for Recognition as a Fundamental Human Right, 6 ASILS INT'L L.J. 65, 68 (1982) (emphasizing that feelings of conscience should not be equated with religious motivations). Wolff, supra. One does not have to base his or her objection to service on religious beliefs. Id.; see also Marie-France Major, Conscientious Objection and International Law: A Human Right, 24 CASE W. RES. J. INT'L L. 349, 350 (1992) (classifying conscience as ethical conviction that may flow from either religious or humanist beliefs).

43. See U.N. HANDBOOK, supra note 33, para. 167-74 (stating that “person is clearly not refugee if his only reason for desertion or draft evasion is his dislike of military service or fear of combat”). The U.N. Handbook also asserts that although punishment for draft evasion varies among states it does not normally constitute persecution. Id.

44. See id. para. 170 (stating that one may be refugee if “a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious, or moral convictions or to valid reasons of conscience”); see also id. at para 171 (stating that another valid reason for draft evasion is where “the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct”).

45. See Amnesty Report, supra note 2 (discussing Serbian conscientious objector predicament).

Regional agreements, such as the Organization of African Unity ("OAU") and the Cartagena Declaration on Refugees ("Cartagena Declaration"), have broadened the definition of refugee to include those who face persecution because of generalized violence or civil war.

1. U.N. Definitions

Scholars note the U.N. Charter (or "Charter") recognized the need for the international community, in the aftermath of World War II, to protect human rights. In 1948, members of the U.N. Educational, Scientific and Cultural Organization

47. See Pierre Bertrand, An Operational Approach to International Refugee Protection, 26 CORNELL INT'L L.J. 495, 496-98 (1993) (discussing emergence of new refugee situations, never imagined at time 1951 Convention and 1967 Protocol were adopted, such as rape and forced impregnation as weapons of war, or mass relocation of populations for environmental reasons). Scholars argue that the 1951 Convention was useful during the Cold War, but that it is outdated today. Id. at 498; see also Arthur C. Helton & Eliana Jacobs, What Is Forced Migration?, 13 GEO. IMMIGR. L.J. 521, 522 (1999) (explaining that neither 1951 Convention nor 1967 Protocol applies to those who flee across border from threats posed by war or by other circumstances of generalized violence).

48. See OAU Convention, supra note 37 (noting increasing numbers of refugees in Africa).

49. See Cartagena Declaration on Refugees, Nov. 1984, reprinted in 2 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS: REGIONAL INSTRUMENTS 206, UN Sales No. GV. E. 96.0.2 (1995) [hereinafter Cartagena Declaration]. The Cartagena Declaration on Refugees ("Cartagena Declaration") provided a refugee definition that includes

[1] In addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Id.; see also Martin, et al., supra note 37, at 560 (calculating that 10 Latin American states adopted this convention).

50. See Goodman-Gill, supra note 31, at 19-20 (recognizing fact that 1951 Convention definition does not apply to every refugee). The OAU and the Cartagena Declaration have tried to improve on the 1951 Convention definition. Id. at 20-21.


("UNESCO"), drafted the UDHR\textsuperscript{54} and identified fundamental rights that should apply to all individuals.\textsuperscript{55} According to Article 14 of the UDHR, everyone has the right to seek asylum.\textsuperscript{56} States, however, have an international legal duty to protect only those who are categorized as refugees.\textsuperscript{57} The 1951 Convention Relating to the Status of Refugees\textsuperscript{58} and the 1967 Protocol Relating to the Status of Refugees\textsuperscript{59} state a refugee definition that has influenced immigration policy in many states.\textsuperscript{60}

\begin{itemize}
\item[a.] The 1948 Universal Declaration of Human Rights
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The U.N. Charter\textsuperscript{61} emphasized the international commu-
nity's desire to standardize human rights in the wake of World War II. The Charter, however, did not precisely define human rights. To enumerate these concepts more completely, the U.N. High Commission for Human Rights, established by UNESCO, drafted the 1948 Universal Declaration on Human Rights. The UDHR is one of several important documents that form the basis of modern human rights in international law, setting out fundamental rights that all people should enjoy, such as the right to life, liberty, and security of person. Article 13 of the UDHR states that freedom of movement is a basic human right. Additionally, the right of asylum is an established principle in the UDHR. Freedom of movement, however, has been interpreted to grant a sovereign state power to grant or deny asylum within its boundaries. This right is not focused on the right of an individual to obtain asylum.

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62. U.N. Charter, art. 1(3) (stating that central purposes of the United Nations is "[t]o achieve international co-operation in solving international problems . . . and in promoting and encouraging respect for human rights and for fundamental freedoms for all . . .").

63. See Porter, supra note 52, at 141 (recognizing that U.N. Charter did not fully define fundamental human rights and freedoms).

64. See Shestack, supra note 52, at 16 (stating that U.N. Commission on Human Rights' purpose was to draft proposals regarding international bill of rights, including protection of minorities, conventions regarding civil liberties, and status of women).

65. See Russell, supra note 53 (discussing UNESCO's official purpose).

66. See UDHR, supra note 30 (citing preamble).


68. UDHR, supra note 30 (quoting preamble).

69. See id. art. 3 (stating that "[e]veryone has the right to life, liberty and security of person").

70. See id. art. 13(1) (stating that "[e]veryone has the right to freedom of movement and residence within the borders of each state"); see also id. art. 13(2) (stating that "[e]veryone has the right to leave any country, including his own, and to return to his country").

71. See id. art. 14(1) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution").

72. See Goodwin-Gill, supra note 31, at 173 (discussing principle that sovereign states have exclusive control over those within its territory).

73. See id. at 173 n.8 (explaining that asylum is privilege granted by state, it is not inherent individual right).

The 1951 Convention was signed in Geneva on July 28, 1951. This document expressly recognized the need to define the legal status of refugees. Commentators note, however, that the 1951 Convention refugee definition contained two substantial shortcomings. The definition pertained only to those who became refugees as a result of events that transpired prior to January 1, 1951, and related only to those persons whose circumstances arose from events in Europe during World War II. In 1967, the General Assembly corrected these flaws by adopting the 1967 Protocol. Experts note that the Protocol removed the geographic and temporal restrictions on the refugee definition.

Under both the 1951 Convention and the 1967 Protocol, a refugee is defined as one who has a well-founded fear of persecution on account of their race, religion, nationality, membership of a particular social group, or political opinion. Additionally,

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74. 1951 Convention, supra note 33 (setting out humanitarian purpose of 1951 Convention).
75. See GRAHL-MADSEN, supra note 38, at 20 (noting various committees that assisted in 1951 Convention's preparations).
76. See U.N. HANDBOOK, supra note 33, at 3, para. 5 (stating that "[s]oon after the Second World War, as the refugee problem had not been solved, the need was felt for a new international instrument to define the legal status of refugees ... there was a call for an instrument containing a general definition of who was to be considered a refugee").
77. See id. at 4, para 8 (recognizing that 1951 Convention needed to be expanded to include new groups of refugees).
78. See id. at 4, para 9 (stating that states that acceded to 1967 Protocol agreed to 1951 Convention substantive provisions but without 1951 dateline).
79. See SHAW, supra note 16, at 828 (describing General Assembly as parliamentary body of United Nations consisting of representatives from each member state).
81. See id. (stating that "it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the date-line 1 January 1951"); see also art. 1(3) (stating "[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation . . .").
82. 1951 Convention, supra note 33, art. 1(A). Article 1(A) states:
(A) For purposes of the present Convention, the term "refugee" shall apply to any person who:

....

(2) owing to well-founded fear of being persecuted for reasons of race,
the individual must be outside his or her country of nationality and unable or, due to such fear, unwilling to avail himself or herself of that country's protection.\textsuperscript{83} Scholars note that, to a large extent, this definition has endured, as many states have adopted this refugee definition by statute.\textsuperscript{84} Although many states have ratified these instruments, administrating the definition is left to the domestic law of specific states.\textsuperscript{85} Critics contend that in addition, the 1951 Convention definition in many cases is exceedingly limited.\textsuperscript{86} In response, there have been regional attempts to broaden the scope of the 1951 Convention definition.\textsuperscript{87}

c. Limitations

The 1951 Convention definition is narrowly construed to ensure that states are not forced to concede their sovereignty, by requiring them to accept refugees forced to leave their homes because of generalized violence or war.\textsuperscript{88} Scholars note that sovereign states have the freedom to interpret the 1951 Conven-

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religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
\end{quote}

\textsuperscript{83} Id.

\textsuperscript{84} See Busby, \textit{supra} note 46 (noting that U.S. domestic refugee law was modeled after international refugee scheme); \textit{see also} Anker, \textit{supra} note 33, at 10 (remarking that Refugee Act of 1980 brought U.S. law in line with 1951 Convention and 1967 Protocol).

\textsuperscript{85} See Falk, \textit{supra} note 67, at 4-5 (discussing that states that have acceded to 1951 Convention and 1967 Protocol must still take steps to incorporate provisions into their domestic law). Therefore, although many states agreed to a single refugee definition, each state may ultimately have varying definitions. \textit{Id.}; Daniel J. Steinbock, \textit{Interpreting the Refugee Definition}, 45 U.C.L.A. L. Rev. 733, 734-35 (1998) (arguing that 1951 Convention refugee definition is one of most widely accepted refugee norms).

\textsuperscript{86} See Martin, et. al., \textit{supra} note 37, at 559 (discussing how 1951 Convention definition does not apply to those who are leaving unsettled conditions in their country of origin and who may wish to return home when situation stabilizes); Steinbock, \textit{supra} note 85, at 738 (recognizing that 1951 Convention definition does not account for increasing numbers of people who face hardships in their countries of origin).

\textsuperscript{87} See Goodwin-Gill, \textit{supra} note 31, at 20 (addressing criticisms of 1951 Convention definition and some attempts at changing it).

\textsuperscript{88} See Helton & Jacobs, \textit{supra} note 47, at 523 (outlining history of 1951 Convention, noting that states did not want to undermine their authority by creating over-inclusive refugee definition).
tion's terms.\textsuperscript{89} The U.N. Handbook (or "Handbook") offers some guidance in this regard, noting that, for example, the persecution may arise from one of these stated reasons or from a combination of reasons.\textsuperscript{90}

Nevertheless, commentators note that many of today's refugees do not fit the 1951 Convention definition in the traditional sense.\textsuperscript{91} Many have fled \textit{en masse} due to civil war or generalized violence.\textsuperscript{92} These individuals have not suffered individualized persecution as required under the 1951 Convention.\textsuperscript{93} Experts note that in times of civil war the legal question often becomes whether the harmful action is perpetrated against a victim on account of his or her race, religion, political opinion, or social group membership, or on account of some other non-convention reason, such as generalized violence, economic hardship, or civil war.\textsuperscript{94} Often, many victims of generalized violence appear to qualify as refugees under the 1951 Convention definition.\textsuperscript{95} One commentator noted that ethnic cleansing practices, for ex-

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\item \textsuperscript{89} See Goodwin-Gill, supra note 31, at 32 (noting that parties to 1951 Convention and 1967 Protocol resolve refugee status under terms set out therein); see Falk, supra note 67, at 4-5 (stating that refugee definitions differ from state to state).
\item \textsuperscript{90} See U.N. HANDBOOK, supra note 33, at 17, para. 66 (stating that "[i]n order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons states above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them").
\item \textsuperscript{91} See James Hathaway, The Law of Refugee Status 10 (1991) (discussing international broadening of refugee concept); see also Falk, supra note 67, at 5 (discussing how refugee flows have changed so that many flee their country of origin because of economic hardship or war).
\item \textsuperscript{92} See Falk, supra note 67, at 5 (asserting that refugee flows were once intermittent but due to intense regional conflicts they are more prolonged today); see also Arthur C. Helton, Forced International Migration: A Need for New Approaches by the International Community, 18 FORDHAM INT'L L.J. 1623, 1625 (1995) (arguing that current refugee scheme is inadequate because it does not apply to internally displaced: those who have been uprooted from their homes, but have not crossed international border).
\item \textsuperscript{93} See Helton, supra note 92, at 1625 (arguing that current protection is inadequate because it omits those who have fled because of war).
\item \textsuperscript{94} See Steinbock, supra note 85, at 737 (describing interpretative questions that arise as result of vagaries of 1951 Convention definition, such as whether those who violate laws of general applicability fall under one of recognized 1951 Convention grounds); see also Helton & Jacobs, supra note 47, at 525 (recognizing fact that those who have been displaced for reasons of armed conflict or civil war are not included within definition).
\item \textsuperscript{95} See Kathleen Sarah Galbraith, Moving People: Forced Migration and International Law, 13 GEO. IMMIGR. L.J. 597, 603 (1999) (noting that forced migration policies can create 1951 Convention refugees if policies are implemented because of race, religion, nationality, or membership of particular social group).
\end{itemize}
ample, used by Balkan regimes in the last decade arguably allow for a classic refugee classification of Bosnians and Albanians forced from their countries of origin. Due to sheer numbers, however, decisions on the status of these individuals have not been based on the 1951 Convention definition, where each person’s application is assessed independently. Instead, Balkan refugees have been classified as a group and frequently only granted temporary protection, not asylum.

2. Regional Alternatives

The 1951 Convention and the 1967 Protocol do not protect individuals who migrate across borders only because of war or generalized violence, rather they protect those who face individualized persecution. Commentators note that many people in need of protection fall outside the 1951 Convention definition. Generally, Western states continue to rely on this convention definition based on persecution, but other states have supplemented the definition by adding other bases for refugee

96. Id.

97. See Simon Bagshaw, Benchmarks or Deutschmarks? Determining the Criteria for the Repatriation of Refugees to Bosnia and Herzegovina, 9 Int’l J. Refugee L. 566, 567 (1997) (citing U.N. High Commissioner on Refugees (“UNHCR”) statistics that in June 1996 there were approximately 1,319,250 Bosnian refugees in Europe; 170,000 in Croatia; 16,500 in Slovenia; and 6500 in Macedonia, all states of former Yugoslavia). Germany held the largest Bosnian refugee population with 320,000. Id.

98. See Fitzpatrick, supra note 40, at 15 (discussing that temporary protection is generally conferred on non-1951 Convention refugees); see also Bagshaw, supra note 97, at 568 n.16 (quoting UNHCR report that premise behind temporary protection is to afford immediate protection to broad groups of people). Temporary protection is intended to assist 1951 Convention Refugees as well as those who are fleeing generalized violence, and might not be considered 1951 Convention refugees. Bagshaw, supra. European governments were concerned that the influx of refugees would create political and economic instability in their countries. Id.

99. See Helton, supra note 92, at 1624 (defining asylum as state act that provides protection to refugees by allowing entry into territorial jurisdiction).

100. See Helton & Jacobs, supra note 47, at 526 (discussing limits of 1951 Convention definition).

101. See Martin, et. al., supra note 37, at 559 (discussing 1951 Convention’s limited applicability); see also Helton supra note 92, at 1624, 1625 (noting 1951 Convention’s shortcomings).

status. Thus, for instance, the OAU Member States and some Latin American governments, acknowledge the limitations of the current, narrowly defined refugee definition, and have broadened it in various ways. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (or “OAU Convention”), contains an expanded definition of refugee to include individuals fleeing civil strife and public disorder. A similarly broadened concept of the refugee character is reflected in some Latin American practices based on the Cartagena Declaration. This need for a broader refugee definition was recognized further in 1985 when the General Assembly of the Organization of American States (“OAS”) approved the Cartagena Declaration refugee definition.

B. Mechanisms for Protection of Refugees

If an individual seeks refuge in another country, then that individual generally has several options. Typically, the options include asylum or temporary protection, also called temporary protected status (“TPS”). In addition, the central principle of

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103. See Steinbock, supra note 85, at 741 n.22 (discussing ways in which states have organized to enhance refugee protection).
104. See Cort, supra note 37, at 316-17 (discussing that OAU Convention considers those who have fled their homes because of generalized violence to be refugees).
105. See Cartagena Declaration, supra note 49 (discussing Cartagena Declaration’s expanded refugee definition).
106. See OAU Convention, supra note 37, art. I(2) (setting forth bases for refugee status, including “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of country of origin or nationality”).
107. See Goodwin-Gill, supra note 31, at 20-21 (explaining that Central American conflicts in 1980s gave rise to Cartagena Declaration’s broader understanding of refugee concept).
108. See id. at 228 (defining Organization of American States (“OAS”) as regional organization devoted to protecting refugees).
109. Martin, et. al. supra note 37, at 559. See Goodwin-Gill, supra note 31, at 21 n.92 (noting that OAS has repeatedly endorsed Cartagena Declaration).
110. See generally Goodwin-Gill, supra note 31, at 230-31 (noting that general protection afforded refugees include non-refoulement, asylum, access to procedures for determining refugee status, prevention of expulsion, discharge from detention, issue of identity papers and travel documents, facilitation of voluntary repatriation, facilitation of family reunion, access to educational institutions, benefit of other economic and social rights, and facilitation of naturalization).
111. See Fitzpatrick, supra note 40, at 15-16 (defining state’s schemes for temporary protection as those that promote eventual repatriation of refugees rather than assist them in becoming permanent citizens).
non-refoulement\textsuperscript{112}—the provision that guards refugees from forcible return to a country where they are likely to become victims of persecution or torture\textsuperscript{113}—governs all refugee protection regardless of classification under the 1951 Convention definition.\textsuperscript{114}

1. Non-Refoulement

Article 33(1) of the 1951 Convention sets out the non-refoulement principle.\textsuperscript{115} The non-refoulement principle requires contracting states to refrain from expelling or returning a refugee to a country where his or her life or freedom would be endangered on account of his or her race, religion, nationality, membership of a particular social group, or political opinion.\textsuperscript{116} Article 33 was drafted to complement Article I of the 1951 Convention.\textsuperscript{117}

Commentators note that in practice, however, especially in the case of a mass influx, non-refoulement applies equally to individual Convention refugees and to sizeable groups, who for reasons of civil war, or other forms of mass dislocation, cannot return to their homeland.\textsuperscript{118} The U.N. High Commissioner for

\textsuperscript{112} See GRahl-MADSEN, supra note 38, at 6 (discussing non-refoulement protection as that which provides refugees with protection against forcible return to territory where they face political persecution).

\textsuperscript{113} See id. at 46 (noting that non-refoulement requires that no refugee shall be forced to return to state where they are likely to face political persecution).

\textsuperscript{114} See GOODwIN-GILL, supra note 31, at 137 (arguing that if asylum seeker is forcibly repatriated to country where he or she has well-founded fear of persecution or fear of torture, then asylum seeker has been refouled contrary to international law). Non-refoulement applies to all asylum seekers even if they are not legally classified as refugees. Id.

\textsuperscript{115} See 1951 Convention, supra note 33, art. 33(1) (stating that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”).

\textsuperscript{116} Id.

\textsuperscript{117} See GOODwIN-GILL, supra note 31, at 121 (discussing drafting history of provision). The 1951 Convention drafters designed the rule to apply only to those who had a well-founded fear of persecution on basis of race, religion, nationality, membership of a particular social group, or political opinion. Id.

\textsuperscript{118} See id. at 123 (recognizing that broader interpretation of non-refoulement has evolved during past 45 years); see also David Weissbrodt & Isabel Hortreiter, The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties, 5 BUFF. HUM. RTS. L. REV. 1, 2 n.8 (1999)
Refugees,119 ("UNHCR") Executive Committee120 has continually approved the essential principle of non-refoulement irrespective of whether the person fleeing his or her country of origin has been formally recognized as a refugee.121 Indeed, many states have permitted refugees to cross their borders en masse, and to remain pending an acceptable resolution.122

Regional organizations, such as the OAU, and the Office of the UNHCR, have applied the non-refoulement principle to persons who fall outside the 1951 Convention definition of refugee.123 Additionally, Europe has extended the principle with the concept of B-status124 or de facto refugees.125 Asylum-seekers are granted B-Status when they fail to meet the definition of refugee under the 1951 Convention, but humanitarian considerations make voluntary repatriation126 impossible.127

2. Asylum Protection

In international law, there is a clear distinction between the

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120. See GOODWIN-GILL, supra note 31, at 215 (defining UNHCR Executive Committee as advisory body that assists U.N. High Commissioner for Human Rights with difficult refugee situations).

121. Id. at 127.

122. Id. at 123-24 (noting that states in Africa, Europe, and Southeast Asia have allowed refugees to stay indefinitely). Non-refoulement applies from the moment an asylum seeker arrives in the receiving country. Id.

123. See Robert L. Newmark, Non-Refoulement Run Aground: The Questionable Legality of Extraterritorial Repatriation Programs, 71 Wash U. L.Q. 833, 843-44 (1993) (arguing that non-refoulement principle has been expanded by UNHCR and by regional agreements).

124. See id. at 844 (discussing that B-status, also termed de facto status, may be granted when person fails to meet 1951 Convention's refugee definition, but is still protected against refoulement, and thus is allowed to remain because of obvious humanitarian concerns that prevent repatriation).

125. Id.

126. See GOODWIN-GILL, supra note 31, at 270 (discussing that voluntary repatriation occurs where refugee status ends and refugees can to return to his or her country of origin because of improved political circumstances).

127. See Newmark, supra note 123, at 844 (stating that refugees are granted B-status when humanitarian considerations preclude return to their country of origin).
right of asylum and a grant of refugee status. Asylum seekers have no absolute right to be granted asylum. In the United States and in Europe generally, two categories of refugees may be granted asylum: those who fall under the 1951 Convention definition, sometimes called de jure refugees, and those who may be granted temporary or permanent asylum but without refugee status, or de facto refugees. This latter category is usually protected against refoulement because of humanitarian reasons that militate against returning them to their home country.

The UDHR states in Article 14(1) that everyone has the right to seek and enjoy asylum from persecution. The UDHR does not, however, define the parameters of this right. Thus, it has been up to states to decide who may enjoy asylum protection within their borders. Asylum is usually sought at the point of entry into a country, when the individual has entered illegally, or after the individual’s legal status has expired. One scholar has noted that the asylum concept has three separate elements: the state’s right to grant asylum; the individual’s right to seek asylum; and the individual’s right to be granted asylum, a concept not embraced by the international community.

A state’s right to grant asylum flows from the accepted principle that every sovereign state has exclusive control over its bor-

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128. Goodwin-Gill, supra note 31, at 34.
130. See id. at 126 (stating that de jure is another term for traditional 1951 Convention refugee).
131. See id. (stating that de facto refugee are refugees accepted for humanitarian reasons).
132. Id.
133. See UDHR, supra note 30, art. 14(1) (stating “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”).
134. See Goodwin-Gill, supra note 31, at 175 (noting that during UDHR drafting sessions, many states vehemently opposed proposal that United Nations would be empowered to secure asylum for refugees).
135. Id.
136. See Paul Kuruk, Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees, 35 Stan. J. Int’l L. 313, 320 (1999) (discussing case of Liberians who were unable to make immigration plans prior to fleeing because their lives were in imminent danger).
137. See Roman Boed, The State of the Right of Asylum in International Law, 5 Duke J. Int’l & Comp. L. 1, 1 (1994) (arguing that these three rights are components of legal right of asylum).
ders and those who reside within them. The corollary to this right is that sovereign nations have the right to grant and also to deny asylum to persons located within their boundaries. Commentators view the right of asylum as a right that vests in the state and not as a right incumbent upon the individual.

None of the major human rights documents recognize a right to be granted asylum. In keeping with the UDHR right for an individual to leave any country including his or her own, international law permits individuals to leave their country of residence and to pursue asylum. An individual's right to gain asylum, however, is not an accepted principle in international law. Furthermore, as one scholar has observed, large waves of refugees have the potential to disrupt a receiving country. Governments are also concerned that they cannot support large numbers of refugees if they have to provide a permanent option for all those who have crossed over into their territory.

3. Temporary Protected Status

Scholars note that refugee status is by its very nature temporary. The notion of temporary protection, however, as opposed to asylum, which affords the refugee a permanent option, is a relatively new development in refugee law. Although

138. See id. at 3 (arguing that this concept is firmly rooted in international law).
139. Id. at 3-4.
140. Id. at 4; see GOODWIN-GILL, supra note 31, at 176 (noting that states are sole arbiters of grounds upon which they will confer asylum protection).
141. See Boed, supra note 137, at 10-11 (concluding that each of seminal post-World War II human rights instruments clearly omits any mention of right to be granted asylum).
142. See id. at 6 (discussing that foundation for this right is principle that states do not own their citizens); ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM 2 (1980) (discussing how right to seek asylum does not conflict with state sovereignty).
143. See Boed, supra note 137, at 9 (asserting that international law does not recognize individual's right to be granted asylum).
144. See Kuruk, supra note 136, at 321 (discussing potential for serious disruption faced by states that receive massive of refugees).
145. See Morten Kjaerum, Temporary Protection in Europe in the 1990s, 6 INT'L J. REFUGEE L. 444, 445 (1994) (discussing that protection options are tied to origins of persecution). In theory, when persecution ends so does protection. Id. at 446.
146. See GOODWIN-GILL, supra note 31, at 196 (addressing main argument against temporary refuge that would erode present practices on asylum and damage non-refoulement principle). In the early 1980s, when U.N. representatives first began to debate the notion of temporary protection, it was controversial, but today, temporary protection is a recognized component of legal refugee schemes in many states. Id.; see generally Kay Hailbronner, Comment, Temporary and Local Responses to Forced Migrations,
there are compelling humanitarian reasons for states to provide assistance to those in need, there is also a need for states to limit full asylum protection, especially in the case of a large-scale influx of people. Commentators argue that the Convention definition is adequate for individuals, but not for masses of people seeking protection.

In fact, scholars have attributed the codification of TPS in Western European law over the last decade to the European governments' desire to avoid granting asylum status to the victims of the Yugoslav wars, even though many of them could have qualified for asylum as refugees. During the Cold War, the 1951 Convention enjoyed public support and appeared adequate in responding to the refugee crises in Western states. Often, the media portrayed reasons for flight in manichean form: unremitting Soviet bloc persecution versus the valiant refugee in pursuit of freedom. Today, in response to the thousands of asylum seekers fleeing generalized violence, rather than individualized persecution, some commentators view TPS as preferable to asylum, so that they can be repatriated when the conflict ends. Currently, no standardized policy exists for the implementation

35 VA. J. Int'l. L. 81, 90 (1994) (defining temporary protection as provisional right of residence or tolerated status). Temporary protection is typically reviewed regularly and renewed for an additional, limited period. Hailbronner, supra.

147. See generally Fitzpatrick, supra note 40, at 16 (commenting that whether refugee entered country as part of mass influx of refugees, determines if she or he will be offered asylum or Temporary Protected Status, ("TPS")).

148. See id. at 16. (remarking that traditional refugee law is no longer applicable to mass influx situations). Although, there are different models for TPS in effect in various parts of the world, this Note is concerned only with the practice of TPS relevant to Europe and North America. See also Goodwin-Gill, supra note 31, at 199 (distinguishing European practice of temporary protection, that is explicitly premised on return to country of origin, with Southeast Asian model of temporary refuge, which is premised on resettling refugees to third countries).

149. See Fitzpatrick, supra note 40, at 18 (arguing that in some cases, latest attempts to manage refugee flows reflect unwillingness to grant asylum to victims from former Yugoslavia).

150. See id. at 28 (suggesting that Western governments and public viewed asylum seeker, during Cold War era, more favorably than they do now).

151. See Exporting Misery, Economist, Apr. 17, 1999 (suggesting that with end of Cold War, although their numbers have grown, refugees have lost their symbolic value).

152. See Fitzpatrick, supra note 40, at 53 (claiming that human rights conditions in refugee producing states are often unstable, therefore, in some circumstances repatriating refugees is not option); see also Joan Fitzpatrick, The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection, 13 Geo. IMMIGR. L.J. 343 (1999) (arguing that repatriation may not be ideal solution)
of TPS within a host state.\textsuperscript{153}

Governments have invoked TPS when faced with a refugee crisis, usually as a result of civil war.\textsuperscript{154} Scholars note that although the purpose behind granting refugees TPS, instead of asylum is eventually to facilitate repatriation, often repatriation does not occur.\textsuperscript{155} Thus, some scholars have discussed the problem of TPS as a backdoor to permanent residence because civil conflict can last many years, which enables refugees to remain in their host state for extended periods of time.\textsuperscript{156}

C. Conscientious Objectors

A conscientious objector is one who refuses to participate in armed conflict, and bases his or her objection to military service on religious, moral, ethical, humanitarian, or philosophical convictions.\textsuperscript{157} In general, sovereign nations may call up their citizens for active military duty, and evading the draft is not grounds for obtaining asylum.\textsuperscript{158} Compelling military service is ordinarily

\textsuperscript{153} See Yakoob, supra note 102, at 619-21 (noting that mechanisms employed by states for granting temporary protection are largely discretionary and ad hoc).

\textsuperscript{154} See Martin, et. al., supra note 37, at 547 (noting that, for example, in United States, TPS is invoked for several reasons including when there is abiding armed conflict and compelling return would endanger individual's lives).

\textsuperscript{155} See Yakoob, supra note 102, at 625 (discussing frequent criticism of temporary protection that as practical matter those admitted to country under temporary protection often times never leave); see Fitzpatrick supra note 40, at 53 (arguing that states view voluntary repatriation as ideal goal even though in certain war-torn regions, such as Rwanda, it may be distant solution).

\textsuperscript{156} Yakoob, supra note 102, at 623; see Peter H. Schuck, Refugee Burden-Sharing, 22 YALE J. INT'L L. 243, 267 (1997) (discussing problems that arose from U.S. TPS grants to El Salvadorians in 1980s). Few of the approximately 200,000 original TPS Salvadorans will ever have to leave the United States. Schuck, supra. The Immigration and Naturalization Service cannot locate many of the original TPS Salvadorans, or how many remain in the United States. Id. at 267. Once a refugee has been in a host country over a lengthy period of time, he or she may develop strong ties to his or her community or may bear children. Yakoob, supra note 102, at 623. For example, children of refugees born in the United States will be U.S. citizens. Id.

\textsuperscript{157} See Musalo, supra note 42, at 850 n.9 (defining conscientious objector as one who refuses to participate in armed conflict, and bases his or her objection to military service on religious, moral, ethical, humanitarian, or philosophical convictions); see also Lippman, supra note 42, at 31 (defining conscientious objection as refusal to participate in armed services based upon opposition to war); Wolff, supra note 42, at 68 (emphasizing that feelings of conscience should not be equated with religious motivations). One does not have to base his or her objection to service on religious beliefs. Wolff, supra; Major, supra note 42, at 350 (classifying conscience as ethical conviction that may flow from either religious or humanist beliefs).

\textsuperscript{158} See U.N. HANDBOOK, supra note 33, para 167-74 (stating that although punish-
considered to be well within the powers of a sovereign nation. Conscientious objection is not recognized as a human right, although some scholars have maintained recently that in view of several U.N. resolutions and the steady decrease in states that have an active draft, the right to object may soon be considered a human right. Interpreting the right to freedom of thought, religion, and conscience set out in the UDHR and in the International Covenant on Civil and Political Rights ("ICCPR"), the United Nations has expressly recognized a right of conscientious objection for draft evasion varies among states, it does not normally constitute persecution). An individual is not a refugee if his or her sole reason for draft evasion is that he or she does not wish to serve, or is afraid to serve, in the military.  

Id.; see also Grahl-Madsen, supra note 38, at 231 (contending that conscription to ordinary military service is not persecution under 1951 Convention definition).  

159. Id. para. 167. The U.N. Handbook states that:  

In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution . . . .  

Id.; see also Grahl-Madsen, supra note 38, at 231 (contending that conscription to ordinary military service is not persecution under 1951 Convention definition).  


[R]ecognizing that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions arising from religious, ethical, moral or similar motives, . . . recognizes the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion as laid down in article 18 of the Universal Declaration of Human Rights as well as article 18 of the International Covenant on Civil and Political Rights.  

Id.; see also Major, supra note 42, at 355-57 (citing to several human rights instruments that recognize right to conscientious objection); Emily N. Marcus, Conscientious Objection as an Emerging Human Right, 38 Va. J. Int'l L. 507, 509 (1998) (reviewing definitions of conscientious objection and proposing that conscientious objection is emerging human right in international law).  

161. See UDHR, supra note 30, at art. 18 (stating that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance").  

162. See International Covenant on Civil and Political Rights, opened for signature on Dec. 16, 1966, 999 U.N.T.S. 171 art. 18(2), with reservation in 999 U.N.T.S. 287 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (stating that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice").
tious objection as a legitimate expression of these three rights. 163

Scholars discuss two categories of conscientious objectors: absolute conscientious objectors, 164 those who oppose all war, and selective conscientious objectors, 165 those who, as in the case of many civil wars, oppose a specific conflict. 166 The latter group presents complicated legal issues in international law. 167

1. Absolute Conscientious Objection

Absolute conscientious objection occurs when an objector refuses to serve in the military. 168 Although conscientious objection is not recognized as a human right, the U.N. Handbook discusses draft evasion as a recognized basis for asylum. 169 Conscientious objection as an exception to the rule that states have the power to call up citizens for active duty has international support. 170 The U.N. Handbook recommends that states grant refugee status to persons who resist the draft for genuine reasons of conscience. 171 An objector may object on the basis of religious

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163. See Marcus, supra note 160, at 516 (stating that in view of these provisions, rights of freedom of thought, religion, and conscience are assured).
165. See id. at 449-50 (defining selective conscientious objector as one who refuses to participate in particular military engagement).
166. Id.
167. See id. at 458-60 (explaining that U.S. Vietnam War draft evaders, who disagreed with U.S. military policy, sought asylum in Canada, Netherlands, and Sweden). Although sympathetic to the draft evaders, these states did not grant them asylum under the 1967 Protocol. Id. at 459. Instead, they were granted residence permits, which provided significantly less protection than complete asylum. Id. Sweden’s and Canada’s immigration measures caused diplomatic tension with the United States. Id.
168. See id. at 449-50 (referring to absolute conscientious objector as devout pacifist, one who for reasons of conscience refuses to engage in military combat).
169. See U.N. HANDBOOK, supra note 33 (discussing conscientious objection to military service in relation to refugee status).
170. See GOODWIN-GILL, supra note 31 (arguing that there is considerable international support for right of conscientious objection); see Major, supra note 42, at 852 (explaining that many states recognize absolute conscientious objection claims, but do not recognize selective objection claims).
171. See U.N. HANDBOOK, supra note 33, para. 173. The U.N. Handbook states: The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service either entirely or subject to their performing
beliefs or moral conviction. Thus, if one is generally opposed to war, he has a valid basis to object, to be classified as a refugee, and to obtain asylum.

2. Selective Conscientious Objection

Unlike the absolute conscientious objector definition, the selective conscientious objector definition has considerably less international legal support. The UDHR states that every person has the right to seek and to enjoy in other states asylum from persecution. In keeping with the spirit of this principle, the U.N. Handbook sets out guidelines for selective military service exemptions. The Handbook reflects the skepticism with which selective claims are regarded, stating that not all convictions, no matter how valid or deeply held, constitute a sufficient reason for requesting refugee status after a desertion or an evasion. The first exemption applies when the deserter or draft evader suffers disproportionately severe punishment for the military offense on account of race, religion, nationality, political...
opinion, or membership in a particular social group.\textsuperscript{178} The second exemption applies if the international community has deemed the particular military action that an individual refuses to participate in as contrary to basic standards of human activity.\textsuperscript{179} Punishing objectors in these situations could be regarded as persecution according to the Handbook guidelines.\textsuperscript{180} More recently, the U.N. High Commission for Human Rights passed resolutions in 1989, 1993, and 1995 stating that the right of conscientious objection to military service is an extension of the rights set out in the UDHR and ICCPR.\textsuperscript{181}

D. The Balkan Conflict

In the 1980s, after Josip Broz\textsuperscript{182} ("Tito"), the Secretary General of Yugoslavia died, nationalism reemerged as a destabilizing political force.\textsuperscript{183} Beginning in 1991, civil war consumed Yugoslavia,\textsuperscript{184} which gradually disunited into five states.\textsuperscript{185} Authorities

\textsuperscript{178} See U.N. HANDBOOK, supra note 33, para. 169. The Handbook states: A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

\textsuperscript{179} See U.N. HANDBOOK, supra note 33, para 170. The U.N. Handbook states: There are, however, also cases where the necessity to perform military service may be the sole grounds for a claim to refugee status, i.e., when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral conviction, or to valid reasons of conscience.

\textsuperscript{180} Id.

\textsuperscript{181} Id.

\textsuperscript{182} See DAVID OWEN, BAUKN ODYSSEY 7(1995) (explaining Josip Broz, better known as Tito, was General Secretary of Yugoslavia for 35 years, until he died in 1980).

\textsuperscript{183} See id. at 10 (discussing how Yugoslav population never forgot completely regional nationalisms of past under Tito’s regime).

comment that after Slobodan Milosevic rose to power in 1980s, the climate of hostility among Kosovar Albanians and Serbians worsened. In March 1999, NATO intervened with military force on behalf of Kosovar Albanians in an effort to thwart the population displacement, ethnic cleansing, and atrocities the Serbian government committed. In addition to those fleeing the civil war in Kosovo, many Serbians who objected to their government’s actions in Kosovo evaded the draft. Many fled Yugoslavia to Hungary and are now living as refugees.

1. History

Historians have argued that Yugoslavia’s demise was predictable after Tito death in 1980. After 1980, tensions flared throughout the country and nationalism emerged as a political force. Gradually the Bosnians, Croats, the Macedonians, and territorially Kosovo and Vojvodina, were autonomous entities within Serbia. Id. See generally ROBERT D. KAPLAN, BALKAN GHOSTS (1995) (detailing general history of region); REBECCA WEST, BLACK LAMB AND GREY FALCON (1944) (accounting her travels through Yugoslavia in 1930s).

185. See John F. Burns, Confirming Split, Last 2 Republics Proclaim a Small New Yugoslavia, N.Y. Times, Apr. 28, 1992, at A1 (reporting that on April 27, 1992, Serbia and Montenegro announced establishment of new Yugoslavia). The other four breakaway states were Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia. Id.

186. See generally ROGEL, supra note 184, at 22-25 (outlining former Yugoslavia’s descent into civil war). President Milosevic was elected President of Serbia in 1990 on a nationalist platform. Id. at 22. He also appealed those who feared the introduction of a market economy and economic instability. Id.


189. See Amnesty Report, supra note 2 (outlining Serbian conscientious objector predicament); see also Mistiaen, supra note 14 (discussing conscientious objectors’ reasons for flight from Serbia).


191. See ROGEL, supra note 184, at 16 (arguing that Tito kept Yugoslavia unified).

192. See MERTUS, supra note 187, at 8 (reasoning that in time of political and economic instability, especially after communism’s demise, politics of Serbian victimization caught on rapidly). The Serbian media encouraged stereotyping of Albanians. Id. The media characterized Albanian men as rapists, despite the fact that Kosovo had the lowest reported cases of sexual assault in Yugoslavia. Id. Similarly, the media depicted Albanian women as bearing too many children although the birth rates of urban Kosovo Albanian women were nearly the same as urban Serbian women. Id.
the Slovenes would break away from Yugoslavia.\textsuperscript{193}

Kosovo,\textsuperscript{194} an autonomous republic within Serbia, has lobbied for independence from Serbia for many years.\textsuperscript{195} Although Kosovo is comprised mainly of Albanians, Serbians view the region as a core of Serbian culture dating back to the Middle Ages.\textsuperscript{196} Throughout the 1980s, human rights groups charged that Serbian police were oppressing Kosovo Albanians.\textsuperscript{197} At the same time, Serbians accused Albanians of targeting Serbians for violence.\textsuperscript{198} Notably, Slobodan Milosevic,\textsuperscript{199} then a midlevel communist bureaucrat, exploited the tense situation in Kosovo to further his political career, particularly in a now infamous 1987 speech in which he reminded crowds of the historic importance of the province.\textsuperscript{200} Many view this incendiary sermon as a


\textsuperscript{194} See Steve Kinzer, \textit{Ethnic Conflict Is Threatening in Yet Another Region of Yugoslavia: Kosovo}, N.Y. Times, Nov. 9, 1992, at A1 (reporting on region's ethnic tensions). Kosovo, is an autonomous region inside Serbia. \textit{Id.} More than 90\% of the population is Albanian Muslim. \textit{Id.} Serbians are a distinct minority. \textit{Id.} Kosovo is the former Yugoslavia's poorest region. \textit{Id.} It is mostly agrarian and undeveloped. \textit{Id.}

\textsuperscript{195} See \textit{id.} at A1 (noting that Yugoslav Constitution granted Kosovo wide autonomy). The post-Tito Government revoked Kosovo's autonomy and Serbia reabsorbed the region. \textit{Id.}; see generally M\textsc{alcolm}, \textit{supra} note 3, at 343-45 (discussing Serbian government's revocation of Kosovo's autonomy).

\textsuperscript{196} See \textsc{M}\textsc{alcolm}, \textit{supra} note 3, at xxviii (noting that Serbian nationalists consistently employ religious rhetoric as reason for historical claim to region).

\textsuperscript{197} See \textsc{M}\textsc{ertus}, \textit{supra} note 187, at 6-7 (discussing pattern of human rights violations in region). The U.N. Special Rapporteur on Human Rights in the Former Yugoslavia reported of Serbian police brutality against Kosovo Albanians throughout the 1990s. \textit{Id.}

\textsuperscript{198} See \textit{id.} at 9 (suggesting that many Serbians believed they were targets of militant Albanian groups).

\textsuperscript{199} See generally \textsc{D}\textsc{uder} \& \textsc{B}\textsc{ranson}, \textit{Milosevic: Portrait of a Tyrant} (1999) (describing Slobodan Milosevic as former Communist party leader who became president of Yugoslavia in 1990); \textit{see Yugoslavia, Background: A Crisis Waiting To Happen}, Report EUR 70/32/98 (visited on Apr. 15, 2000) <http://www.amnesty.org/allib/aipub/1998> (on file with the \textit{Fordham International Law Journal}) (noting that prior to his election in 1990, Milosevic was president of League of Communists in Serbia, party in power, in late 1980s).

\textsuperscript{200} See \textsc{M}\textsc{alcolm}, \textit{supra} note 3, at 341 (discussing events that led up to President Milosevic's speech on April 24, 1987 in which he shouted to crowd of Serbians in Kosovo town Kosovo Polje, "No one should dare beat you!"). This speech and these words marked a turning point in Milosevic's political career. \textit{Id.} This speech was played over and over again on Radio Television Belgrade. \textit{Id.} at 342. See generally \textsc{D}\textsc{uder} \& \textsc{B}\textsc{ranson}, \textit{supra} note 199, at 3 (examining nationalist impact of this speech); \textsc{Vickers}, \textit{supra} note 187, at 228 (noting how Milosevic used this speaking opportunity to remind crowds of their Serbian ancestral ties to Kosovo).
flash point for an aggressive surge in Serbian ethnic pride and nationalism.\footnote{201}{See Malcolm, supra note 3, at 342 (arguing that after speech, Milosevic increased his use of anti-Albanian slogans and rhetoric); see also MERTUS, supra note 187, at 179 (proposing that this speech was turning point in Serbia’s national awakening).}

On June 25, 1991 Croatia and Slovenia declared independence from Yugoslavia.\footnote{202}{WARREN ZIMMERMAN, ORIGINS OF A CATASTROPHE 140 (1996).} Two days later, on June 27, a ten-day war between Serbia and Slovenia commenced.\footnote{203}{Id. at 144.} It ended with minimal casualties on July 7, 1991.\footnote{204}{Id. at 144.} The war between Croatia and Serbia continued through late November, causing 10,000 casualties and approximately 750,000 refugees to flee to neighboring republics.\footnote{205}{Id.} In 1992, the European Community (“EC”) recognized Bosnia-Herzegovina, Croatia, and Slovenia as independent states.\footnote{206}{Id. at 144.} In 1993, the EC recognized Macedonia.\footnote{207}{Id. at 144.} The remainder of the former Yugoslavia, Serbia and Montenegro, including the Vojvodina and Kosovo provinces, became the Federal Republic of Yugoslavia (“FRY”).\footnote{208}{Id.}

On January 9, 1992, slightly less than one week after the cease-fire in Croatia became effective, the Bosnian Serbian population of Bosnia-Herzegovina declared independence.\footnote{209}{SABRINA PETRA RAMET, BALKAN BABEL 205 (1999).} War began in the spring of 1992 and lasted until 1995.\footnote{210}{See id. at 239 (estimating that some 215,000 persons died in Bosnia-Herzegovina and approximately 2.7 million people became refugees). It is estimated that Bosnian soldiers raped approximately 20,000 to 50,000 Bosnian Muslim women. Id. at 239.} After failed attempts at diplomacy, NATO conducted aerial strikes against Bosnian Serbians between 1993 and 1995.\footnote{211}{See id. at 232 (discussing NATO’s ambivalence about involvement in civil war); see also ROGEL, supra note 184, at 35 (noting that in 1994 NATO shot down four Serbian planes in defense of U.N. personnel); RICHARD HOLBROOKE, TO END WAR 101 (1998) (describing that NATO planes attacked Bosnian Serbian stations around Sarajevo on August 30, 1995). At that time, it was the largest military action in NATO’s history. HOLBROOKE, supra, at 102.} In 1995, the Dayton Peace Accords\footnote{212}{See ZIMMERMAN, supra note 202, at 232-33 (discussing agreement reached in 1995, effectively ending Bosnian war). The agreement granted Serbians 49% of Bosnia, and their own republic within Bosnia called Republicka Srpska. Id.} effectively ended the fighting in 1995 by recognizing the sovereignty of Bosnia-Herzegovina as a two-part
state, a Muslim-Croat federation and a Serbian Republic. In the final peace agreement, however, Kosovo was not mentioned.

2. Kosovo Crisis

Kosovo was a region of unrest years before President Milosevic’s rise to power in Serbia. Commentators argue that each side in this ferocious ethnic divide has used history as their palimpsest, upon which pasts are glorified, enemies are demonized, and truths are obfuscated. During the communist era, however, Albanian Kosovars enjoyed modest cultural prosperity. The Yugoslav government opened schools for Albanians, and Kosovo was granted autonomous status as a region

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213. Id.

214. See Malcolm, supra note 3, at 353 (asserting that peaceful resistance efforts in Kosovo prior to Dayton Peace Accords continued to be passive because much of population believed that Kosovo would be included in war-ending settlement). Instead, President Milosevic remained in power and his policies in Kosovo were not included in the peace agreement. Id. The Dayton Peace Accords sanctioned Serbia in one respect, they would not be allowed access to the International Monetary Fund (“IMF”) until they improved their human rights record with Kosovo Albanians. Id. Kosovo’s omission from Dayton Peace Accords had one significant effect: the population grew less inclined to accept passive resistance policies. Id.

215. See Kinzer, supra note 194 (predicting, in 1992, major conflagration in Kosovo); see also Kaufman, supra note 193 (reporting on depth of animosity between Albanians and Serbians).

216. See Europe’s Roughest Neighbourhood, supra note 24, at 3 (reporting on war-torn history of Balkans). The Serbians had laid claim to an empire that included most of Greece until the Turks defeated them on June 28, 1389. Id.; Chris Hedges, Journal: If the Walls Could Speak, Serb Epic Would Unfold, N.Y. TIMES, Nov. 10, 1997, at A3 (noting that sacred component to Serbian ties to Kosovo date even farther back than 1389); Peter R. Prifti, Confrontation in Kosovo: The Albanian-Serb Struggle, 1969-1999 34 (1999) (noting that in 1346, Pec, Kosovo, Serbian Orthodox Church officially became independent of Constantinople). Throughout the middle ages Serbian religious life flourished in the region. Prifti, supra.

217. See Hedges, supra note 216 (discussing how 1389 battle is routinely invoked as beginning of episodic Serbian oppression and Ottoman domination that endured until First Balkan War of 1912). Today, the battle is routinely appealed to in songs and in epic poems. Id.; see also Malcolm, supra note 3, at xxx (arguing that 19th century Serbian nationalist ideology concocted cult of medieval battle of Kosovo).

218. See Jane Perlez, Ethnic Conflict in Kosovo Has Centuries-Old Roots, N.Y. TIMES, May 5, 1999, at, A13 (reporting that many Serbians argue that Kosovo was wasteland until Serbian settlement in region around sixth and seventh centuries, and that Albanians only arrived, along with vanquishing Turks circa 15th century). Alternatively, Kosovar history chronicles past where Albanians descended from ancient Illyrians, who were original inhabitants in the region. Id.

219. See id. (noting that Kosovars enjoyed some cultural prosperity after Tito granted Kosovo autonomous status in 1974).
within the Republic of Serbia, and this status was later elevated to autonomous province within the Republic of Serbia. When Milosevic rose to power in the late 1980s the Serbian government revoked Kosovo's autonomy in 1989, and reversed many of the earlier advances in Kosovo.

In response to the loss of autonomy and attendant rights and privileges, a political party, the Democratic League of Kosovo ("LDK"), led by Ibrahim Rugova, emerged in Kosovo. Commentators note that at first, the Kosovo Albanian resistance was largely peaceful. Various activists pressed the West to retain sanctions against Serbia until Serbia resolved the human rights situation. Rugova urged peaceful resistance and patience in the face of Serbian policies. Also, he expressed confidence that when the Bosnian crisis ended, the situation in Kosovo would be included in the resolution. The Dayton Peace Accords, however, made no substantive mention of a plan to address Kosovo.

Gradually, Kosovo Albanians stopped accepting passive

220. RAMET, supra note 209, at 304.
221. See MALCOLM, supra note 3, at 344 (noting that when Kosovo was stripped of its autonomy, rioting broke out in Pristina); RAMET, supra note 209, at 308 (noting that Albanian language education was terminated, and Albanians were fired from their jobs and replaced by Serbians). Police brutality against Albanians increased and the Belgrade government confiscated land from Albanians and redistributed it to Serbians. RAMET, supra.
222. See MALCOLM, supra note 3, at 347-48 (describing that Democratic League of Kosovo ("LDK") evolved in 1980s).
223. Id. at 348.
224. See VICKERS, supra note 187, at 242 (discussing that in 1990 many Albanians discarded violent resistance to Serbian domination and officially embarked on campaign of passive resistance, led by Adem Demaci); see also GREG CAMPBELL, THE ROAD TO KOSOVO, A BALKAN DIARY 153 (1999) (mentioning emphasis Kosovo leaders placed on passive resistance during early 1990s).
225. Perlez, supra note 218, at A13. See MALCOLM, supra note 3, at 348 (noting that LDK's mission was three-tiered). First, to prevent violence. MALCOLM, supra. Second, to seek the help of international organizations and the United Nations to raise awareness of Serbian oppressive policies. Id. Third, to ignore the legitimacy of Serbian rule by boycotting elections and setting up Albanian-run schools and institutions. Id.
226. MALCOLM, supra note 3, at 353.
227. See CAMPBELL, supra note 224, at 153 (discussing how Albanian passive resistance advocates impressed upon population that any international resolution to Bosnian war would include resolution to fighting in Kosovo); see also VICKERS, supra note 187, at 265 (contending that Kosovo's leaders embraced passive resistance because they feared war with Serbia).
228. See RAMET, supra note 209, at 310 (discussing omission of Kosovo from Dayton Accords).
resistance policies, and the Kosovo Liberation Army\textsuperscript{229} ("KLA"), a terrorist organization, gained a large following.\textsuperscript{230} During 1998, Serbian forces in Kosovo launched a series of attacks in the region.\textsuperscript{231} At approximately the same period, KLA members targeted Serbians for violence.\textsuperscript{232}

The numbers of Albanian refugees increased during 1998 along with reports of Serbian aggression and violence towards Albanians.\textsuperscript{233} By January 1999, Serbian troops forced some 20,000 Albanian civilians from their homes.\textsuperscript{234} On January 15, 1999, forty-five Albanians were murdered in Racak, a Kosovar town.\textsuperscript{235} From December 1998 to March 1999, the refugee toll reached 80,000.\textsuperscript{236}

3. Serbian Atrocities

Kosovo Albanians suffered sporadic episodes of violence by Serbian police and military until March 1998.\textsuperscript{237} In March 1998, however, Serbian forces launched a series of attacks against civilians.\textsuperscript{238} Commentators note that these attacks marked a turning point in relations among Kosovo and Serbia and NATO. As a

\textsuperscript{229} See Vickers, supra note 187, at 290 (remarking that after Dayton Accords neglected to mention Kosovo, many grew to reject passive resistance policies). In response to this increasing hostility, in 1996 an underground organization called the Kosovo Liberation Army ("KLA") initiated a series of attacks against Serbians. Id. at 291. The organization appeared to receive its funding, weapons, and training from Kosovars living in Western Europe and sources in the Middle East. Id.

\textsuperscript{230} See id. at 309 (noting that KLA grew in numbers from reportedly only 100 or so before 1997 to several thousand by middle of 1998); see also Chris Hedges, Victims Not Quite Innocent, N.Y. Times, Mar. 28, 1999, at 1 (asserting that although KLA atrocities are not equal to Serbian crimes, KLA shows little compassion for its ethnic rivals and has reportedly targeted Serbians for kidnappings and executions).

\textsuperscript{231} Ramet, supra note, 209, at 309.

\textsuperscript{232} Id.

\textsuperscript{233} See id. at 310 (estimating that by mid-September 1998, approximately 265,000 Albanians were homeless).

\textsuperscript{234} See Id. at 317 (noting that by end of January 1999, there were approximately 200,000 displaced Kosovar refugees).

\textsuperscript{235} Id.

\textsuperscript{236} Id at 317-18.

\textsuperscript{237} See Serbs Pound Kosovo To Repel Separatists, N.Y. Times, Mar. 7, 1998, at A1 (reporting that Serbian police launched attacks against Albanian Kosovar civilians). The Serbian military allegedly attacked in retaliation for Albanian killings of four Serbian policemen. Id.

\textsuperscript{238} See Defiant Albanians Rebury Their Dead in Kosovo Province, Chi. Trib., Mar. 11, 1998, at 1 (discussing repeated Serbian military attacks on villages Serb government believed to have sheltered KLA members).
direct result of these Serbian attacks, ethnic Albanian refugees fled Kosovo for neighboring Albania.\footnote{239} Serbian forces killed hundreds of Kosovo Albanians.\footnote{240} Western observers were unsure of the extent of the atrocities until Serbian forces temporarily pulled out of the region in September 1998.\footnote{241} Throughout 1998, journalists reported of Serbian massacres in the region.\footnote{242} These reports renewed NATO discussions of a military intervention.\footnote{243}

When the 1999 NATO bombings began, Serbian forces intensified their attacks against Kosovo Albanians.\footnote{244} Some argue that the Serbian government planned the mass killings to coincide with the beginning of Operation Allied Force.\footnote{245} After the cease-fire, humanitarian workers and war crimes investigators unearthed mass civilian graves.\footnote{246}

\begin{thebibliography}{9}
\bibitem{239}See Serbs Keep Shelling Kosovo Villages Despite Threat of Sanctions, N.Y. Times, June 7, 1998, at 8 (noting that in one week, over 10,000 ethnic Albanian refugees fled Kosovo due to fighting).
\bibitem{240}See id. (estimating that over 250 people died from March 1, 1998 to June 7, 1998).
\bibitem{241}See Dinmore, supra note 188 (reporting that Western investigators gathered evidence of genocide after Serbian troops left region).
\bibitem{242}See id. (listing systemic Serbian human rights abuses against ethnic Albanians). Serbian police attacked villages, rounded up civilians, separated the men from the women and children, beat them and gouged their eyes with pitchforks. Id.; see also Philip Smucker, Kosovo Refugees Easy Prey for Serbian Forces, House Chron., Sept. 11, 1998, at A30 (reporting on how Kosovar refugees, herded into camps, were easy targets for Serbian forces). Serbian troops torched villages surrounding Pec, a village near Pristina, Kosovo's capital. Smucker, supra.
\bibitem{243}See Serbian Deception, Wash. Post, Oct. 6, 1998, at A22 (arguing that NATO should intervene and end humanitarian crisis).
\bibitem{244}See John Daniszewski, Evidence Details Systematic Plan of Killings on Kosovo; As More Graves Are Discovered Daily, L.A. Times, Aug. 8, 1999, at A1 (estimating that 1 out of every 180 Kosovo Albanians died during 11 week bombing campaign).
\bibitem{245}See id. (discussing that extent of civilian killings was too vast to have been result of Serbian reaction to wartime attack). A German foreign policy advisor, obtained a document that detailed plans for systemic Kosovo Albanian murders. Id. Serbian massacres began less than a day after Operation Allied Force commenced. Id. In the Southern region of Kosovo, Serbian troops killed 3000 civilians during the first week of the bombing. Id.
\bibitem{246}See Maggie Farley, 2,108 Corpses Dug Up So Far in Kosovo Effort, L.A. Times, Nov. 11, 1999, at A12 (discussing that teams of investigators discovered grave sites containing more than 50 corpses); see also Philip Shenon, State Dept. Now Estimates Serbian Drive Killed 10,000, N.Y. Times, Dec. 10, 1999, at A12 (noting difficulty in determining death toll because Serbians made concentrated effort to destroy evidence of killings). Serbian troops burned bodies to prevent identification. Shenon, supra. Serbian military forces and police also systematically raped Kosovo Albanian women. Id.
\end{thebibliography}
4. NATO Intervention

On March 25, 1999, NATO launched air attacks on Kosovo, Montenegro, and Serbia. From March 25 to June 9, NATO unleashed 12,575 air strikes, forcing Yugoslavia to agree to a ceasefire. In the end, the fighting displaced 600,000 civilians within Kosovo, and forced 800,000 out of the country.

After the seventy-eight day bombing campaign, President Milosevic capitulated to international demands and agreed to a cease-fire. The U.N. Security Council voted to deploy

247. See Shaw, supra note 16 (stating that NATO was founded in 1949 as military alliance to defend against eastern bloc states whereby each country agreed to consult if another member was threatened with force). Id.; see also Sergio Balanzino, NATO’s Actions To Uphold Human Rights and Democratic Values in Kosovo: A Test Case for a New Alliance, 23 Fordham Int’l L.J. 364, 364 (1999) (observing irony that NATO’s 50th Anniversary fell during war in Kosovo); see generally Francis X. Clines, At NATO’s Birthday Party, Chilling Specter of Kosovo, N.Y. Times, Apr. 22, 1999, at A3 (reporting on NATO’s 50th anniversary celebration); Tim Weiner NATO Finds Kosovo War Is a Fly in Its Champagne, N.Y. Times, Apr. 11, 1999, at A1 (commenting that delegates from 42 nations gathered to honor NATO’s golden anniversary); see Alan Cowell, It’s A Wonder This Alliance Is Unified, N.Y. Times, Apr. 25, 1999, at 5 (noting that currently, NATO is comprised of 19 members). The 19 members are Belgium, Britain, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United States. Cowell, supra.

248. RAMET, supra note 209, at 320

249. Balanzino, supra note 247, at 372.

250. See Messy War, Messy Peace, Economist, June 12, 1999 (arguing that death toll and refugee numbers militate against suggestion that NATO was victorious).

251. See Balanzino, supra note 247, at 372 (noting that eventually President Milosevic surrendered to NATO’s five demands). Milosevic agreed to a cessation of all military action and to the killings; the withdrawal of Serbian military, police, and paramilitary forces; an international military presence in Kosovo; full refugee repatriation to Kosovo; the establishment of a political framework for Kosovo based on the Rambouillet Accords. Id.

252. See Shaw, supra note 16, at 825-26 (defining U.N. Security Council as body comprised of five permanent member nations and 10 rotating member nations and
President Milosovic signed an agreement allowing for Kosovo to remain within Yugoslavia, but it was to have a severely truncated interaction with Serbia. The approved plan established an autonomous Kosovo with a parliament, judiciary, local government, and police force. The Kosovars would have minimal contact with Yugoslavia, but they would not serve in the military or pay taxes, to ensure that they could achieve gradual independence from the central government within three years.

Part of the cease-fire between Serbia and NATO involved the return of refugees to Kosovo. Commentators note that initially, the refugee crisis rallied public support in the West around the bombing campaign. As the swells of deracinated Kosovars threatened to further destabilize the Balkan region, Western governments brainstormed to devise a plan to cope with the refugees. Because neighboring Western European countries were already weary from waves of Bosnian refugees, the

created by Article 27 of U.N. Charter to have primary responsibility of maintaining international peace and security).


254. See Perlez, supra note 253 (reporting that NATO officials plan for Kosovo to be part of Yugoslavia in theory only). Eventually Kosovo will be an independent state. Id.

255. Id.

256. See id. (noting that West Europeans are concerned about possibility that breakaway Kosovo might encourage other separatist groups in Europe to wage war for independence).

257. See Balanzino, supra note 247, at 372 (discussing right of refugees to return to Kosovo as part of NATO cease-fire agreement).

258. See Exporting Misery, supra note 151 (criticizing efficacy of Operation Allied Force because it had unintended consequence of provoking refugee crisis); see also Victim of Serbia—or NATO?, ECONOMIST, Apr. 3, 1999 (suggesting that NATO's intervention provoked genocide instead of thwarting it). After four days of bombing, 500,000 Kosovars, over one fourth of the population, were driven out of their homes. Victim Of Serbia, supra.

259. See Exporting Misery, supra note 151 (detailing Kosovo Albanian expulsions). At one point, the United States offered to airlift 20,000 people to a military base in Guantanamo Bay, Cuba, but few refugees wanted to avail themselves of this option. Id. The UNHCR objected to a U.S. proposal to house Kosovars in Guantanamo Bay, Cuba on grounds that such a place would become a "rights free zone, where babies born have no citizenship and the people are open to abuse." Id.

European Union took steps to contain the flows within the region through various assistance programs.261

Macedonia and Albania were the two principle asylum states for Kosovar refugees.262 Experts note that, as a small and somewhat unstable state, it was difficult for Macedonia to accommodate Kosovar refugees.263 The protection that Macedonia afforded the refugees was in the form of burden-sharing arrangements.264 Instead of focusing on asylum, the plan allowed refugees to enter on the condition that some would be sent on to third countries,265 such as Germany, Greece, Norway, and Turkey.266

Commentators note that the NATO bombings caused the dislocation of not only Kosovo Albanians but also Serbians as well.267 Hungary shouldered the burden of many Serbians fleeing Yugoslavia.268 In particular, many refugees left Serbia's Vojvodina region where there was a distinct, ethnically Hungarian minority.269 Other groups settling in Hungary's camps included middle-class Serbians, members of political opposition groups, and draft evaders.270

5. Serbian Conscientious Objectors

During the 1999 air strikes, NATO encouraged draftable

neighboring areas in course of about two weeks and within two more weeks, total was over 850,000). After nine weeks of air strikes, nearly 860,000 Kosovo Albanians fled or were expelled to Albania, Macedonia, and Montenegro. Id. at 6.

261. Id.
262. Id. at 10-11.
263. Id. at 10; see John Tagliabue, Alive and Ailing in the Balkans, N.Y. Times, June 27, 1999, at 4 (describing widespread poverty in Macedonia). Macedonia has a 35% unemployment rate. Id.
264. Tagliabue, supra note 263. See also UNHCR Evaluation, supra note 260, at xii (suggesting that burden-sharing can be very useful for states that are faced with significant refugee inflows).
265. See UNCHR Evaluation, supra note 260, at 11 (discussing that solution was urged by United States and was at odds with UNHCR's general position focusing emphasizing obligations of first asylum states).
266. Id. at 36.
267. See John Tagliabue, Hungary, on NATO Conflict's Front Line, Feels a Sense of Anxiety, N.Y. Times, May 2, 1999, at A16 (reporting waves of Serbians and ethnic Hungarians fled from Yugoslavia to Hungary either to avoid conscription or for other politically motivated reasons).
268. Id.
269. Id.
270. Id.
Serbian men either to desert the military or to refuse conscription.\textsuperscript{271} NATO carried out a leaflet airdrop by scattering flyers around Belgrade and elsewhere bearing the NATO logo along with messages that encouraged illegal\textsuperscript{272} resistance.\textsuperscript{273} In addition every evening during Operation Allied Force, Serbians could tune their televisions to NATO television for anti-war programming.\textsuperscript{274} Many draftable men fled, and of those who

\begin{quote}
\textit{Id.} See Amnesty Report, supra note 2 (discussing NATO’s encouragement of draft evasion).
\end{quote}

\begin{quote}
\textit{Id.} (reporting that Yugoslav penalties for ignoring draft summons range from one to 10 years imprisonment; five years for avoiding call up by going into hiding; punishment of five to 20 years for fleeing to another country or staying abroad to avoid call-up). The Amnesty Report also claims that several hundred conscientious objectors are in prison for refusing to serve in the military. Id.; see also Schmetzer, supra note 23, at 4 (discussing military tribunals set up in Belgrade to hasten prosecutions of objectors). Draft evaders are tried \textit{in absentia} and the results are not made public. Schmetzer, supra. One objector criticized that the government “can’t possibly prosecute 40,000 people. So now it’s become a selective process.” Id.
\end{quote}

\begin{quote}
\textit{Id.} Amnesty Report, supra note 2. According to the report, one such NATO leaflet dropped near Belgrade in April 1999 read: “In recent weeks, Serb police and the army, under direct orders of Slobodan Milosevic, have emptied villages and towns in Kosovo, burning or destroying thousands of houses . . . . don’t let wrongly directed patriotism land you with his crimes.” Id. Others read: “more than 13,000 members of the Yugoslav army have already defected. Stay here and leave your bones or run away as soon as you can. . . .” Id. “[O]ver 13,000 Yugoslavian [sic] service members have already left the armed forces because they can no longer follow illegal orders in Milosevic’s war against civilians in Kosovo. Leave your unit and your equipment and get out of Kosovo now. If you choose to stay, NATO will relentlessly attack you from every direction. The choice is yours.” Id. Additionally, President Clinton’s March 1999 address broadcast by satellite to Serbians commented,

\begin{quote}
He [Milosevic] could have kept Kosovo in Serbia and given you peace. But instead, he has jeopardized Kosovo’s future and brought you more war. Right now he’s forcing your sons to keep fighting a senseless conflict that you did not ask for and that he could have prevented . . . I call on all Serbs and all people of good will to join with us in seeking an end to this needless and avoidable conflict.
\end{quote}

\begin{quote}
\textit{Id.} Secretary of State Albright similarly recorded a broadcast on Voice of America, Radio Free Europe

\begin{quote}
I believe your leaders are not telling the truth. We do not want to harm the Serb people. But our nations cannot stand by while thousands of innocent people are killed or driven into exile. That is what the Serbs are doing in Kosovo. Your state media will not tell you this. But the world knows it is the truth.
\end{quote}

\begin{quote}
\textit{Id.} But see Carlotta Gall, NATO TV Is Sent to Serbs, Who Are Harsh Critics, N.Y. TIMES, May 26, 1999, at A17 (mentioning NATO-dropped fliers over Belgrade failed to make favorable impression on some Serbian students).
\end{quote}

\begin{quote}
\textit{Id.} See Gall, supra note 273, at A17 (chronicling near-comic nature of some of broadcasted propaganda: “A colored map of Yugoslavia appears on the screen . . . . Cheerful pop music plays in the background”); \textit{see also} Free Serbia Net, (visited on Feb.
sought refuge, most of them did so in Montenegro and in Hungary.\textsuperscript{275} The UNHCR estimates that 50,000 Serbians fled Serbia during the bombing.\textsuperscript{276} Of those fleeing the country, some estimates suggest that 15,000 to 20,000 were draft evaders, and more than 1000 were documented in Hungarian refugee camps.\textsuperscript{277} Commentators are unable to calculate how many refugees entered Hungary either with valid passports and stayed on with friends or family, or entered illegally and never contacted refugee officials.\textsuperscript{278}

Currently, the Serbian conscientious objectors' future in Hungary is uncertain, and many are effectively stranded without employment or permanent residency.\textsuperscript{279} Asylum protection in Hungary is unlikely, as about two percent of all Serbian applicants were granted asylum from January to May 1999.\textsuperscript{280} Many of the draft evaders were granted permission to stay in Hungary for up to ninety days, but did not qualify for authorization to work.\textsuperscript{281} After the official stay expires, however, refugees are not deported in keeping with non-refoulement principles.\textsuperscript{282} The Hungarian government granted some draft evaders one-year renewable temporary permits on humanitarian grounds.\textsuperscript{283} Travel visas to move out of Hungary and to Western states are similarly difficult to obtain, as most states are not open to accepting additional refugees from this region.\textsuperscript{284}

\textsuperscript{275} See Montenegrin Assembly Adopts Amnesty Law, supra note 24 (reporting that unlike Montenegro, status of Serbian conscientious objectors in Hungary is unresolved; Montenegrin assembly passed amnesty law for conscientious objectors during NATO campaign, so that no one would be sent back to Serbia to face punishment for avoiding military service).

\textsuperscript{276} Schapiro, supra note 13.

\textsuperscript{277} See Adam Lebor, War in Europe: Serb Liberals Take Refuge Abroad, INDEPENDENT, May 2, 1999, at 19 (noting that this figure only includes those who have been processed through official agencies).

\textsuperscript{278} Hungarian Refugee, supra note 13.

\textsuperscript{279} See Amnesty Report, supra note 2 (discussing conscientious objectors' options in refugee camps).

\textsuperscript{280} See Schapiro, supra note 13 (noting that there were 2315 asylum applicants from March 24, 1999 to June 20, 1999).

\textsuperscript{281} See id. (reporting that between 100,000 and 300,000 men have fled Serbia during since first war in 1991).

\textsuperscript{282} Mistiaen, supra note 14, at A19.

\textsuperscript{283} Id.

\textsuperscript{284} See Schapiro, supra note 13 (discussing difficulty in obtaining visas).
Commentators note the difficulties attendant to living in refugee camps. Refugees who have little money cannot afford to pay for transportation to Budapest from the camps to visit the embassies and investigate immigration options. Likewise, these refugees cannot go home. By crossing the border into Hungary, the Serbian draft evaders violated a law imposed by the Serbian government during the NATO bombing, that prohibited males between sixteen and sixty-five from leaving the country. The punishment for this act is imprisonment, with sentences ranging from one to twenty years. Additionally, these Serbian draft evaders were vilified in the Serbian media as traitors. In July 1999, the Serbian government initiated expedited proceedings to put draft evaders on trial for avoiding service during the Kosovo war. Evaders have been tried in absentia, the proceedings are not open to the public, and most importantly, the results are not disclosed to the general public. If an objector returned home, then he may not realize that he had been tried, convicted, and sentenced for a crime.

II. THE INDIVIDUALIZED AND COLLECTIVIZED APPROACHES: TWO METHODS FOR THE PROTECTION OF REFUGEES

Currently, states protect refugees on an individualized basis. Each country, in keeping with its commitment to the 1951 Convention, 1967 Protocol, and other human rights instruments, chooses its own procedures for handling Convention ref-

285. See Theresa Agovino, Serb Deserters Fear Revenge, HOUS. CHRON., June 9, 1999, at A30 (discussing difficulties refugees have in ascertaining immigration and asylum information).
286. Id.
287. See Schapiro, supra note 13 (stating that military age males were only allowed out of country in exceptional cases); Gregor Mayer, Vojvodina Hungarians Feel Neglected by Mother Country, DEUTSCHE PRESSE-AGENTUR, June 16, 1999; Steven Erlanger, Serb Conscripts Assert Patriotism While Avoiding Army in Safe Houses, N.Y. TIMES, Apr. 5, 1999 (analyzing ambivalence of some Serbian draft evaders).
288. See Amnesty Report, supra note 2 (discussing penalties for draft evasion).
289. Id.
290. Schmetzer, supra note 23.
291. Id.
292. Id.
293. Id.
ugees or those fleeing generalized violence and war. Critics of the current individualized approach argue that the individualized basis, upon which refugee claims are managed, is no longer tenable in the post Cold War world and suggest that nations should properly channel their resources to a new collectivized solution. The more traditional, individualized approach focuses on asylum, whereas the collectivized approach affords refugees temporary protection in anticipation of repatriation.

A. The Individualized Approach

Currently, the protection afforded refugees is individualized. Thus, obligations to protect refugees, such as those created by the 1951 Convention refugee definition or the principle of non-refoulement, are considered universal, whereas the actual formula for protection is provided by individual states. Scholars frequently acknowledge that the current practices do not adequately protect refugees and are in need of reformulation. Even those scholars who believe in the foundations of current refugee protection recognize that it is uneven and decentralized. A person has an internationally recognized right to leave a country, but no right of admission to another country. Currently no umbrella system exists to receive and confer refu-

295. See id. (noting 1951 Convention forms basic legal standards for refugee protection).


297. See Hathaway & Neve, supra note 296, at 117-18 (positing approach to refugee protection that emphasizes temporary protection). But see Anker et al., supra note 294, at 295 (maintaining that asylum is preferable protection mechanism).

298. Anker et al., supra note 294.

299. See generally id. 294 at 305 (noting that although present protections are decentralized, states still accept responsibility for those refugees that qualify for protection in their territory).

300. See Schuck, supra note 296, at 251 (stating that individuals and organizations have criticized current refugee protection system). See generally Helton, supra note 92 (arguing that existing system of refugee protection is not capable of managing mass movements of those fleeing their homes).

301. See Anker et al., supra note 294, at 299 (agreeing with criticism that states have improperly refouled refugees because refugee protection standards are not uniform).

302. Helton, supra note 92, at 1624.
The mechanisms in effect currently depend on the policies of a given nation, so that states may fashion a policy of swift admission, immediate repatriation, or opt for something in between both of these measures. States have this option because the 1951 Convention and the 1967 Protocol do not discuss restrictive policies that states may employ to prevent the influx of refugees, such as inflexible visa requirements or interdiction at sea.

Proponents of maintaining an individualized approach to refugee protection acknowledge failures in the current asylum scheme, but allege that it ultimately saves lives by granting asylum to many refugees and also protects state sovereignty. In any case, proponents claim that there is not enough evidence to support the notion that an additional regional organization comprised of states will provide efficiently any more protection than individual states now provide. They argue that the legal framework established by the 1951 Convention and the 1967 Protocol is adequate protection if only states would honor their international legal obligations.

Advocates of the current system point out that an alterna-

303. See Office of the United Nations High Commissioner for Human Rights (visited Apr. 22, 2000) <http://unhchr.ch/html/hchr.htm> (on file with the Fordham International Law Journal) (discussing one of functions of UNHCHR is to respond to serious violations of human rights). The UNHCHR approximates an international framework for refugee protection. Id. See generally Helton, supra note 92, at 1627 (arguing in favor of new international regime by underscoring point that, despite multitude of international instruments setting out standards for treatment of refugees and despite multilateral arrangements in Asia and other agreements among some Western European states, there is no great deal of international harmonization of refugee protection).


305. Id.; see generally Helton, supra note 92, at 1625 (noting another ambiguity in current refugee regime, worth mentioning, although beyond scope of this Note, is lack of protection afforded internally displaced—those who have been forced from their homes, but have not crossed international border).

306. Anker et al., supra note 294, at 299.


308. See Anker et. al., supra note 294, at 300 (arguing that best way to reform refugee protection is to improve upon current framework).

309. Id. at 309.
tive, such as the emphasis of the collectivized scheme on temporary protection, is misguided because so many crises are long-term and each crisis is fact specific. They note that civil unrest lasts for years, and it cannot be expected that governments should repatriate refugees before it is safe to do so, or that refugees should remain under temporary protection, possibly for as many as five years, without the hope of permanent residence. Advocates of the individualized system argue that there are numerous legitimate reasons for refugees to seek asylum in developed states because they provide due process and other legal safeguards for refugees.

B. The Collectivized Approach

Scholars have proposed a collectivized approach to refugee protection composed of an international commitment to temporary protection, policies to promote repatriation, and a shared financial burden for protecting refugees. Collectivized solutions to migration that apportion the burden of refugee care are not new, but in recent years, such theories have assumed a more prominent position in refugee discourse. Moreover, a unified system would create a single standard for determining asylum when appropriate, thereby eliminating many of the current inconsistencies.

310. See id. (asserting particularized nature of refugee law and arguing that each emergency calls for its own specifically tailored solution). Additionally, a new burden-sharing system is unlikely to become accepted by states, or to become a substitute for the conventions, and customary international law that has emerged over time. Id.

311. See id. at 302 (noting that, for example, refugee flows from Afghanistan, El Salvador, Eritrea, Haiti, and Vietnam lasted longer than standard five year period under most temporary protection schemes).

312. See id. at 305 (noting that regionally based collectivized schemes could deny legal safeguards to refugees forced to seek asylum in poorer nations).

313. See Hathaway & Neve, supra note 296, at 117 (indicating that authors propose shift away from refugee status leading to permanent residence). The authors, instead assert that an emphasis on temporary protection would enable states to treat refugee protection more expansively. Id.; see generally Kenneth Regensburg, Note, Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agenda of Western Europe and the United States, 29 CORNELL INT'L L.J. 225 (1996) (arguing in favor of equitable burden-sharing whereby states agree to pay into fund to assist poorer states to manage influx of refugees during crisis).

314. See Schuck, supra note 296, at 297 (contending that equitable burden-sharing concept, although noble, is not new).

315. See Regensburg, supra note 313, at 258 (arguing that properly administered burden-sharing program would further human rights goals); Asha Hans & Astri Suhrke, Responsibility Sharing, in, RECONVIVING INTERNATIONAL REFUGEE LAW 83, 83-4 (James C.
1. Background

Scholars note that the origin of a collectivized theory is two-fold: many governments believe that a resolute commitment to refugee protection is akin to a relinquishment of their ability as sovereign states to control their borders; and second, neither the admission of refugees, nor the financial costs associated with caring for them is justly allocated among nations. A collectivized approach rests on the theory that refugee law is no longer embraced by many states because current procedures cannot balance the rights of those fleeing _en masse_ with the obligations of the states forced to receive them. With a collectivized model, scholars argue that host states can focus on preserving the human rights of refugees without revamping their immigration policy each time there is a mass migration of people due to a humanitarian crisis. Additionally, scholars argue that the current state of refugee law and the preference for asylum protection imposes an unsupportable burden on poor states. A collectivized solution to the problem of migrants _en masse_ shares the costs of caring and of managing refugees among many nations, and does not concentrate solely on the regions from whence they have fled. Proponents of a collectivized model

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316. _See_ Hathaway & Neve, _supra_ note 296, at 116 (asserting that many states view refugee protection as end run to permanent immigration). This perception conflicts with a state’s efforts to tailor admission on the basis of economic or other factors. _Id._

317. _Id._

318. _See generally_ Schuck, _supra_ note 296, at 271 (affirming importance of ensuring human rights principles). A component of a collectivized approach would ensure that refugees would actually receive the protections they are permitted in international law. _Id._

319. _See generally_ Hathaway & Neve, _supra_ note 296, at 117 (noting that this is one of reasons that refugee law has fallen out of favor internationally).

320. _See id._ at 115 (arguing that collectivized efforts to date have not been sufficient); _see also_ Schuck, _supra_ note 296, at 265 (arguing that asylum eligibility is only small portion of those who ever obtain protection, although traditional refugee law centers around asylum qualifications). Thus, asylum is no longer as relevant to refugee movements, as it once was. Schuck, _supra_.

321. _See_ Hathaway & Neve, _supra_ note 296, at 141 (discussing that currently, least developed states bear brunt of caring for most of world’s refugees).
argue that since receiving states are increasingly hostile to refugees and routinely violate their human rights, a solution emphasizing temporary protection would encourage states to be more receptive to refugees because these states will not be expected to house them permanently.\footnote{322}

The reality for many refugees, especially for those who flee in large groups as a result of intense political trauma, is that their efforts for protection in other states are met with formidable barriers preventing them from ever reaching potential asylum states.\footnote{329} The end result for many refugees is uncertainty: if they are able to cross the border then they face warehousing,\footnote{324} an increasingly prevalent fact of refugee schemes in many states.\footnote{325} An additional feature of the current refugee protection system allows states to refuse entry to asylum-seekers who have not arrived directly from the persecuting country.\footnote{326} The effect is that governments may remove them to safe-third countries, where they are not refouled, but are forced instead to seek assistance in a country not of their choice.\footnote{327}

Scholars note that the resolution to temporary protection is repatriation.\footnote{328} On the most basic level, repatriation requires the home country to undergo substantial political changes.\footnote{329} Presently, states offer permanent resettlement as an option if

\footnote{322. See Schuck, supra note 296, at 266 (asserting that temporary protection is realistic approach to refugee flows). Realistically, national self-interest dictates that industrialized states will resist attempts to protect and permanently resettle additional refugees. \textit{Id.} A plan that humanly cares for them near the country from whence they have fled, however, could draw political support by industrialized states. \textit{Id.}}

\footnote{323. See Hathaway & Neve, supra note 296, at 119 (recognizing that attempts at excluding refugees entirely are effective way for states to dodge protecting refugees).}

\footnote{324. See \textit{id.} at 130 (defining warehousing as term used to describe situations where refugees have no right to integrate in asylum state, but are not likely to be returned to their country of origin).}

\footnote{325. \textit{Id.}}

\footnote{326. \textit{Id.} at 120}

\footnote{327. See \textit{id.} at 120-21 (contending that practical effect of safe third country proceedings is that refugees are moved disproportionately from states in North and in Western Europe to states in Southern Hemisphere and Central and Eastern Europe).}

\footnote{328. See Hailbronner, supra note 146, at 81 (asserting that temporary protection should be one element in approach, involving international community that involves burden-sharing and international assistance to states affected); see Schuck, supra note 296, at 265 (arguing that TPS emphasizing repatriation generally assists asylum states refugees flee to first). These first asylum states are likely to be near the refugee's country of origin. Schuck, supra. It is less costly to move a refugee home if repatriation becomes available and the refugee is located close to his or her country of origin. \textit{Id.}}

\footnote{329. See Hathaway & Neve, supra note 296, at 131-32 (noting that repatriation and
safe repatriation is not possible within a reasonable number of years.\textsuperscript{330} Ultimately, different states handle the types of protection and the extent of the protection, differently.\textsuperscript{331} By focusing on repatriation when the eventual threat to the refugees has abated, refugees can then be sent home to resettle.\textsuperscript{332} This way a central objective is reached: refugees have a temporary sanctuary with a host that is more willing to embrace them because it is uniformly understood at the outset that their stay will not be permanent.\textsuperscript{333}

2. Burden-Sharing

A collectivized theory of refugee protection is concerned with providing temporary safety and focuses on the goal of repatriation.\textsuperscript{334} Some advocates of this system emphasize that no convention or international instrument prevents governments from banding together to forge an alliance to manage refugee crises.\textsuperscript{335} Additionally, this approach considers how the burden of caring for refugees is allocated.\textsuperscript{336}

Scholars note that the collectivized tactic entails the balancing of two elements: responsibility sharing,\textsuperscript{337} which concerns

\textsuperscript{330} See \textit{id.} at 132 (arguing that if repatriation is not tenable within reasonable number of years, then refugees should obtain permanent resettlement option).

\textsuperscript{331} See \textit{id.} (noting that Norway and Denmark allow those receiving temporary protection for several years to apply for permanent residence). France, Germany, and the United States, however, do not have a system in place whereby TPS translates into permanent status. \textit{Id.}

\textsuperscript{332} See \textit{id.} at 138 (asserting that tenable and human refugee protection system should not have irreparably to change receiving state’s demographic composition).

\textsuperscript{333} \textit{Id.} at 139.

\textsuperscript{334} See Hathaway & Neve, \textit{supra} note 296, at 130 (noting however, that repatriation may not succeed if political situation has not stabilized).

\textsuperscript{335} See \textit{id.} at 169 (arguing that sharing burdens and responsibilities of refugee management is consistent with accepted principles in international law).

\textsuperscript{336} See Hathaway & Neve, \textit{supra} note 296, at 141 (noting that states located in southern hemisphere tend to bear greater refugee burden because of their geographical location).

\textsuperscript{337} See Schuck, \textit{supra} note 296, at 257-58 (arguing that otherwise successful Vietnamese refugee protection schemes suffered when some of states in region neglected their responsibilities). In 1989, the Malaysian government refused to accept Vietnamese refugees. \textit{Id.} This act, in turn, triggered other states in the region to gain an increase of Vietnamese refugees. \textit{Id.} States in an effective burden-sharing scheme must recognize the interdependence of their actions and the ramifications if one state
safe and humane refugee protection, and burden sharing, which is the real cost of attaining this goal. Under this approach, proponents note that associations of states would agree to share in their region's refugee responsibilities. States belonging to these associations would not have to shoulder the burden of a mass influx alone, but would be part of a system that would distribute the responsibility of their care equitably. Such a system would include a binding guarantee of financial assistance from association members who do not have the physical refugee presence. Each country's contribution would be limited to what it could reasonably afford. Adherents to this type of system would still abide by the 1951 Convention's non-refoulement obligation.

Scholars recognize that the impact of refugee movements either indirectly or directly affects all states. Generally, poorer states, those bordering on areas of conflict and states in the South, are affected the most because they receive the most refugees. The fiscal burden that a state faces when it accepts waves of refugees is not typically shared with other states.

departs from an agreed plan. \textit{Id.} at 258; see also Hathaway & Neve, \textit{supra} note 296, at 144-45 (stating need for responsibility sharing of refugee protection).

338. See Hathaway & Neve, \textit{supra} note 296 (discussing that tenable burden sharing requires methods to reduce refugee burden on small group of nations by spreading it out among many); see also \textit{Id.} at 144 (stating need for scheme to distribute effectively costs among nations for refugee care).

339. See \textit{Id.} at 144-45 (referring to regional associations as interest convergence groups). This approach recognizes that not all states can provide equal assistance to the incoming refugees. \textit{Id.}

340. See \textit{Id.} at 146 (stating that under this approach states would grant temporary protection, accept refugees that cannot return home, or help fund burden-sharing system).

341. See \textit{Id.} at 144 (stating that state's level of assistance would depend on their capability).

342. \textit{Id.}

343. See \textit{Id.} at 145 (arguing that under this system industrialized states agree to fund burden-sharing along with developing states' governments who instead agree to host refugees in return for access to responsibility sharing scheme).

344. See \textit{Id.} (proposing that in addition to respecting non-refoulement principle, governments would be required to respect refugee's basic human rights).

345. See Regensburg, \textit{supra} note 313, at 261 (arguing that mass refugee flows affect state's national interests and therefore, universal questions call for universal responses).

346. See Hathaway & Neve, \textit{supra} note 296, at 141 (mentioning that poorest states have greatest legal refugee burden); Schuck, \textit{supra} note 296, at 253 (stating that only small number of nations ever assume burden of caring for bulk of refugees and those states are some of least capable, financially, to handle influx).

347. Hathaway & Neve, \textit{supra} note 296, at 141.
Also, UNHCR’s assistance is not always distributed equitably.\footnote{See \textit{id.} at 141 (noting that often funds from UNHCHR are not allocated on basis of need). According to 1993 UNHCR expenditures, more UNHCHR funds were directed to refugee protection in European states than to refugees in Africa, Asia, and the Middle East. \textit{Id.} These regions house three times more refugees than are housed in Europe. \textit{Id.} The UNHCHR contributed less funding to assist the approximately 1.7 million refugees in Burundi, Tanzania, and Zaire than it did on assisting those from the former Yugoslavia, in 1995. \textit{Id.}}

III. \textbf{A HYBRID OF THE INDIVIDUALIZED AND COLLECTIVIZED APPROACHES WILL PROVIDE A SOLUTION TO THE PROBLEM OF SERBIAN CONSCIENTIOUS OBJECTORS}

A hybrid approach to the dilemma facing Serbian conscientious objectors requires NATO states to recognize a duty owed to those who refused to participate in a war condemned by the international community as contrary to basic standards of human conduct.\footnote{See supra notes 174-80 and accompanying text (discussing recognition of conscientious objection when individual refuses to participate in military activity contrary to basic standards of human activity).} NATO states should adopt an approach that recognizes the Serbian conscientious objectors’ right to object selectively to war, that acknowledges their contribution to NATO’s effort, and that shares the burden of their care among NATO Member States. Like the individualized approach discussed in Part II(A) of this Note, this scheme promotes asylum as the ultimate solution for Serbian conscientious objectors.\footnote{See supra note 306 and accompanying text (referring to individualized approach’s emphasis on asylum).} Like the collectivized approach discussed in Part II(B), however, NATO nations should jointly share the burden of caring for the objectors.\footnote{See supra notes 313-16 and accompanying text (outlining contours of collectivized theory of refugee protection).} States such as Hungary should not, by geographical default, be compelled to shoulder this burden alone.

\textbf{A. The Hybrid Approach}

A hybrid approach evolves from the broader problem concerning the effective management of refugee flows in a post-Cold War world.\footnote{See supra notes 150-51 and accompanying text (discussing shift in attitude towards refugee following break up of Soviet bloc).} After World War II, the United Nations and the international community devised a method of assisting refu-
gees facing persecution, focusing on asylum status for those meeting the 1951 Convention refugee definition.\(^{353}\) The influx of refugees to Western Europe and elsewhere has increased since the Soviet Union's disintegration.\(^{354}\) Additionally, because the political benefit to receiving states is not as great as it once was during the Cold War era, many nations are less inclined to accept refugees.

The Serbian conscientious objector dilemma is an illustration of a problem not yet addressed by the international community. The two principle models for managing refugee crises are not capable of resolving this issue. The individualized approach fails to address adequately the burden large numbers of refugees place on receiving states when forced from their countries of origin because of generalized violence or civil war. The collectivized approach fails to resolve the plight of those who have fled generalized violence or civil war due to political persecution. Temporary protection is not a solution if these refugees will be persecuted upon their return. A hybrid approach, emphasizing burden sharing and asylum, recognizes that individualized persecution may stem from civil conflict. A burden sharing scheme would redistribute the duty of caring for refugees among several states.\(^{355}\) Arguably, more states would be willing to offer assistance if they were required to care for fewer people. In addition, a hybrid approach recognizes that such care may require offering asylum, not temporary protection, to these refugees. Conscientious objectors, for example, may face criminal persecution long after the conflict precipitating their departure has ended.

B. Serbian Conscientious Objectors Were Justified in Fleeing Serbia During Operation Allied Force

Serbian conscientious objectors face a difficult and uncertain future.\(^{356}\) States, including Hungary, although bound by

\(^{353}\) See supra notes 61-83 and accompanying text (discussing evolution of classic refugee definition following massive population displacements caused by World War II).

\(^{354}\) See supra notes 151 and accompanying text (noting increase in refugees since end of Cold War).

\(^{355}\) See supra notes 337-44 and accompanying text (discussing elements of burden sharing scheme that would distribute refugee caring responsibilities among many states).

\(^{356}\) See supra notes 22-27 and accompanying text (illustrating Serbian conscientious objectors' plight).
the principle of non-refoulement, have not offered Serbian objectors legal permanent residence or asylum. This situation occurs despite the fact that they are living within their borders, and face severe criminal penalties if they return home.\textsuperscript{357}

Objection to military service is based on political opinion. A well-founded fear of persecution due to one’s political opinion is one of the five recognized categories an asylum seeker may claim in order to qualify as a refugee under international law, and under the domestic laws of many states.\textsuperscript{358} The U.N. Handbook discusses the notion of selective conscientious objection to military service. Although a sovereign state may legally require military service, the U.N. Handbook recognizes that an objector may qualify as a refugee if he or she objects to a military action that the international community deems contrary to basic standards of human activity.\textsuperscript{359}

Given that Serbian wartime atrocities are well documented,\textsuperscript{360} Serbians, who refused to participate in this military infliction of horror on civilians, fall within a recognized exception to the rule that governments can require military service from their citizens. Additionally, there is credible evidence to suggest that during Operation Allied Force, NATO distributed leaflets and propaganda encouraging Serbians to desert the military or to resist the draft entirely.\textsuperscript{361} The campaign’s purpose was to expressly encourage military draft evasion and desertion. Arguably, many Serbians heeded this call and fled.

A skeptic of selective conscientious objection might argue that during civil war, or generalized violence, any draft age male outside his country of origin would automatically qualify as a 1951 Convention refugee. Consequently, this would result in a sizeable exception to the classic Convention refugee definition whereby nearly half a population would qualify for refugee sta-

\textsuperscript{357} See supra note 272 and accompanying text (describing criminal penalties for resisting Serbian draft).

\textsuperscript{358} See supra notes 82-83 and accompanying text (defining refugee according to 1951 Convention and 1967 Protocol).

\textsuperscript{359} See supra note 179 and accompanying text (mentioning U.N. Handbook’s recognition of selective objection).

\textsuperscript{360} See supra notes 237-46 and accompanying text (examining Serbian perpetrated war crimes and human rights abuses).

\textsuperscript{361} See supra notes 271-74 and accompanying text (describing extent of NATO’s campaign to encourage draft evasion).
This position is problematic for several reasons. Serbian men risked their lives by refusing military service in a war they opposed. Their actions conferred a benefit on NATO intervention, i.e., fewer soldiers arguably assisted in weakening Milosevic's military strength. Therefore, these individuals, albeit indirectly, assisted in NATO's effort. Secondly, considering the Serbian military's history of human rights abuses, individuals refusing to participate in such a military regime should be commended and protected by the international community.

Most importantly, in circumstances where the international community has intervened militarily in a conflict concerning human rights, an exception allowing refugee protection for conscientious objectors would be reasonable and limited. Technically, objectors who are outside their country of origin, owing to a well-founded fear of persecution based on their political opinion—in this case, refusal to engage in military activity long condemned by many states and the subject of international military response—qualify as 1951 Convention refugees. Thus, Serbian conscientious objectors presently housed in Hungarian refugee camps qualify as Convention refugees. Nevertheless, for a variety of practical and political reasons, this group has not been afforded a viable immigration option.

C. NATO States Should Assume the Burden of Caring for Serbian Conscientious Objectors

States are reluctant to assume a permanent burden of caring for Serbian conscientious objectors, particularly states neighboring the war-torn former Yugoslavia, partly because they have been inundated with exiles fleeing this region over the past decade. Unlike many others who fled to escape generalized violence, these objectors face near certain criminal persecution based on their political beliefs if they return home. The issue

362. See supra notes 18 and accompanying text (stating that males age 18 to 65 were draft eligible during Operation Allied Force).
363. See supra notes 5-9, 18-20 and accompanying text (recounting Serbian objectors' encounters with police and their reasons for fleeing Serbia).
364. See supra notes 279-84 and accompanying text (noting reluctance of states to accept additional refugees from Balkan region).
365. See supra notes 97, 149 and accompanying text (illustrating problem of refugee flows caused by Balkan civil wars).
becomes one of fair apportionment of the burden of care, so that states effectively may offer the objectors a tenable solution.

NATO states should bear some responsibility in caring for and protecting Serbian objectors who defected from the military during the war. A scheme that accepts the individualized approach’s emphasis on asylum, while shifting the burden of refugee care away from the bordering states to all NATO states, is a more humane and equitable solution. A plan to allocate the burden of care among NATO states also could be in the form of financial assistance with equitable distribution of funds in proportion to the number of refugees each state receives. This scheme would benefit states, such as Hungary, who are currently caring for many objectors. Alternatively, other states could accept some of the objectors.366

CONCLUSION

Sadly, ethnic cleansing campaigns are not exclusive to the Balkan wars. If past is prologue, then such atrocities are likely to occur again in another part of the world. A policy of granting asylum to a defector who refuses to engage in genocide is just; it would also help drain an aggressor state’s military strength. During Operation Allied Force, Serbian conscientious objectors indirectly assisted NATO’s efforts by heeding NATO’s call to resist the draft or to desert. If they return home now, then they will be criminally prosecuted. Enduring refugee status, or refugee-like status, is untenable. Therefore NATO states should recognize their obligation to share in the burden of care, insuring optimal protection for the objectors.

Unlike the burden-sharing scheme set out in Part II(B) of this Note, the abiding solution should be asylum, not temporary protection and eventual repatriation. Draft evasion and desertion are criminal offenses, leaving conscientious objectors little choice but to flee Serbia. Perhaps the political situation in Serbia will change, and objectors will no longer face criminal prosecution for their actions. Judging from past refugee crises lasting more than five years, and the present political situation, it seems unlikely that this will occur. Requiring objectors to remain in a situation of stateless uncertainty, hoping for a pardon by an irra-

366. See supra notes 258-66 and accompanying text (noting extent of refugee crisis during bombing and discussing burden-sharing scheme employed to assist refugees).
tional head of state, or expecting a dramatic change in Serbia's political climate, is neither practical, nor humane. Therefore, a hybrid plan, emphasizing asylum, while fairly apportioning the burden of care, would recognize the significant contributions of Milan, Goran, and the approximately 15,000 other Serbian conscientious objectors to the NATO effort.