

ARTICLE

REFORMING THE APPROACH TO POLITICAL OPINION IN THE REFUGEES CONVENTION

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ABSTRACT

The number of displaced persons in the world is at an unprecedented high. There are more than seventy million people in the world that are currently searching for a place to live. To put this into context, if these people were all in the one country it would be the nineteenth biggest country in the world. There is no tenable solution to the crisis. A large portion of these displaced people are refugees. The legal definition of a refugee is relatively narrow. This presents an obstacle to many people who are in need of protection from being relocated to any of the countries that are signatories to the Refugee Convention. The United States is in fact one of the more than 140 countries that have signed this convention and it receives more refugee applications than any other nation on earth. The key limiting aspect of the Convention is that for a person to qualify for protection, they must be in fear of persecution for one of five very specific reasons. These reasons are race, ethnicity, particular social group, religion and political opinion. If these grounds are interpreted narrowly it necessarily means that countries, even those that are signatories to the Convention, can legitimately refuse to provide asylum to people in need of protection. Thus, the manner in which the grounds are interpreted has a profound impact on the ability of displaced people to emigrate to other nations. In this Article, the Author examines the meaning of one of these refugee grounds, namely political opinion. The ground has been interpreted unduly narrowly. The Author examines the history of the Refugee Convention and the most persuasive jurisprudential meaning of political opinion and conclude that a broader sphere of operation should be accorded to this concept. This will provide the

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pathway for a much greater number of asylum seekers being granted protection in countries such as the United States.

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I. INTRODUCTION

The number of displaced people in the world currently is at a record high. Many parts of the world are experiencing an unprecedented and growing crisis regarding the amount of people that have been forcibly displaced from their homeland. There is no coherent or tenable solution to the problem.

In April 2019, the United Nations High Commissioner for Refugees, Filippo Grandi, addressed the current unabating displacement crisis in a brief to the United Nations Security Council. During the briefing, the High Commissioner expressed his concern at the unprecedented toxic stigmatization that is being directed to refugees and acknowledged that current responses to the refugee crisis are becoming increasingly inadequate. However, according to the High Commissioner, it is “wrong” to view the crisis as one which is unmanageable because it can be addressed with the right political will and improved responses.¹ He went on to highlight that the main driver of refugee displacement is conflict, and so “if conflicts were prevented or resolved, most refugee flows would disappear,” appealing to members of the Security Council to help address the root causes of conflicts and not its symptoms.²

Preventing or resolving international conflicts is an ideal aspiration, however, it is not pragmatically tenable given the extent of geo-political fractures in the world. Accordingly, less ambitious solutions are necessary to ameliorate the problem of displaced people. This Article is about providing one such solution.

The means by which more displaced people have been accommodated in other countries is the Refugee Convention. This instrument commenced in 1951, and currently there are 145 countries that are signatories to it.³ It does not present as being a total solution to the displaced person crisis, however, given the overwhelming nature of

1. *UN's Grandi Slams 'Toxic Language of Politics' Aimed at Refugees, Migrants, UN NEWS* (Apr. 9, 2019), <https://news.un.org/en/story/2019/04/1036391> [<https://perma.cc/H664-UVLB>].

2. U.N. SCOR, 74th Sess., 8504th mtg., U.N. Doc. S/PV.8504 (Apr. 9, 2019), available at <https://www.unhcr.org/en-au/admin/hcspeeches/5cf4d2b37/briefing-united-nations-security-council.html> [<https://perma.cc/XNM3-U2C3>].

3. *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol* U.N. HIGH COMMISSIONER FOR REFUGEES [hereinafter UNHCR] 1, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/5YQ5-RAJ7>]. Note that there are 146 state parties to the 1967 protocol. *See id.*

the crisis and the lack of other plausible solutions, the operation and scope of the Convention is now more important than ever in providing a pathway for people to settle in other countries. This is especially true in relation to the United States given that it receives more refugee claims than any other country, approximately 250,000 per year in recent years.⁴ Additionally, there are over 900,000 people in the United States who are awaiting the processing of their claims.⁵

In this Article, the Author considers one of the most important parts of the Convention. In order for a person to qualify for refugee status, it is essential that they are at risk of persecution for one of five distinct reasons being race, ethnicity, particular social group, religion, and political opinion. The focus of this Article is on one of the key, and most contentious and uncertain refugee grounds, the political opinion ground. There is no established or settled meaning of the term political opinion. In this Article, the Author examines the history, jurisprudence, and the current approach to this concept. The Author argues that the current approach is unduly restrictive and not consistent with the overarching objective and rationale for the Convention. The Author proposes a broader and more jurisprudentially sound definition of political opinion.

The adoption of this Article's recommendation will provide a pathway for a significant increase in the number of displaced people that would come within the scope of the Convention. This would not provide a holistic or total solution to the displaced persons crisis. However, it would significantly enhance the level of flourishing of large numbers of people who are currently destitute as a result of being displaced from their homeland. The imperative to now rethink the definition of a refugee is arguably stronger than at any time in recent US history, given the considerable restrictions that have recently been put in place in acknowledging refugee claims and granting asylum in the United States.

During the 2016 presidential campaign, President Donald Trump called for "'a total and complete shutdown' of Muslims entering the

4. *Global Trends: Forced Displacement in 2018*, UNHCR (2019), <https://www.unhcr.org/globaltrends2018/> [<https://perma.cc/N9HM-S2K3>].

5. Transactional Records Access Clearinghouse [TRAC], *Immigration Court Backlog Tool*, TRAC IMMIGRATION (Sept. 2019), https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/Z2JS-5JXW>].

United States”⁶ and since the beginning of his presidency, the refugee admissions process has continued to be a key priority. In fact, in the first week of his presidency, President Trump controversially closed American borders to all refugees by issuing an executive order that froze the United States refugee admissions program for 120 days and banned Syrian refugees indefinitely, who were labeled as “detrimental to the interests of the United States.”⁷ It also included a blanket ninety-day travel ban for foreign nationals travelling from several Muslim majority countries.⁸ This ban was eventually abandoned after a series of Federal Courts blocked it.⁹ In its place, the Trump Administration issued a somewhat narrower revised order in March 2017, which reinstated the 120 day suspension of all refugees admissions but replaced the indefinite bar on Syrian refugees with a 120 day freeze.¹⁰ This too was struck down by a Federal Judge before its implementation,¹¹ however the Supreme Court allowed the order in part, including the 120 refugee admission suspension, which took effect in late June 2017.¹² Refugee admissions resumed in October 2017, however citizens from eleven “high-risk” countries continued to be barred from the United States for a further ninety-day review.¹³

6. Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/> [https://perma.cc/8AEY-GD69].

7. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

8. *Id.* at 8978.

9. Adam Liptak, *Court Refuses to Reinstate Travel Ban, Dealing Trump Another Legal Loss*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/politics/appeals-court-trump-travel-ban.html> [https://perma.cc/46LH-ZQAP].

10. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

11. Alexander Burns, *2 Federal Judges Rule Against Trump’s Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html> [https://perma.cc/6WUM-Y29M].

12. Robert Barnes & Matt Zapposky, *Supreme Court Allows Limited Version of Trump’s Travel Ban to Take Effect and Will Consider Case in Full*, WASH. POST (June 26, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-allows-limited-version-of-trumps-travel-ban-to-take-effect-will-consider-case-in-fall/2017/06/26/97afa314-573e-11e7-b38e-35fd8e0c288f_story.html [https://perma.cc/J6KF-YMHZ].

13. Peter Baker & Adam Liptak, *U.S. Resumes Taking in Refugees, but 11 Countries Face More Review*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/politics/trump-lifts-refugee-suspension.html> [https://perma.cc/38AS-T5F2]. For resumption of refugee admissions for the affected countries, see Yeganeh Torbati, *U.S. to Resume Refugee Admissions From 11 ‘High-risk’ Countries*, REUTERS (Jan. 30, 2018), <https://www.reuters.com/article/us-usa-immigration-refugees/u-s-to>

Following the expiration of the March 2017 Executive Order, President Trump introduced the third iteration of the travel ban in September 2017, taking effect the following month.¹⁴ After a number of challenges in the courts, in a 5-4 decision by the Supreme Court, the new order was allowed to be implemented in full.¹⁵ This order targets citizens from seven countries to varying degrees; of which five are Muslim-majority. It is the citizens of these five countries that are effectively banned from travelling to the United States.¹⁶ Unlike the earlier iterations, this ban is not temporary.¹⁷ Thus, reshaping the US refugee admission program has been a key focus for the Trump Administration. Most notably, however, the annual refugee cap is the lowest it has ever been since the creation of the modern Refugee Program in 1980 which established the ceiling system.¹⁸

The US Government is responsible for setting a cap for the number of people fleeing persecution in their home countries allowed to enter the United States. In the final year of the Obama Administration, the cap was set at 110,000 (this, however, was subsequently reduced to 50,000 by President Donald Trump).¹⁹ In 2019, the maximum number of refugees allowed into the United States is 30,000.²⁰ However, it is important to emphasize that these ceilings are simply targets. For example, in the 2018 fiscal year (FY), the refugee ceiling was set at 45,000, but only 22,491 refugees were admitted.²¹ This is currently the lowest record number of admissions since the system was established in 1980, and is lower than the 27,131

resume-refugee-admissions-from-11-high-risk-countries-idUSKBN1FI27F
[<https://perma.cc/DE3Q-BE3W>].

14. Proclamation No. 9645, *supra* note 10. The seven countries targeted by the travel ban are Iran, Syria, Somalia, Yemen, Libya, North Korea, and Venezuela. *Id.* at 45163. The practical effect on North Korean and Venezuelan citizens is limited. *Id.*

15. Adam Liptak & Michael D. Shear, *Trump's Travel Ban Is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html> [<https://perma.cc/8NTS-M7R4>].

16. Proclamation No. 9645, *supra* note 10.

17. *Id.*

18. ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY (2018), <https://fas.org/sgp/crs/misc/RL31269.pdf> [<https://perma.cc/LH3U-CK48>].

19. *Id.* at 3.

20. *Id.* at 5.

21. Nayla Rush, *Refugee Resettlement Roundup for FY 2019*, CTR. FOR IMMIGR. STUD. (Oct. 4, 2019), <https://cis.org/Rush/Refugee-Resettlement-Roundup-FY-2019> [<https://perma.cc/XP65-HXRA>].

admissions in FY 2002, following the events of 9/11.²² As of May 31, the United States had admitted only 18,051 refugees.²³ Not only has the Trump Administration lowered the number of people allowed in, but it has also sought to heavily exclude certain refugees from seeking asylum in the United States. For example, of the 22,491 refugees admitted in FY 2018, 16,018 were Christians and 3,495 were Muslims—that is, seventy-one percent and sixteen percent respectively.²⁴

To a lesser extent, the decline in refugee admission numbers is also due to the tougher vetting procedures and security screening measures of refugee applicants.²⁵ The refugee vetting process in the United States was already considered to be among the most extensive, with the typical application process taking two years to complete.²⁶ Thus, these additional hurdles not only place an additional barrier on those seeking safety, but also have led to unduly long processing times to the already overwhelmed refugee processing system. Thus, while the refugee cap has been reduced in recent years, processing delays have also contributed to these caps not being met.

In the next part of the Article, the Author provides an overview of the current displaced person crisis. This is followed in Part III by an examination of the history and background to the Refugee Convention. In Part IV, the Author discusses the current approach to the meaning of political opinion and argues that it is jurisprudentially and normatively flawed. Part V of the Article advances a more coherent and normatively sound definition of political opinion. In the concluding remarks, the

22. BRUNO, *supra* note 18, at 3.

23. *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL 3 (June 18, 2019), <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy> [<https://perma.cc/6LN6-YCMT>].

24. Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RES. CTR. 9 (June 17, 2019), <https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/> [<https://perma.cc/CRJ3-YBEP>].

25. Press Release, U.S. Dep't Homeland Sec., *Improved Security Procedures for Refugees Entering the United States* (Oct. 24, 2017), <https://www.dhs.gov/news/2017/10/24/improved-security-procedures-refugees-entering-united-states> [<https://perma.cc/KU2L-8XTQ>].

26. U.S. CITIZENSHIP & IMMIGR. SERVICES, *Refugee Security Screening Fact Sheet 4–7* (Aug. 28, 2018), https://www.uscis.gov/sites/default/files/USCIS/Refugee%20Asylum%20and%20Int%271%20Ops/Refugee_Screening_and_Vetting_Fact_Sheet.pdf [<https://perma.cc/C8M7-DG3H>].

Author summarizes reform proposals and impact they are likely to have in relation to settling a high number of displaced people.

II. *THE CURRENT DISPLACED PERSON CRISIS*

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

The mass displacement of people who are forced to flee their homes due to conflict or violence has long been documented in human history. The magnitude of this phenomenon is now at the highest recorded level in recent history. The global population of forcibly displaced people today is larger than the population of Thailand. In fact, if the total global population of forcibly displaced people today were to be combined to form their own country, they would be the nineteenth largest country in the world.²⁷

The most illuminating figures are set out in the most recent annual study by UN refugee agency, the United Nations High Commissioner for Refugees (“UNHCR”). According to the *UNHCR Global Trends Report* (“UNHCR Report”),²⁸ in 2018 there were 70.8 million people who had been forced to leave their homes and seek safety elsewhere.²⁹ This is the eighth consecutive year that the world’s forcibly displaced population has increased and is 2.3 million higher than the previous year.³⁰ This is the highest number of displaced persons recorded since the agency began collecting data on displaced persons in 1951.³¹

The rate at which the displaced population is growing is staggering. The increase in the population of displaced people is outstripping the growth of the world’s total population. In 2018, one in every 108 people worldwide was forcibly displaced.³² This is compared to one in every 160 people a decade ago.³³

The marked rate of displacement is further highlighted by the increase in displaced persons over the most recent seven-year period, as recorded by UNHCR. In the six-year period from 2012 to 2018, the displaced population increased by 25.6 million people—from 45.2

27. UNHCR, *supra* note 3.

28. *Id.*

29. *Id.* at 4.

30. It was 68.5 million in 2017. *Id.* at 2 and 5.

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 4.

million to almost 71 million.³⁴ In approaching the issue from a somewhat wider lens, the extent of the crisis is further illuminated. In 1996, there were 37.3 million displaced people in the world. This is an increase of 33.5 million people in just over twenty years.³⁵

As noted by the UNHCR Report, the global population of displaced persons is comprised of different cohorts. It consists of refugees, who account for almost 26 million; internally displaced persons (“IDPs”), who comprise over 41 million people; and asylum seekers, who account for about 3.5 million of the total number of displaced persons.³⁶ Stateless persons are not accounted for in this global total of displaced persons. These are individuals who are not considered a citizen of any country and thus are denied basic civil and social rights such as access to education, healthcare, and freedom of movement. In 2018, UNHCR conservatively estimated that there were at least ten million stateless persons worldwide.³⁷

The Syrian civil war has resulted in the most profound refugee and displaced persons problem in the world since World War II (“WWII”). It is the single largest driver of displacement. The UNHCR Report states that Syria recorded the largest population of displaced persons for the fifth consecutive year with a total of thirteen million displaced Syrians.³⁸ This figure is comprised of 6.7 million refugees, 6.2 million internally displaced within the borders of Syria (of which 2.5 million are children), and 140,000 asylum seekers.³⁹ Other countries that registered large displaced person populations included Colombia (8 million), Democratic Republic of the Congo (DRC) (5.4 million), Afghanistan (5.1 million), South Sudan (4.2 million), and Somalia (3.7 million).⁴⁰

As noted above, refugees account for a significant proportion of the global displaced population—there are currently more refugees worldwide than at any time since WWII. The number of refugees under UNHCR’s mandate increased for the eighth consecutive year—from

34. *Id.*

35. *Id.*

36. *Id.* at 2.

37. *Persons of Concern to UNHCR*, UNHCR, <https://www.unhcr.org/ph/persons-concern-unhcr> [<https://perma.cc/HR54-VDF5>] (last visited Jan. 22, 2020).

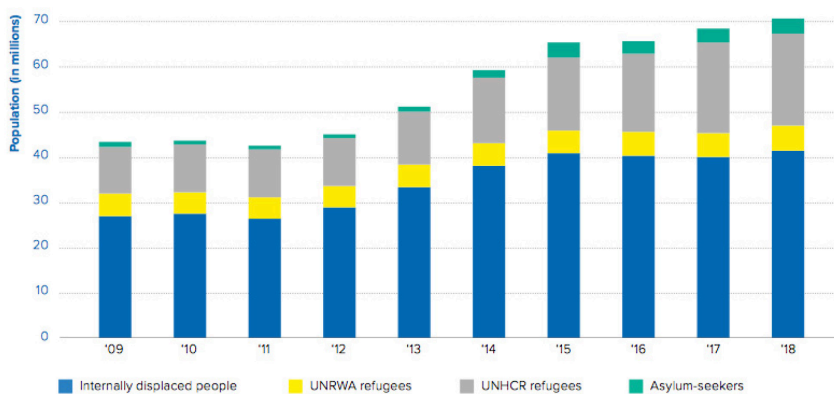
38. UNHCR, *supra* note 3, at 6 and 14.

39. *Id.* at 6.

40. *Id.* at 6–7.

10.5 million in 2010,⁴¹ to a record high of 20.4 million in 2018.⁴² There were an additional 5.5 million Palestinian refugees registered under the United Nations Relief and Works Agency's mandate.⁴³ When combined, the total number of refugees in 2018 stood at twenty-six million. The significance of the refugee crisis is further underlined by the fact that half of the world's refugees continue to be children.⁴⁴ The below chart sets out the rapidly growth in world's displaced population in recent years.⁴⁵

Figure 1 | **Global forced displacement** | 2009-2018



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

The most recent calendar year for which displaced persons figures have been reported, demonstrates the persistence and magnitude of this unprecedented displacement crisis and further underscores the pressing need for a tenable and effective solution. According to UNHCR data, during the course of 2018 alone, there were 13.6 million people who were newly displaced; of this number, 10.8 million were internally displaced inside their own countries, and 2.8 million had sought safety

41. *Global Trends 2010*, UNHCR 3 (2011), <https://www.unhcr.org/4dfa11499.pdf> [<https://perma.cc/QA87-8FQV>].

42. UNHCR, *supra* note 3, at 13.

43. *Id.*

44. *Id.* at 61.

45. *Id.*

abroad (as refugees or asylum seekers).⁴⁶ To further illuminate the marked rate at which the number of displaced persons is increasing, 13.6 million people worldwide were newly displaced worldwide in 2018—that is 37,000 every day.⁴⁷

During 2018, there were also 1.1 million people registered as new refugees.⁴⁸ These are persons who sought protection outside their country of origin and have either been recognized as a refugee on a prima facie basis or granted temporary protection following a refugee status determination. Over half of the newly recognized refugees were Syrians (520,000), of which almost 400,000 were located in Turkey.⁴⁹ In addition, there were 1.7 million new asylum claims submitted in 2018.⁵⁰

Notably, the United States was the world's largest recipient of individual asylum applications for the second consecutive year—with 254,300 applications submitted.⁵¹ A high number of applications were also made to Germany and Turkey—161,900 and 83,800 respectively.⁵² There are a number of factors which have contributed significantly to the high number of new displacements. This includes a rise in general violence, unresolved governance challenges, and protracted armed conflicts, which have caused large scale deterioration in several countries.⁵³

As noted above, the Syrian civil war had a particularly pronounced impact in the global displacement figures since it began in 2011. In 2018 alone, there were almost 900,000 newly displaced Syrians; of this total, 630,000 Syrians fled the country to find safety and the remainder were internally displaced within the country.⁵⁴ However, it was Ethiopia who accounted for the largest number of newly displaced persons in the year. There were almost 1.6 million

46. *Id.* at 20.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 41.

51. *Id.* at 42.

52. *Id.* at 3.

53. See generally *id.*; *Global Report on Internal Displacement* (2018), <http://www.internal-displacement.org/global-report/grid2018/downloads/2018-GRID.pdf> [<https://perma.cc/TBU7-Z4AT>].

54. UNHCR, *supra* note 3.

newly displaced Ethiopians in 2018 alone—ninety-eight percent were displaced within the country.⁵⁵

The increase in violence and human rights abuses which has been triggered by the deteriorating political and economic conditions in Venezuela has also contributed significantly to the growth in displaced people in recent years. It is estimated that there was an average of 5,000 people leaving Venezuela every day in 2018.⁵⁶ Recent data estimates that by mid-2019 the number of Venezuelans leaving the country would have reached four million.⁵⁷ Alarming, one million of these displacements occurred in the seven months since November 2018.⁵⁸ It is estimated that the total figure could reach eight million by the end of 2020.⁵⁹ This mass exodus of Venezuelans is one of the biggest displacement crises in recent history—comparable to those experienced by war-ravaged Syria.

C. Key Refugee and Displaced Person Producing Countries

The top ten refugee producing countries accounted for a staggering eighty-two percent of the world's refugees registered under UNHCR's mandate, which has been a consistent trend over recent years.⁶⁰ That is, 16.6 million of the global total of 20.4 million refugees are under UNHCR's responsibility.⁶¹ Even more remarkably, about

55. *Id.* at 6.

56. Siegfried Modola, *Venezuelan Outflow Continues Unabated, Stands Now at 3.4 Million*, UNHCR 1 (Feb. 25, 2019), <https://www.unhcr.org/ph/15238-venezuelan-outflow-continues-unabated-stands-now-at-3-4-million.html> [<https://perma.cc/SPF2-YGKQ>]; Press Release, International Organization for Migration [IOM] *Venezuelan Outflow Continues Unabated, Population Abroad Now Stands at 3.4 Million*, at 1 (Feb. 22, 2019), <https://www.iom.int/news/venezuelan-outflow-continues-unabated-population-abroad-now-stands-34-million> [<https://perma.cc/MVS7-5NUC>].

57. Press Release, IOM, *Refugees and Migrants from Venezuela Top 4 Million: UNHCR and IOM*, at 1 (Jun. 7, 2019), https://www.iom.int/news/refugees-and-migrants-venezuela-top-four-million-iom-and-unhcr?utm_source=IOM+External+Mailing+List&utm_campaign=e34c71ed9b-EMAIL_CAMPAIGN_2019_06_06_07_16&utm_medium=email&utm_term=0_9968056566-e34c71ed9b-43648581 [<https://perma.cc/4F9N-2GLY>].

58. *Id.*

59. *OAS Working Group to Address the Regional Crisis Caused by Venezuela's Migrant and Refugee Flows*, ORG. FOR AM. STATES 19 (June 2019), <http://www.oas.org/documents/eng/press/OAS-Report-to-Address-the-regional-crisis-caused-by-Venezuelas-migrant.pdf> [<https://perma.cc/EL36-LDZA>].

60. UNHCR, *supra* note 3, at 18.

61. *Id.*

two-thirds of these refugees originate from just five countries—Syria, Afghanistan, South Sudan, Myanmar, and Somalia.⁶²

Syria has continued to produce the world's highest number of refugees, for the fifth consecutive year. As noted above, there were 6.7 million Syrian refugees reported in 2018.⁶³ This is unprecedented in recent history for a single country and is a significant increase since 2014, when the total displaced population was estimated to be 7.6 million, of which about 3.9 million were refugees.⁶⁴ This is the world's biggest refugee crisis.

The second largest group of refugees were Afghans. In fact, Afghanistan was the largest refugee producing country for more than thirty years, until 2014 when it was surpassed by Syria.⁶⁵ In 2018, it was estimated that some 2.7 million Afghans had fled the country in search of international protection.⁶⁶ As in previous years, Pakistan shouldered the majority of Afghan refugees (over 1.4 million) followed by the Islamic Republic of Iran (951,100) in 2018—combined this equates to almost ninety percent of the total Afghan refugee population.⁶⁷

The on-going civil conflict in South Sudan produced the third largest refugee group under UNHCR's mandate, with 2.3 million refugees worldwide in 2018.⁶⁸ The remaining top ten-refugee-producing countries in 2018 were Myanmar (1.1 million), Somalia (900,000), Sudan (724,800), DRC (720,300), Central African Republic (590,900), Eritrea (507,300), and Burundi (387,900).⁶⁹

In addition to these refugee numbers, there were 2.1 million applications for refugee status submitted by asylum seekers across 158 countries in 2018.⁷⁰ An asylum seeker is an individual who has sought asylum protection outside of their country of origin however their application has yet to be assessed. Further, a considerable proportion

62. *Id.* at 3.

63. *Id.*

64. *Id.*

65. *Global Trends: Forced Displacement in 2014*, UNHCR (2015), <https://www.unhcr.org/en-au/statistics/country/556725e69/unhcr-global-trends-2014.html> [<https://perma.cc/44RN-DGJM>].

66. UNHCR, *supra* note 3, at 3.

67. *Id.* at 14.

68. *Id.* at 3.

69. *Id.* at 15.

70. *Id.* at 41.

of these applications, 1.7 million, were new applicants.⁷¹ Venezuelans lodged the highest number of asylum claims in 2018 (341,800) with the majority made in Peru, Brazil, and the United States.⁷² Afghans and Syrians lodged the second and third highest number of asylum claims in 2018, each having made just over 100,000 claims.⁷³

To further complete the picture regarding countries which have produced the highest numbers of displaced persons, just ten countries account for seventy-six percent of the world's total number of IDP's.⁷⁴ As noted above, IDP's constitute the largest cohort of displaced people in 2018, totaling 41 million.⁷⁵ Colombia registered the highest number of IDP's due to conflict or violence within the country—7.8 million.⁷⁶ Other countries that were reported as having high levels of internal displacement included Somalia (2.6 million), Ethiopia (2.6 million) and, Yemen (2.1 million).⁷⁷

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

The data shows that there is an unrelenting trend of poor countries bearing a disproportionate burden of the refugee intake. The incidence of displaced and refugee persons is heavily concentrated within just a few regions. Nine of the top ten refugee hosting countries in 2018 were developing countries, and combined hosted eighty-four percent of the world's refugees.⁷⁸

More broadly, the data shows that the world's least developed countries (this includes South Sudan, DRC, and Ethiopia—who each are among the top ten refugee-hosting countries) host one-third of the global refugee total. In other terms, 6.7 million refugees under the UNHCR's mandate are located in the world's most impoverished countries with unstable political and rule of law institutions.⁷⁹ The world's least developed countries account for only 1.25% of global

71. *Id.*

72. *Id.* at 44-45.

73. *Id.* at 45.

74. *Id.* at 35-37.

75. *Id.* at 35.

76. *Id.*

77. *Id.* at 37.

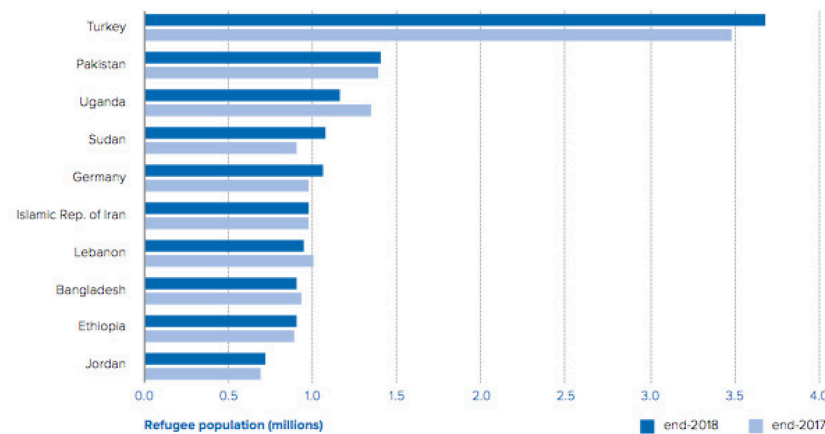
78. *Id.* at 18.

79. *Id.* at 17-18.

GDP.⁸⁰ This is in stark contrast to the 16% of refugees that are hosted by high income, developed countries.⁸¹

Looking at it from another measure, low to middle income countries host an average of 5.8 refugees per 1000 of population. This is in stark comparison to the average of 2.7 per 1000 of population in high-income countries.⁸² The below table sets out the ten countries that hosted the largest refugee number of refugees in 2018.⁸³

Figure 6 | Major host countries of refugees | end-2017 to end-2018



Turkey was the country most affected by the refugee burden for the fifth consecutive year—hosting 3.7 million refugees in 2018.⁸⁴ This is a significant increase from 1.6 million refugees the country hosted in 2014.⁸⁵ The refugee population in Turkey is comprised almost exclusively of Syrians (ninety-eight percent—this is the largest Syrian refugee intake by any single country. Over the course of 2018 alone,

80. *Id.*

81. *Id.* at 2.

82. *Worldwide Displacement Tops 70 Million, UN Refugee Chief Urges Greater Solidarity in Response*, UNHCR 3 (June 19, 2019), <https://www.unhcr.org/en-au/news/press/2019/6/5d03b22b4/worldwide-displacement-tops-70-million-un-refugee-chief-urges-greater-solidarity.html> [<https://perma.cc/H6L6-4J8K>].

83. UNHCR, *supra* note 3, at 17.

84. *Id.* at 3.

85. *Global Trends: Forced Displacement in 2015*, UNHCR 15 (2016), <https://www.unhcr.org/statistics/unherstats/576408cd7/unhcr-global-trends-2015.html> [<https://perma.cc/V2NR-2FBC>].

Turkey took in about 500,000 new refugees—over 100,000 were newborns.⁸⁶ Pakistan was the second largest host of refugees, with a refugee population of 1.4 million, which is almost entirely made up of Afghans.⁸⁷ The third largest country of asylum was Uganda (1,165,000) as a result of the conflict in neighboring South Sudan.⁸⁸ According to UNHCR, other countries that provided safety for a high number of refugees in 2018 included Sudan, Germany, Islamic Republic of Iran, Lebanon, Bangladesh, Ethiopia, and Jordan.⁸⁹ Thus, it is clear from this data that responsibility for the world's refugee crisis is overwhelmingly carried by countries with the least resources to absorb and accommodate the needs of those seeking refuge.

The contrast between refugees and asylum seekers is not the source countries of these respective groups, but rather the destinations where they are seeking to be located. They are invariably first world wealthy countries with the exception of Peru, who experienced a drastic increase in asylum applications as a result of the crisis in Venezuela. Peru received the second largest number of claims for asylum in 2018 with 192,500 claims lodged.⁹⁰ This is compared to 37,800 in 2017 and 4,400 in 2016.⁹¹

The largest recipient of new individual asylum claims in 2018 was the United States, for the second consecutive year. There were approximately 250,000 claims lodged.⁹² As with previous years, applicants from Central America and Mexico make up about half of all asylum applications to the United States, specifically El Salvador, Guatemala and Venezuela⁹³--areas that are considered as one of the most violent in the world largely due to the on-going increase in gang-

86. UNHCR, *supra* note 3, at 18.

87. *Id.* at 3, 14.

88. *Id.* at 3, 8.

89. *Id.* at 70-73.

90. *Id.* at 3.

91. *Id.* at 42.

92. *Id.* at 3.

93. *Id.* at 8. See also Nora Sturm, *UNHCR Calls for Urgent Action as Central America Asylum Claims Soar*, UNHCR (Apr. 5, 2016), <http://www.unhcr.org/en-au/news/latest/2016/4/5703ab396/unhcr-calls-urgent-action-central-america-asylum-claims-soar.html> [<https://perma.cc/BCU7-L5R7>].

related violence.⁹⁴ A total of 94,000 of these asylum applications originated from these three countries alone.⁹⁵

As with previous years, Germany continues to receive a high number of asylum claims. In 2018, 161,900 were lodged in Germany, with Syrians being the most common nationality of these applicants (44,200).⁹⁶ However, this is a significant decrease from the 722,400 that were submitted in 2016.⁹⁷ According to UNHCR data, other countries which registered the largest numbers of asylum applications in 2018 were France (114,500), Turkey (83,800), Brazil (80,000), Greece (65,000), Spain (55,700), Canada (55,400), and Italy (48,900).⁹⁸

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

Thus, from the above it follows that the United States is one of the most common target countries by prospective refugees. The number of people seeking asylum in the United States is rapidly increasing given the recent upheaval in Venezuela and other parts of Central America.

The increase in refugee numbers has paradoxically been met by a reduction in the refugee cap set by the United States. Even though the cap has been reduced, administrative and processing delays have meant that even these lower caps have not been filled with refugees that have been granted asylum. The entire process of dealing with and processing refugee applications is fundamentally broken. There are many political and social reasons associated with this, including the appetite that a nation has for receiving refugee applicants.

Another consideration that complicates and compromises the refugee pathway is the uncertainty surrounding the characteristics of people that qualify as refugees. This is a legal question. If further clarity

94. For a discussion of the violence and crime in this region, see Joshua Partlow, *Why El Salvador Became the Hemisphere's Murder Capital*, WASH. POST (Jan. 5, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/01/05/why-el-salvador-became-the-hemispheres-murder-capital/?utm_term=.6695dbb3d9b5 [<https://perma.cc/MQ26-XMPY>]; Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (Oct. 1, 2019), <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle> [<https://perma.cc/N724-EKMW>].

95. UNHCR, *supra* note 3.

96. *Id.*

97. *Global Trends: Forced Displacement in 2016*, UNHCR (2019), <https://www.unhcr.org/globaltrends2016/> [<https://perma.cc/MU49-A9FY>].

98. UNHCR, *supra* note 3, at 42-43.

is injected into the refugee determination process, this will clear the pathway for more rational and objective political and social decisions to be made regarding refugee quotas and the manner in which asylum claims are processed. In the remainder of this Article, the Author focuses on this legal issue and more pointedly at the definition of political opinion, which is one of the five grounds for refugee status. In light of the above, the Author now discusses a pathway to ameliorate the refugee crisis in a logical and coherent manner. Prior to doing so and to contextualize the Author's recommendations, the Author provides a brief overview on the background and history of the Refugee Convention.

III. HISTORY AND BACKGROUND TO THE REFUGEE CONVENTION

In this part of the Article, the Author provides a brief historical review of international refugee protection, specifically looking at a number of refugee agreements that were developed in response to a number of discrete refugee movements in the aftermath of World War I ("WWI"). These instruments had a considerable impact in shaping the modern era of refugee law in the form of the 1951 *Convention Relating to the Status of Refugees*.⁹⁹ Thus, it is necessary to first examine the origin and history of the refugee problem during the early 20th century to understand the scope and potential application of the Refugee Convention.

A. The First Agreements

The twentieth century was a period of mass disturbance and movement on a large global scale following numerous political events and violent conflicts in Europe. Governments were particularly ill-prepared for the mass population flows that arose following WWI and in the absence of protection obligations on governments or the existence of a central body, legal responses by governments to this displaced person crisis was not in any regular or systematic manner.

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

Rather, those displaced by the war were left largely dependent on the material assistance and relief provided by charitable organizations.¹⁰⁰

The earliest refugee group to attract and receive the attention of the international community were Russian citizens who had been displaced following the breakdown of the Russian Empire.¹⁰¹ This group of people faced what were then unprecedented challenges to relocation. The first significant obstacle was the sheer number of people that were displaced. It is estimated that by 1922, there were at least 1.5 million Russian refugees who had been displaced and were scattered across Europe—making it the largest post-war group of political refugees.¹⁰² Although refugees had existed prior to this time, large groups of refugees were virtually non-existent. Not only were European governments particularly ill-prepared for such a large-scale flow of refugees, but the burden created by the Russian refugee crisis was further “magnified by the fact that Europe was drained by war: stirred by political tensions; and exhausted of capacities to provide adequate relief.”¹⁰³ The mass displacement of Russian refugees was further exacerbated by the fact that the relatively free international movement accorded to refugees during the 19th century had come to an abrupt end following the conclusion of WWI.¹⁰⁴ In an effort to tighten their borders and control the movements of refugees, governments worldwide were adopting more guarded immigration policies.¹⁰⁵

These movement restrictions had in fact begun in the United States with the enactment of the 1921 and 1924 Immigration Acts, which imposed the first numerical quotas on immigration to the United

100. Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT. REV. RED CROSS 727, 727-36 (2001).

101. See generally CLAUDENA M. SKRAN, REFUGEES IN INTER-WAR EUROPE (1995); Alessandra Roversi, *The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period*, 22 REFUGEE SURV. Q. 21, 23 (2003).

102. SKRAN, *supra* note 101, at 33. However, it is noteworthy that estimates in relation to this vary significantly. See DANIELE JOLY & CLIVE NETTLETON, REFUGEES IN EUROPE: THE HOSTILE NEW AGENDA (1990); JOHN C. TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP & THE STATE (2000); EVAN MAWDSLEY, THE RUSSIAN CIVIL WAR (1987).

103. Roversi, *supra* note 101, at 23.

104. James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33(2) INT. & COMP. L. Q. 348, 348 (1984).

105. See *id.* at 348. See also SKRAN, *supra* note 101, at 22-23; see generally Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT'L L. 680 (1938).

States.¹⁰⁶ Not only were restrictions imposed on the number of persons that the United States would accept, but it also set caps on the ethnic origins of those allowed to enter. For example, under the Immigration Act 1924, European immigration was limited to only 150,000 people per year and favored certain European countries. For example, the annual UK quota was 77,000 compared to the 2,300 cap set for persons of Russian origin.¹⁰⁷ The increasing reluctance by governments to admit refugees was a continuing obstacle for the refugee flows during the inter-war period.

By late 1921, it was becoming increasingly clearer that repatriation by the new soviet authorities would not be a tenable solution. A 1921 decree had rendered those Russians who had fled the revolution stateless, thus depriving them of their citizenship.¹⁰⁸ Even in the event that such refugees could find a temporary place of asylum, governments were reluctant to naturalize them and they were without any internationally accepted travel documents to identify themselves which would allow them to travel to other countries for safety or to work.¹⁰⁹ As noted by Skran, “they lived as aliens in foreign lands, often with an insecure legal status and subject to expulsion at a moment’s notice.”¹¹⁰ The lack of a secure legal identity and ability to travel was the most significant problem faced by this group of refugees.

In response to the mass exodus of Russians, an appeal was made by the International Red Cross Committee (“IRCC”), a voluntary organization, to the League of Nations to deal with the “Russian refugees scattered throughout Europe without legal protection or representation.”¹¹¹ The League of Nations was an international, inter-governmental organization established in 1919 out of the Treaty of Versailles¹¹² with the primary purpose “to promote international co-operation and to achieve international peace and security” between countries in the aftermath of WWI.¹¹³ The League provided a forum

106. SKRAN, *supra* note 101, at 22.

107. *Id.*

108. Hathaway, *supra* note 104, at 351.

109. *Id.*

110. SKRAN, *supra* note 101, at 38.

111. League of Nations, *Annex 1: Letter from the President of the Comité International De La Croix-Rouge*, 2 L.N.O.J. 227 (1921).

112. League of Nations, *Covenant of the League of Nations*, REFWORLD (Apr. 28, 1919), <http://www.refworld.org/docid/3dd8b9854.html> [<https://perma.cc/7DMB-QPJG>].

113. *Id.*

for its members to discuss and deal with a variety of social and political problems, and was the first international organization that addressed the refugee problem.¹¹⁴

The IRCC had appealed to the Council of the League of Nations on the basis that the need for action was an issue that went beyond humanitarian duty but rather as “an obligation of international justice,”¹¹⁵ and that the League of Nations was “the only super national political authority capable of solving a problem which is beyond the power of exclusively humanitarian organization.”¹¹⁶ The move by the Red Cross to frame the refugee crisis in juridical and legal, rather than strictly humanitarian terms, encouraged a positive response from the Council which, after consulting with member governments, established the Office of High Commissioner for Refugees in 1921.¹¹⁷ This was the first action that the League undertook on behalf of refugees.

Dr. Fridtjof Nansen was appointed as the first High Commissioner on Behalf of the League in Connection with the Problems of Russian Refugees in Europe.¹¹⁸ The High Commissioner’s mandate included defining the legal status of Russian refugees, engaging in attempts to organize their repatriation or alternatively facilitating their employment opportunities outside of Russia and to coordinate assistance and relief efforts.¹¹⁹

The establishment of the inter-governmental League of Nations and the appointment of the Refugee High Commissioner marked an awareness by governments as to the need for an international response to the refugee problem. It was also under the framework of the League of Nations that a number of important legal international instruments were developed in an attempt to afford some degree of protection and rights to the refugees in inter-war Europe which subsequently marked the beginnings of the inter-war era of legal refugee protection.

The High Commissioner had devoted particular attention to securing the legal protection and status of refugees during his mandate.

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

115. League of Nations, *supra* note 111, at 227.

116. *Id.*

117. Skran, *supra* note 114, at 277.

118. *Id.*

119. Hathaway, *supra* note 104, at 351. For a detailed overview of the High Commissioner period, see generally BRUNO CABANES, *THE GREAT WAR AND THE ORIGINS OF HUMANITARIANISM, 1918–1924* (2014).

In July 1922, he convened an international conference in Geneva where he put forward a proposal for internationally recognized identification papers to be issued to Russian refugees.¹²⁰ This travel certificate—which became known as the “Nansen Passport”¹²¹ was subsequently adopted under the *Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees* (“1922 Arrangement”).¹²² This was the first international legal instrument addressing the legal protection of refugees and as noted by Skran, “the beginning of international refugee law can properly be dated to the creation of the Nansen passport system.”¹²³ Although this was a non-binding agreement, it was generally well-received with fifty-four signatory governments.¹²⁴

Under the terms of the 1922 Arrangement, governments could issue Russian refugees living within their borders with legal identity certificates, and renew these documents. Although the certificates were not equivalent to a national passport, in that it did not grant citizenship rights, or provide the right to return to the country of issue (unless there was an express permission within), it did give refugees who were effectively stateless somewhat a recognizable legal identity, and allowed them to cross national borders and travel internationally more freely in an attempt to resettle.¹²⁵ As noted above, this was one of the key challenges faced by these refugees.

In 1924, the High Commissioner extended the issuance of the certificates to approximately 320,000 Armenian refugees¹²⁶ who had been displaced from the former Ottoman Empire under the *1924 Plan for the Issue of a Certificate of Identity to Armenian Refugees*.¹²⁷ This agreement essentially mimicked the 1922 Arrangement, providing

120. See generally Hathaway, *supra* note 104. See also SKRAN, *supra* note 101.

121. See generally Hathaway, *supra* note 104. See also SKRAN, *supra* note 101.

122. Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922, 355 L.N.T.S. 238 (1922).

123. Skran, *supra* note 114, at 105. See also *Russian Refugees: Report by Dr Nansen, High Commissioner of the League of Nations*, 8 L.N.O.J. 923, 927 (1922) (submitted to the Council on July 20, 1922); LOUISE W HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME* 10 (1975).

124. Hathaway, *supra* note 104; SKRAN, *supra* note 101.

125. Hathaway, *supra* note 104; SKRAN, *supra* note 101. See also Holborn, *supra* note 105, at 680, 684.

126. Hathaway, *supra* note 104.

127. League of Nations, *Plan for the Issue of a Certificate of Identity to Armenian Refugees*, 5 L.N.O.J. 969–70 (May 31, 1924). See also SKRAN, *supra* note 101, at 106.

refugees of Armenia with some form of legal recognition and the ability to travel.¹²⁸

The subsequent *12 May 1926 Arrangement Relating to the Issue of a Certificate of Identity to Armenian Refugees* (“1926 Arrangement”)¹²⁹ made several improvements to these earlier arrangements. The most significant among them was the inclusion of a *return* clause to the identity certificates. As mentioned above, the certificates at first were relatively limited, however the 1926 Arrangement recommended that the certificates make provision for a return visa if the holder departed the country. Thus, governments would undertake to re-admit the holder to the country of issue in an effort to enable the “freedom of movement of the refugees.”¹³⁰ As a result, the identity certificates increasingly became accepted as *de facto* “passports.”¹³¹

Significantly, the 1926 Arrangement was the first international legal document to contain an explicit definition of a refugee.¹³² Under the earlier 1922 Arrangement and 1924 Plan, eligibility for the issuance of an identity certificate was according to certain categories, that is *Russian* or *Armenian* refugees, without any further elaboration. Thus, the focus was simply on whether the person belonged to the relevant ethnic group which presented challenges for the governments administering the certificate system. The definitions in the 1926 Arrangement, which had been proposed by the High Commissioner,¹³³ were relatively narrow. They continued to define a refugee according to a particular country of origin, and the fundamental element was that the refugee was deprived of the *protection* by the government in their country of origin and had not acquired another nationality.¹³⁴ Nonetheless, the 1926 Arrangement became the first international legal instrument to define a refugee. The definition was also eventually adopted by the *1933 Convention Relating to the International Status of*

128. See Hathaway, *supra* note 104, at 352.

129. Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 2004 L.N.T.S. 48 (1926).

130. *Id.* at provision 3.

131. See Holborn, *supra* note 105, at 685–86.

132. Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 2004 L.N.T.S. 48 (1926) [hereinafter 1926 Arrangement].

133. *Report by the High Commissioner*, League of Nations Doc. 1926.XLII.2 (1926), at 11 (as cited by Hathaway, *supra* note 104).

134. 1926 Arrangement, *supra* note 132.

Refugees (“1933 Convention”),¹³⁵ however it was not without criticism, particularly for the lack of scope and emphasis on a lack of diplomatic protection in the definition.¹³⁶

At a 1928 intergovernmental conference on refugees, the scope and legal protections afforded under the Nansen certificate system was extended by the League of Nations to other categories of refugees who were living in similar conditions as the Russian and Armenian refugees under the *30 June 1928 Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures taken in favour of Russian and Armenian Refugees*.¹³⁷ This included those of Assyrian origin, Assyro-Chaldean persons of Syrian or Kurdish origin as well as persons of Turkish origin.¹³⁸ Thus, this continued to emphasize the ad hoc, category-oriented approach of classifying refugees according to country of origin or group affiliation that was dominant during this period, seeking to limit their commitments to known categories and staying away from any general description of unknown quantity.

A second agreement that was concluded under the League of Nations, following the 1928 intergovernmental conference, was the *1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees* (“1928 Arrangement”).¹³⁹ This arrangement was effectively an enhanced arrangement on the legal status of Russian and Armenian refugees, however it differed markedly from the earlier arrangement with regard to one fundamental aspect. The arrangement marked the League’s first attempt to confer a range of rights to refugees—this included the recognition of the refugees’ personal status, including divorce and marriage rights, and contained other favorable treatment including rights to work, protection against expulsion, and equality in taxation. Notably, the arrangements prior to 1928 did not establish any specific responsibilities for states other than co-operation in the recognition of League of Nations documentation.¹⁴⁰

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

136. See Claudera M. Skran, *Historical Development of International Refugee Law, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 3*, 35 (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds., 2011).

137. Arrangement Concerning the Extension to Other Categories of Refugee of Certain Measures Taken in Favour of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 65 (1928) [hereinafter 1928 Arrangement].

138. *Id.*

139. 1928 Arrangement, *supra* note 137.

140. See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 86 (2005).

The standards contained within the 1928 Arrangement lacked the status of treaty law and therefore were not legally binding. They were simply recommendations and ultimately reliance on goodwill to deal with the mass population flows was insufficient. By the 1930s, governments were plagued with enormous political and economic instability, and thus had become increasingly unwilling to accept many of the defined categories of refugees under these arrangements. In an attempt to preserve any entitlements for their own citizens, particularly those relating to the work force, governments began promulgating laws unfavorable to refugees, particularly dealing with limits on foreign workers and further restricting their immigration and asylum laws.¹⁴¹

B. The 1933 Refugee Convention

By the late 1920s, the refugee problem was heightened following a continuous series of refugee flows throughout Europe and a heightened reluctance by refugees and host governments to mass naturalizations.¹⁴² It had also become clear that these earlier ad hoc arrangements were not satisfactory in addressing or providing legal protection to address the ongoing mass movements of refugees. As noted in a Secretariat memorandum, “with the exception of the Nansen passport, the existing so-called arrangements are producing practically no effect upon the position of the refugees.”¹⁴³

A number of recommendations had been put forward to consider creating a formal international legal document with a convention foundation on the basis that it would be the best means of securing a more permanent solution to the protection of refugees.¹⁴⁴ In 1933, the League of Nations formally called for a refugee convention and a draft

141. *Id.* at 86–87. See also SKRAN, *supra* note 101, at 123–24.

142. League of Nations, *Report of the Advisory Commission to the HC for Russian, Armenian, Assyrian, Assyro-chaldean and Turkish Refugees*, League of Nations Doc. C.210.1929.VII (1929); reprinted in League of Nations, *Russian, Armenian, Assyrian, Assyro-chaldean, and Turkish Refugees: Report to the Tenth Assembly*, August 15, 1929, League of Nations Doc. A.23.1929.VII (1929), at 1.

143. Secretariat memorandum of Feb. 3, 1933, LNA R5614/686. See also SKRAN, *supra* note 101, at 124.

144. See Skran, *supra* note 114. See also League of Nations, *Work of the Intergovernmental Advisory Commission for Refugees During its Fifth Session and Communication from the International Nansen Office for Refugees*, 5(1) LN OJ 854 (1933), at 855 (as cited by HATHAWAY, *supra* note 140, at 87).

was submitted at an intergovernmental conference in Geneva that year.¹⁴⁵

The outcome of the conference was the 1933 Convention,¹⁴⁶ which fully came into force on June 13, 1935. As noted by Louise Holborn, the Convention represented a “new stage in the efforts to achieve an international legal status for refugees by putting forward a set of rules governing important aspects of the refugee problem.”¹⁴⁷ The Convention was applicable to Russian, Armenian, Assyrian, Assyro-Chaldean, and Turkish refugees—adopting the narrow definitions set out in the 1926 and 1928 Arrangements which greatly limited the ambit of protection provided for in the Convention.¹⁴⁸ By the adoption of these definitions, it is clear that the Convention was designed to deal with refugees already under the assistance of the League of Nations, specifically the Nansen International Office which had been set up in 1930 following the death of the High Commissioner, and its purpose was not to aid refugees in a broader sense.

The Convention guaranteed these refugees a broad range of basic civil, political, and economic rights. These included rights in respect of identity certificates, education, labor conditions, taxation, expulsion, social welfare, and access to courts.¹⁴⁹ Moreover, there was an emphasis on promoting the principle of equal treatment of refugees by governments. As highlighted by Hathaway, “it is noteworthy however, that the 1933 convention guaranteed almost all refugee rights either absolutely or on terms of equivalency with the citizens of most-favoured states.”¹⁵⁰ Thus, the 1933 Convention placed particular emphasis on promoting the concept of equal/same treatment that governments should accord to all refugees. However, the drafters seemed to merely be consolidating earlier practices as many of these rights guaranteed in the Convention simply formalized or enhanced those in the 1928 Arrangement.¹⁵¹

145. See Skran, *supra* note 114.

146. 1933 Convention, *supra* note 130.

147. Holborn, *supra* note 105. See also SKRAN, *supra* note 101, at 129.

148. Article 1 of the 1933 Convention states that it applicable to “Russian, Armenian, and assimilated refugees, as defined by the Arrangement of 12 May 1926, and 30 June 1928.”

149. For a detailed discussion on the rights and standards set out under the 1933 Convention, see SKRAN, *supra* note 101, at 125–29; HATHAWAY, *supra* note 140.

150. HATHAWAY, *supra* note 140, at 88.

151. *Id.*

Importantly, the Convention was the first instrument to set a binding obligation on signatory states in relation to expulsion and the non-refoulement of refugees,¹⁵² which became an increasingly common practice during the 1930s.¹⁵³ This principle means that governments should not expel or involuntarily return a refugee to not only their country of origin, but any country against their will if there is a risk of persecution—this includes the refusal to admit someone at the frontier. The right to non-refoulement is considered to be fundamental to modern international refugee law.

Ultimately, only eight states formally ratified and applied the provisions of the treaty, however many did so with reservations.¹⁵⁴ The small number of ratifications coupled with the fact that it only applied to certain refugee groups as a result of the narrow definition it had adopted of a refugee meant that it had very little practical impact.¹⁵⁵ Nonetheless, the 1933 Convention marked a significant milestone in the history of the international refugee regime. It was the first legally binding comprehensive instrument addressing the legal protection and standard of conduct to be accorded to refugees. It is also significant because it served as the foundation of the 1951 Refugee Convention. This is perhaps the most important contribution that the 1933 Convention has made to modern international refugee law.

In response to a number of specific world events between 1936 and the adoption of the current refugee convention, a number of ad hoc treaties and intergovernmental agreements were formulated in an attempt to provide some measure of protection to the affected refugees.¹⁵⁶ This was driven by the emerging crisis caused by displaced German refugees after National Socialism came to power in Germany. Although these documents were not a comprehensive approach to the refugee issues at the time, they demonstrated an awareness by

152. 1933 Convention, *supra* note 130, art. 3. Although the obligation not to expel and to avoid refoulement of Armenian and Russian refugees was first set out in the 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees, this obligation was in the form of non-binding recommendations. See also SKRAN, *supra* note 101, at 131.

153. League of Nations, NIO, *Discussion du rapport du Conseil d'administration*, LNOJ Special Suppl. No. 109, at 16, 17.

154. See SKRAN, *supra* note 101, at 129; HATHAWAY, *supra* note 140, at 88.

155. See SKRAN, *supra* note 101, at 129; HATHAWAY, *supra* note 140, at 88.

156. See generally SKRAN, *supra* note 101; HATHAWAY, *supra* note 140. This includes two international treaties concluded under the League of Nations concerning the protection of refugees from Germany - the 1936 Provisional Arrangement Concerning the Status of Refugees Coming From Germany (1936 Provisional Arrangement) and the 1938 Convention Concerning the Status of Refugees Coming From Germany.

governments of the international nature of the refugee problem, and that refugees were a special category of migrants who deserved special attention and should not be sent back to a country of persecution. They established important principles that would later be included in the Convention.

C. Refugee Law Following the Second World War

The years that followed were dominated by dire economic events and the outbreak of further violent conflicts, dampening the possibility of any further ratifications by states to the Convention. In particular, the Second World War marked a new era of mass exodus for millions of people. When the war ended in 1945, there were more than 40 million displaced people who were reluctant or could not return home because of border changes—constituting the largest group displaced in history.¹⁵⁷

In 1943, prior to the beginning of the war, the United Nations Relief and Rehabilitation Administration (“UNRRA”) was established which relied on cooperation and charitable funding by governments. Although it was not created principally as a refugee organization, it had a wide-ranging mandate to address the massive groups of refugees following the upheaval of WWII. This included measures for providing relief and an attempt to repatriate those had been displaced as well as assisting with the rehabilitation of war-torn European nations.¹⁵⁸

Following the conclusion of the war, the UNRRA assisted with the repatriation of approximately 7 million people.¹⁵⁹ However, the mandate of the UNRRA was not extended past 1947 after its repatriation and rehabilitation efforts were effectively hampered due to Cold War tension and opposition from the Soviet Union.¹⁶⁰ Further, the US Government, who were responsible for providing the majority of the UNRRA’s funding, refused to grant any further financial aid to the

157. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *THE STATE OF THE WORLD’S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION* (2000), available at <http://www.unhcr.org/en-au/publications/sowr/4a4c754a9/state-worlds-refugees-2000-fifty-years-humanitarian-action.html> [https://perma.cc/94MY-VE56] [hereinafter UNHCR, *THE STATE OF THE WORLD’S REFUGEES*].

158. *Id.*

159. *Id.*

160. *Id.*

organization, effectively vetoing the extension of its mandate.¹⁶¹ This was largely due to the US Government's preference to replace the UNRRA with an international body with a more wide-ranging capacity of operations and authority to deal with the protection of refugees displaced in the aftermath of the war.¹⁶²

Subsequently, the International Refugee Organization ("IRO") was created in 1947 by a resolution of the recently established United Nations General Assembly.¹⁶³ The IRO was initially established as a non-permanent specialized intergovernmental agency of the United Nations primarily tasked with providing relief, repatriation, resettlement, and protection of refugees displaced within Europe.¹⁶⁴ However, unlike the UNRRA, its efforts focused on the resettlement of refugees as opposed to their repatriation.¹⁶⁵ Although its work was restricted to assisting displaced European refugees, the IRO was the first international refugee body to fully address all issues arising from the refugee crisis.¹⁶⁶ Ultimately, the IRO's activities formally ceased in 1952 as a result of its inability to bring the refugee crisis to an end with masses of people still adrift in Europe.¹⁶⁷ The IRO was the last refugee organization to precede the United Nations High Commissioner for Refugees.¹⁶⁸ It was primarily concerned with offering material assistance and making attempts to repatriate or resettle displaced persons.¹⁶⁹

D. The 1951 Refugee Convention

By 1950, the international community recognized that the refugee problem sparked by the Second World War was not a temporary one. A more durable solution was necessary, especially given that there was

161. *Id.* See also Hathaway, *supra* note 104, at 372–73.

162. UNHCR, THE STATE OF THE WORLD'S REFUGEES, *supra* note 157.

163. *Id.*; Hathaway, *supra* note 104, at 374.

164. UNHCR, THE STATE OF THE WORLD'S REFUGEES, *supra* note 157.

165. *Id.*

166. *Id.*

167. LOUISE W. HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION, A SPECIALIZED AGENCY OF THE UNITED NATIONS: ITS HISTORY AND WORK, 1946-1952, 29-30 (1956).

168. See *infra* Section III.E.

169. See Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol*, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL A COMMENTARY 45-46 (Andreas Zimmermann, Jonas Dörschner (asst.) & Felix Machts (asst.) eds., 2011).

no obligation at the time on states to assist refugees. The only agreements providing for refugee protection in place were those formulated under the League of Nations and created in response to specific events that triggered significant refugee movements.¹⁷⁰ Thus, it was recognized that an instrument with a broader approach would be more effective at addressing the ongoing refugee problems.

The intent of the drafters of this instrument was to revise and consolidate the earlier refugee agreements, and to extend their scope of protection.¹⁷¹ Specifically, the 1951 *Convention Relating to the Status of Refugees* was drafted in response to the problems confronting the international community as a result of the mass displacement of people from Europe following World War II.¹⁷² The Convention was also viewed as necessary to encourage a more equal sharing of responsibility for refugees through the implementation of binding obligations.¹⁷³

The *Convention Relating to the Status of Refugees* was adopted on July 28, 1951, and came into force on April 22, 1954.¹⁷⁴ The Convention was drafted by a combination of United Nations organs, ad hoc committees and a conference of plenipotentiaries with the intent of ensuring that states could not again turn their backs on vulnerable groups escaping persecution and purported to provide a guarantee of non-refoulement.¹⁷⁵ The Refugee Convention was the first and remains the only binding refugee protection instrument of a universal character and has become the foundation of the international refugee protection regime post WWII.

The definition of refugee adopted by the Refugee Convention was restricted to those persons who had become displaced as a result of “events occurring in Europe before 1 January 1951” and who were unwilling or unable to return to their country of origin because of a

170. See Part III for its discussion.

171. 1951 Refugee Convention, *supra* note 99, at preamble.

172. *Id.*

173. *Id.* at preamble. As noted in the preamble of the Convention “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation[.]”

174. *Id.*

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

well-founded fear of being persecuted for one of five reasons.¹⁷⁶ It also allowed signatory states to elect to *limit* their obligations to refugees originating from “events occurring within Europe.”¹⁷⁷ Thus, these limitations make it clear that the Refugee Convention was originally drafted with the political goal of directly responding to and assisting displaced European refugees who had been affected by the Second World War.¹⁷⁸

However, in recognition of the continuing displacement of persons across different parts of the world following events unrelated to WWII, the Convention was subject to an amendment by the 1967 *Protocol Relating to the Status of Refugees* (“1967 Protocol”).¹⁷⁹ The Protocol entered into force on October 4, 1967 and is a separate instrument from the 1951 Refugee Convention. Further, accession to it is not limited to those states already party to the 1951 Refugee Convention. The Protocol did not change the refugee definition in any material way other than by removing the abovementioned temporal and geographical limitations, thereby strengthening the protection of refugees. Article 1.2 of the Protocol states “[f]or the purpose of the present protocol, the term ‘refugee’ shall . . . mean any person within the definition of Article 1 of the convention.”

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

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

Thus, as the Refugee Convention stands today, the rights and protections conferred by the Convention are extended to all refugees, and not just those affected by pre-1951 events in Europe.¹⁸⁰ Moreover, the 1967 Protocol did not broaden rights under the Convention, but simply incorporated them by reference under Article 1(1). Thus, in effect, the aim of the amendment was to expand the scope of the

176. 1951 Refugee Convention, *supra* note 94, art. 1A, (amended by G.A. Res. 2198 (xxi), Protocol Relating to the Status of Refugees, art. 1 (Jan. 31, 1967) [hereinafter 1967 Protocol].

177. 1951 Refugee Convention, *supra* note 99, art. 1B.

178. See HATHAWAY & FOSTER, *supra* note 175.

179. 1967 Protocol, *supra* note 176.

180. See HATHAWAY & FOSTER, *supra* note 175, at 10.

Convention and allow for the universal coverage and protection of refugees.

However, the Convention definition only applies to specific types of displaced people. In other words, to qualify for refugee status, an individual must have a well-grounded basis for fearing persecution in their homeland. The basis for persecution is not generic. It can only be for one of five designated reasons. These are race, religion, nationality, political group, or membership in a particular social group. In addition to this, in order for the Refugee Convention to be applicable, the individual must be outside of their country of origin and unable or unwilling to return. These limitations are significant. For example, if a person is outside their country of origin and is almost certain to be killed if they return to their country of origin because, for example, a generalized wide-ranging conflict or they are being targeted by powerful criminal gangs or corrupt government officials, they are not entitled to invoke the Refugee Convention.

Importantly, the 1951 Convention continues to provide the guarantee of non-refoulement under Article 33. According to this principle, a refugee cannot be expelled or returned to a country where they may be subject to persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion.¹⁸¹ However, this right is not conferred upon refugees reasonably regarded as posing a risk to national security or considered a danger to the community.¹⁸² The Convention extends a number of other rights to refugees. For example, refugees are entitled to the same rights as citizens in relation to freedom of religion, intellectual property, access to courts and legal assistance, accessing elementary education, labor rights, and social security.¹⁸³

As at August 2019, the total number of states party to the 1951 Convention is 145 and those party to the 1967 Protocol is 146.¹⁸⁴ The number of states parties to both the Convention and Protocol stands at 142.¹⁸⁵ There are also three countries (including the United States) which have agreed to the Protocol only, and two small countries that have agreed to the Convention only.¹⁸⁶ The Refugee Convention has

181. 1951 Refugee Convention, *supra* note 99, art. 33(1).

182. *Id.* art. 33(2).

183. *Id.* arts. 4, 14, 16, 22, and 24.

184. UNHCR, *supra* note 3.

185. *Id.*

186. *Id.*

been responsible for settling more displaced people than any other international instrument. Thus, despite the somewhat arbitrary limits imposed in the Convention, it has proven to be an incredibly successful platform upon which resettlement has occurred for millions of asylum seekers.

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

The UNHCR, replacing the IRO, was established by the UN General Assembly with a three-year mandate beginning January 1, 1951.¹⁸⁷ It was initially tasked with the goal of providing protection and establishing permanent solutions to deal with the refugee crisis.¹⁸⁸ As mandated under Article 2 of the UNHCR Statute, the work of the High Commissioner “shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.”¹⁸⁹

UNHCR’s mandate and operations were repeatedly renewed to address the ongoing refugee movements.¹⁹⁰ However, in 2003 the UN General Assembly converted the UNHCR into a permanent independent agency.¹⁹¹

It is also important to note that the Refugee Convention and UNHCR mandate were drafted at the same time. Thus, the framework of the UNHCR was very much built upon and centered around the intentions reflected in the Convention—mainly to supervise its application by signatory states¹⁹² and to assist and seek protection for the European refugees displaced in the aftermath of WWII.¹⁹³ However, as refugee movements became larger and more complex, the Convention refugee definition presented significant limitations on the scope and activities of the UNHCR. In response, the mandate of the UNHCR was extended by the UN General Assembly to not only assist and monitor refugees but also displaced persons who fell outside the

187. UNHCR, THE STATE OF THE WORLD’S REFUGEES, *supra* note 157, at 19.

188. *Id.* at 22.

189. *Id.* at 19.

190. *Id.* at 14.

191. *Id.* at 14.

192. 1951 Refugee Convention, *supra* note 99, art. 35.

193. *Id.*

scope of the Refugee Convention.¹⁹⁴ Although the Convention definition itself was not broadened, the UNHCR's mandate was broadened to provide assistance to a number of other categories of persons it considers to be of concern.¹⁹⁵ This includes internally displaced persons, stateless persons, asylum-seekers and also returnees.¹⁹⁶

From a staff of thirty-four at the time of its founding, UNHCR now employs 16,803 staff as at May 31, 2019. The agency is active in over 134 countries and its budget has grown from US\$300,000 in its first year to more than US\$1 billion in the early 1990s and reached a new annual high of US\$8.6 billion in 2019—funded almost entirely by voluntary contributions.¹⁹⁷

F. Summary of International Refugee Instruments

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

194. 1967 Protocol, *supra* note 176.

195. U.N. HIGH COMM'R FOR REFUGEES (UNHCR), UNHCR RESETTLEMENT HANDBOOK: DIVISION OF INTERNATIONAL PROTECTION 11 (rev. Jul. 2011), *available at* <http://www.unhcr.org/46f7c0ee2.pdf> [<https://perma.cc/Z4W9-7XLT>].

196. *Id.* at 18.

197. *See* U.N. High Comm'r for Refugees (UNHCR), *Figures at a Glance*, UNHCR, <https://www.unhcr.org/en-au/figures-at-a-glance.html> [<https://perma.cc/9AQR-ECT4>] (last visited Feb. 6, 2020).

to admitting displaced people.¹⁹⁸ In light of that, part of the solution may involve a more expansive interpretation of the existing Refugee Convention and it is to that that the Author now turns.

IV. THE MEANING OF POLITICAL OPINION IN A NUMBER OF REFUGEE COUNTRIES

A. Overview of Meaning of Political Opinion

Political opinion is one of the five persecution grounds as set out in Article 1A(2) of the Refugee Convention. It states:

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

The meaning of this ground is nebulous. There is no uniform or consistent approach that has been taken to its meaning or scope. The difficulty in achieving a clear and definitive interpretation can be seen across all jurisdictions, with interpretative inconsistencies arising from both within and among jurisdictions. The manner in which it is interpreted can have significant consequences for the capacity of displaced people to obtain asylum in a country outside of their own, and also for the obligations of states to absorb refugees within their borders.

One reason for the uncertainty regarding the meaning of political opinion is the absence of interpretative guidance provided within the Refugee Convention itself. The Refugee Convention does not in any way attempt to expressly define the ground nor does it contain any examples of the types of opinions that may constitute *political opinion* within the meaning of Article 1A(2).

The guidance provided by the travaux préparatoires of the Refugee Convention in ascertaining the meaning of political opinion is

198. See *supra* Part II.D.

also particularly limited. Reference to these working papers indicate that the drafters of the Convention intended that the ground be interpreted and applied in an expansive manner to encompass “diplomats thrown out of office,” persons “whose political party had been outlawed”, and “individuals who fled from revolution.”¹⁹⁹ In other words, protection under this ground should not be restricted to persons that have an obvious association to a political party or who adhere to a formal political ideology.²⁰⁰

The *UNHCR Handbook*,²⁰¹ although not legally binding, has long been recognized as a leading source of guidance in interpreting and applying the Refugee Convention and Protocol. The Handbook, which was republished in 2019, provides the following guidance as to ascertaining the boundaries of the ground:

Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant.²⁰²

Further, the Handbook explicitly recognizes that a person may still qualify for asylum under this ground on the basis of an unexpressed political opinion. It states:

As indicated above, persecution “for reasons of political opinion” implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant

200. *See also* U.N. High Comm’r for Refugees (UNHCR), Guidelines on International Protection No. 10, §51, U.N. Doc. HCR/GIP/13/10 (Nov. 12, 2014) (“The political opinion ground is broader than affiliation with a particular political movement or ideology . . .”).

201. U.N. HIGH COMM’R FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/ENG/REV. 4 (reissued 2019) [hereinafter UNHCR, HANDBOOK].

will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned. This applies particularly to the so-called refugee "sur place."²⁰³

The UNHCR has also adopted the somewhat liberal interpretation by Goodwin-Gill, who states that the expression "political opinion:"

Should be understood in the broad sense to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion or any matter in which the machinery of the state, government and policy may be engaged.²⁰⁴

This definition has been a central pillar in the analysis of this ground. The only court to have explicitly adopted the Goodwin-Gill interpretation is the Supreme Court of Canada.²⁰⁵ In contrast, a NZ tribunal has found that this definition was "too broad to be of any meaningful assistance."²⁰⁶ Ultimately, the courts have disagreed on the outer limits of the ground and this notion of breadth creates a tension for decision makers who are cautious so as to not "open the flood-gates of asylum."²⁰⁷

In fact, there are only a handful of decisions in which courts have attempted to precisely define or set out a definitive approach to

203. *Id.*

204. For example, see U.N. High Comm'r for Refugees (UNHCR), Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 32, HCR/GIP/02/01 (May 7, 2002), and also U.N. High Comm'r for Refugees (UNHCR), Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶ 45, (Mar. 31, 2010), available at <https://www.refworld.org/docid/4bb21fa02.html> [<https://perma.cc/RK8X-E6AG>].

205. *Canada (Attorney-General) v. Ward*, [1993] 2 S.C.R. 689, 746 (Can.).

206. *Refugee Appeal No. 76339* [2010] NZAR 386 (N.Z. R.S.A.A.).

interpreting this ground. The case law that does exist has contributed little to the analysis, rather it merely adds to the uncertainty, with a number of different approaches emerging. As noted by Hathaway and Foster in *Law of Refugee Status*:

Among those acts that have been construed as expressions of political opinion are public statements regarding the unfair distribution of food in Iraq, a public accusation of judicial ineptness where such conduct was considered “anti-Islamic,” attempts by a Guatemalan literacy teacher to educate the population, the preparedness of a Sinhalese travel agent to engage in business with Tamil clients, the supply of business services to governmental and military institutions, employment by political figures including the government, actual, imputed, or implied advocacy of human rights, including labor rights, undertaking humanitarian work, defection from the KGB, illegal departure or stay abroad, the lodgment of a (failed) claim for refugee status abroad, and violation of a politically motivated criminal law. Even the refusal to declare a political opinion – in other words a position of neutrality – might lead to an imputation of a political opinion.²⁰⁸

These examples of qualifying political opinions are inherently conflicting and when considered as a whole illustrates the extent to which the interpretations of this ground are unclear in the absence of an authoritative definition and has led to an open-ended analysis.

Broadly however, it is settled law among major common law countries—the United States, Canada, United Kingdom, and Australia that “the Convention speaks not of political activities but of political opinions”²⁰⁹—which is inherently much broader. This is in line with the views of the UNHCR above. Thus, the opinion does not necessarily need to be expressed or acted upon prior to their departure to be eligible for protection.²¹⁰ There may be various reasons why a person has not expressed their political opinion. For example, it may have been

208. See HATHAWAY & FOSTER, *supra* note 175, at 413-15 (citations omitted).

209. See Juan Alejandra Araya Heredio cited in *id.* at 409-23. This principle has been endorsed in Australian cases, see *V v. Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 355 [hereinafter *V v. Minister*]; and within Canadian jurisprudence, see *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689.

210. See HATHAWAY & FOSTER, *supra* note 175, at 409-23; GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 87, 89, 104 (3d ed. 2007).

practically impossible to express a non-conforming political opinion while in the home state and great risks associated with that.²¹¹

Moreover, an applicant for refugee status does not even need to hold the opinion that has created the risk of persecution. It is widely accepted that a political asylum claim can be grounded on the basis of an opinion that has been attributed to the applicant, even if that opinion has been falsely attributed. This is known as the imputed political opinion doctrine.²¹² For example, an opinion may be attributed to an applicant based on their past association, family ties, or social class. The question in such cases is whether the persecutor views the person as holding a political opinion. Given that in most imputed political claims there will be no direct evidence, it will be up to the decision maker to speculate about the persecutor's perceptions. This presents problems in itself and the case law highlights a vastly varied approach by decision makers in their attitude towards imputing a political opinion.

In either case, whether the refugee claim is based on an actual or imputed opinion, the decision maker must decide whether there is reason to believe that the holding or attribution of such opinion will place them in jeopardy upon return to their home state.²¹³ Thus, for asylum purposes, the Convention requires a forward-looking assessment of the risk. Both the UNHCR and courts have generally held that to satisfy this requirement, the persecutor must be on notice of an applicant's alleged opinion, and the persecutor is not willing to tolerate the applicant's political opinion.²¹⁴ In other terms, the opinion must be discernable in some way, otherwise, there is no basis on which a potential persecutor could possibly form a view. The situation therefore is clearest where there has been some action consistent with that opinion.

Moreover, not every opinion will create a risk of persecution and therefore qualify for protection. The opinion must be *political* in nature. The notion of *opinion* has not caused any controversy or generated any analysis. In contrast, decision makers have extensively grappled with what ought to be considered *political* in the context of the Refugee Convention.

211. See HATHAWAY & FOSTER, *supra* note 175, at 409-23.

212. *Id.*

213. See HATHAWAY & FOSTER, *supra* note 175 at 409-23.

214. See UNHCR, HANDBOOK, *supra* note 201 at 14.

The application of *political opinion* is particularly straight forward when there has been an *opinion* that has been expressed in an overt manner and it concerns formal political structures, such as the government of the day or some other element regarding the state. However, as is clear through recent jurisprudence, many political opinion claims do not fit within these parameters.

There have been a number of trouble spots that have arisen in this context. For example, one of the most troublesome issues is the widespread disagreement among decision makers about whether or not political opinion should be defined by reference to an engagement with the government or the state—as per the Guy Goodwin-Gill definition.²¹⁵ Another complexity that has arisen is whether refusing to hold a political opinion comes within the scope of the ground. The complexities underpinning this area of law are now fleshed out more fully in the context of examining the relevant jurisprudence in leading refugee law jurisdictions.

B. United States

The Refugee Convention definition was first codified in domestic United States law under the Refugee Act of 1980,²¹⁶ described as “the most comprehensive US law ever enacted concerning refugee admissions and resettlement.”²¹⁷ The Act intended to ensure US immigration law was consistent with its rights and obligations under the Refugee Convention and as such incorporated a new definition of the term *refugee* that was in line with the Convention definition.²¹⁸ The Refugee Act modified the 1952 US Immigration and Nationality Act (“INA”) by codifying the definition of a *refugee*. It defines a refugee as a person who is “outside the United States and is unable or unwilling to return to his or her country of origin because of persecution or a well-

215. It appears that such a connection to the government, policy or the state is required by the majority in *Immigration & Naturalization Service v. Elias-Zacarias*, 502 U.S. 478 (1992), whereas in *Canada (Attorney-General) v. Ward* [1993] 2 S.C.R. 689 (Can.) it is not a requirement.

216. Refugee Act of 1980, Pub. L. No. 96 – 212, 94 Stat. 102 (1980). The United States did not sign the Refugee Convention. However, it adopted the obligations under the Refugee Convention by accession to the 1967 Protocol. The 1967 Protocol explicitly incorporated the convention refugee definition.

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

218. Refugee Act of 1980, *supra* note 216.

founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”²¹⁹

Political opinion is not defined under the INA. Further, as was the case with the legislative history of the Convention, the US Congress did not provide any guidance as to the meaning intended to attach to the *political opinion* ground. As a result of this, the meaning of *political opinion* in the US context has been given shape through determinations by the Board of Immigration Appeals (“BIA”) and US courts. There has been no clear interpretation of the ground, with a number of divergent approaches emerging at each level. There are diverging standards as to what the applicant must satisfy which has resulted in a body of asylum law that is difficult to reconcile and inconsistent.

US courts have unambiguously recognized claims which involve the overt expression of an opinion and that has been tied to a formal political party or ideology. For example, where the opinion has been evidenced through organizational membership, including association with a dissident party and related organizations, and memberships in organizations that promote social, cultural, economic, or political rights, such as labor unions.²²⁰ These claims are generally uncontroversial and do not result in much analysis.

However, US courts have been reluctant to grant asylum in circumstances where there is no cognizable political opinion. That is, where the asylum seeker can show no overt manifestation of such opinion. This has commonly arisen in the context of forced recruitment by gangs, in which case the principle question is whether the refusal to engage in combat constitutes a political choice for neutrality.

In the seminal *political asylum* case of *Immigration & Naturalization Service v. Elias-Zacarias*,²²¹ the US Supreme Court was faced with this issue. Notably, the Court did not embark on any attempt to ascertain the meaning and scope of political opinion and in the absence of a formal definition, the decision has generated an unclear and conflicting body of political asylum jurisprudence. In that case, the applicant (Elias-Zacarias) had sought asylum in the United States after an anti-government guerrilla organization in Guatemala unsuccessfully

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

220. See, e.g., *Sharma v. Holder*, 729 F.3d 407, 412–13 (5th Cir. 2013) and *Sobaleva v. Holder*, 760 F.3d 592, 594 (7th Cir. 2014).

221. *INS v. Elias-Zacarias*, 502 U.S. 478, 478 (1991).

attempted to recruit him to join them in their war against the Government. Elias-Zacarias supported neither side in the conflict and subsequently fled to the United States believing that the guerrillas would retaliate against him for his refusal to join them, in an attempt to remain neutral.²²² The Ninth Circuit court's ruling in favor of Elias-Zacarias was reversed in a 6-3 majority decision by the Supreme Court. The question before the Court was whether the forced participation in a guerrilla organization constituted "persecution on account of . . . political opinion."²²³

On the issue of whether neutrality qualifies as a basis for political asylum under the Refugee Act, Justice Scalia, writing for the majority stated that it is "not ordinarily" an "affirmative expression of a political opinion."²²⁴ The Court did not meaningfully elaborate on this. Despite leaving this question open, Justice Scalia went on to inquire into Elias-Zacarias' motivation for refusing recruitment. According to the Court, even if Elias-Zacarias' refusal did constitute an affirmative expression of his neutrality, it must have been politically motivated. The Court reasoned that "even a person who supports a guerrilla movement might resist recruitment for a variety of reasons-fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few."²²⁵ Because Elias-Zacarias had testified that he was "afraid that the government would retaliate against him and his family if he did join the guerrillas" this evinced the "opposite" of a political motive on his part.²²⁶

This is in stark contrast to the position taken by the 9th Circuit, who prior to this decision, had held that it was improper to examine the applicant's motives in holding their belief:

We have several reasons for reaching the conclusion that the government may not look behind the manifestation of an alien's political opinion and seek to determine why he made a particular political choice. First, it is simply improper for the government to inquire into the motives underlying an individual's political decisions. Second, the motives frequently will be both complex

222. *Elias-Zacarias*, 502 U.S. at 479-80.

223. *Id.* at 478.

224. The Ninth Circuit, ruling in favor of Elias, held that the act of resisting forced recruitment is the expression of a qualifying political opinion that is hostile to the persecutor and therefore is a qualifying political opinion under the Refugee Act - *Zacarias v. United States I.N.S.*, 921 F.2d 844 (9th Cir. 1990).

225. *Elias-Zacarias*, 502 U.S. at 482.

226. *Id.* at 480.

and difficult to ascertain; it may not be possible to separate the political from the non-political aspects. What standards would we use, for example, to determine whether a choice was sufficiently based on political principles or whether economic self-interest was the determinative factor? Third, and perhaps most important, it is irrelevant why the individual made his choice. It does not matter to the persecutors what the individual's motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion."²²⁷

Justice Stevens (who was joined by Justices Blackmun and O'Connor) in his dissent, criticized the majority for their "narrow" and "grudging" opinion. According to Stevens, "a political opinion can be expressed negatively as well as affirmatively" and therefore Elias-Zacarias' refusal did constitute a political expression that would qualify under the ground. Moreover, his opinion was not any less political because it was motivated by fear.²²⁸ As explained by Stevens, "even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect."²²⁹

Ultimately, Justice Scalia did not feel compelled to decide whether Elias-Zacarias did in fact hold a political opinion because even if he did, he failed to establish that he had "a 'well-founded fear that . . . on account of that opinion."²³⁰ According to Justice Scalia, "persecution on account of . . . political opinion" in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's."²³¹ He arrived at this interpretation based solely on "the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."²³²

227. *Bolanos-Hernandez v. Immigration & Naturalization Service*, 767 F.2d 1277, 1287 (9th Cir. 1984).

228. *Elias-Zacarias*, 502 U.S. at 490 (Stevens dissenting).

229. *Elias-Zacarias*, 502 U.S. at 486 (Stevens dissenting).

230. *Elias-Zacarias*, 502 U.S. at 482.

231. *Id.* at 482, quoting *Richards v. United States*, 369 U.S. 1 (1962).

232. *Elias-Zacarias*, 502 U.S. at 482.

The Court held that Elias had failed to demonstrate that the guerrillas would persecute him “*because of* that political opinion, rather than because of his refusal to fight with them. . . .”²³³ In the Court’s view, the guerrilla organization’s interest in Elias-Zacarias would likely be for the purposes of augmenting their troops and not to express their displeasure at his refusal to join/fight with them.²³⁴

This is an additional burden that applicants must meet to justify the grant of political asylum. An applicant must show a causal nexus between the political opinion and the threatened harm. “The mere existence of a generalized ‘political’ motive underlying the persecutors actions is no longer sufficient to draw an inference that persecution is on account of political opinion.”²³⁵ The Court did not meaningfully elaborate on how an applicant is to prove the persecutors motive, but “since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial.”²³⁶

Following *Elias-Zacarias*, it appears that decision makers have held that subjectively holding a political opinion will not establish a claim. There must be an affirmative expression of a political opinion. In addition to this, evidence must be produced to establish that the persecutor will be motivated by that opinion. Thus, the Court’s decision has narrowed the availability of political asylum by increasing the standard that applicants must meet to satisfy a claim on this ground.²³⁷

It is noteworthy that this decision has been heavily criticized by observers and legal scholars, particularly for its lack of consideration to interpretative aids in requiring that applicants prove their persecutor’s intent and lack of consideration for international jurisprudence. For example, the Chair of Canada’s Immigration and Refugee Board criticized the majority opinion for its failure to “cite a single international precedent, judicial or academic” and noted that most jurisdictions throughout the world had found that the refusal to

233. *Id.*

234. *Id.*

235. *Id.* Thus, the Supreme Court disproved of the approach that had been taken by the ninth circuit. *See, e.g., Sangha v. Immigration & Naturalization Service*, 103 F.3d 1482 (9th Cir. 1997): “A number of our asylum cases decided before 1992 broadly defining persecution on account of political opinion, based on the political opinion of the persecutors, have been weakened by *Elias*.”

236. *Elias-Zacarias*, 502 U.S. at 483.

237. *See, e.g., Sangha*, 103 F.3d at 1487–91, (discussing how the Supreme Court has narrowed its interpretation of the political asylum ground).

join a guerilla group constitutes a political opinion.²³⁸ The majority also failed to consider the *UNHCR Handbook*, which acknowledges the inherent difficulties asylum applicants face in obtaining evidence to support their claim. It states, “it is hardly possible for a refugee to ‘prove’ every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized.”²³⁹ On the issue of an imputed political opinion, no meaningful analysis was provided by the Supreme Court in *Elias-Zacarias*. The Court simply stated that there was nothing to suggest “that the guerrillas erroneously believed that Elias refusal was politically based.”²⁴⁰ It should also be noted that the INA does not provide any guidance as to whether an imputed political opinion is a ground for asylum.

The circuit courts do, however, seem to agree that an applicant can satisfy a claim for political asylum based on an opinion that the persecutor has been attributed to them.²⁴¹ In such cases, attention turns to the views of the persecutor. The applicant must provide evidence that the persecutors actually believed that he or she held a political opinion.²⁴² The applicant must also provide direct or circumstantial evidence that the persecutor was motivated because of that political opinion.²⁴³ In contrast, the BIA have been particularly hesitant to recognize the doctrine of imputed opinion.²⁴⁴

C. Canada

The position in the United States regarding the meaning of political opinion can be contrasted with that adopted in Canada. The leading authority on the definition of *political opinion* in Canada is the

238. R.G.L. Fairweather, *Temporary Sanctuary Tends to Get Permanent; Political Persecution*, N.Y. TIMES (Mar. 7, 1992), <https://www.nytimes.com/1992/03/07/opinion/1-temporary-sanctuary-tends-to-get-permanent-political-persecution-043892.html> [<https://perma.cc/6DLT-XTYQ>]. See James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT’L L. 207, 208 (2002). See also Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1181 (1994).

239. UNHCR, HANDBOOK, *supra* note 201, at 39.

240. *Elias-Zacarias*, 502 U.S. at 482.

241. See *Sangha*, 103 F.3d at 1489; *Singh v. Ilchert*, 63 F.3d 1501, 1508-09 (9th Cir. 1995); *Haider v. Holder*, 595 F.3d 276, 284 (6th Cir. 2010).

242. *Id.*

243. *Id.*

244. See, e.g., *Khudaverdyan v. Holder*, No. 10-73346 (9th Cir. 2015).

Supreme Court decision of *Canada (Attorney-General) v. Ward*.²⁴⁵ The decision in *Ward* marks the first attempt by a superior court to attempt to delineate the meaning and scope of the ground. However, even within Canada, *Ward* has created uncertainty and inconsistency among decisions.²⁴⁶

Ward was a member of an Irish paramilitary group, the Irish National Liberation Party (“INLA”), which, according to the Court, was “more violent than the Irish Republican Army.”²⁴⁷ Ward was ordered to guard and execute two hostages. Instead, he secretly released them because as a matter of conscience he felt that he could not kill innocent hostages. He subsequently fled to Canada in fear of punishment by the INLA, where he applied for refugee status.

In delivering the judgement, La Forest J observed that political opinion has previously been interpreted as existing where persons fear persecution on the basis “that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party.”²⁴⁸ In his view, this interpretation is inaccurate because:

This definition assumed that the persecution from whom the claimant is fleeing is always the government or ruling party, or at least some party having parallel interests to those of the government. . . . however, the *Convention* applies where the State is not an accomplice to the persecution, but is simply unable to protect the claimant. **In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real.**²⁴⁹ (emphasis added)

Although La Forest J appears to suggest that political asylum may be granted where the persecutor is not the state, he goes on to cite with approval the Goodwin-Gill definition, as noted above. That is, that *political opinion* should be understood broadly to include “any matter

245. See [1993] 2 S.C.R. 689 (Can.) for an illustration of the principle of imputed political opinion.

246. See, e.g., *Klinko v. Canada (Minister of Citizenship & Immigration)*, [2000] 3 F.C. 327 (Can.) and *Femenia v. Canada (Minister of Citizenship & Immigration)*, [1995] F.C. No. 1455 (Can.), despite each attempting to follow *Canada (Attorney-General) v. Ward*, [1993] 2 S.C.R. 689 (Can.).

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

248. *Id.* at 746 (citing ATLE GRAHL-MADSDEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 220 (1966)).

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

in which the machinery of state, government, and policy may be engaged.”²⁵⁰ Thus, some linkage to the engagement of the government or the state is needed to turn an opinion into one that is political.

However, according to La Forest J, there are *two refinements* needed to be made to Goodwin-Gill’s analysis:

First, the political opinion at issue need not have been expressed outright. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant’s well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant.

Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant’s true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.²⁵¹

Under this standard, the Court ultimately found that the applicant’s political opposition to the tactics of the INLA could be imputed to him on the basis of his conduct in releasing the hostages he was ordered to guard. The Court held:

To Ward, who believes that the killing of innocent people to achieve political change is unacceptable, setting the hostages free was the only option that accorded with his conscience. The fact that he had or did not renounce his sympathies for the more general goals of the INLA does not affect this. This act, on the other hand, made Ward a political traitor in the eyes of a militant para-military organization, such as the INLA, which supports the use of terrorist tactics to achieve its ends. The act was not merely an isolated incident devoid of greater implications. Whether viewed from

250. *Id.* (adopting GOODWIN-GILL & MCADAM, *supra* note 205).

251. *Id.*

Ward's or the INLA's perspective, the act is politically significant. The persecution Ward fears stems from his political opinion as manifested by this act.²⁵²

At first instance, the opinion imputed to Ward does not appear to be *political*. However, the Court took a very expansive view of the meaning of political opinion to include firstly a reluctance to act in the way required or requested by an organization, even in circumstances where there is no express disagreement with the organization's values. Secondly, the Court stated that the context in which an opinion is political does not need to directly relate to the state entity but instead includes institutions or entities which are involved in attempting to shape the policies and practices of the state. It must be emphasized that in determining whether the applicant is imputed with a political opinion, the reference point is not the actual express or implied views of the applicant, but rather the perception of the persecutor. If the persecutor believes, even wrongly, that the sentiment of the applicant which the persecutor finds objectionable is political in nature, that is sufficient to attract the operation of this ground.

Another manner in which *Ward* expanded the scope of political opinion was that the Court did not require the applicant to establish a causal nexus between the suggested political imputation and the persecution. Unlike the decision in *Elias-Zacarias*, La Forest J did not appear to place any emphasis on the persecutor's motives. In other words, his Honor did not consider the possibility that the INLA may be motivated to harm Ward for non-political reasons, which may have included a desire to punish him for being disobedient as opposed to being a *political traitor*.

The application of this principle in the US context has been considered in *Elias-Zacarias* but as noted above, has not been firmly answered, apart from the fact that US courts have indicated that a causal nexus between the political imputation and the persecution needs to be established.

D. Australia

There has been no attempt by an Australian court to define the parameters of the political opinion ground, however they have

252. *Id.*

described political opinions as being “diverse, imprecise, and even idiosyncratic.”²⁵³ In *Minister for Immigration and Multicultural Affairs v Y*,²⁵⁴ Davies J held that “[t]he words ‘political opinion’ are ordinary words of the English language and have not been the subject of judicial exposition limiting their meaning in the context of the Refugees’ Convention.”²⁵⁵

Australian courts have accepted the position that the ground be interpreted in a broad manner, and that it not be limited to opinions that have been overtly expressed.²⁵⁶ Moreover, in line with *Ward*, Australian courts appear to affirm that political asylum is available where the persecutor is not the state. Thus, the ground extends to actions that are perceived to be a challenge by a group that is opposed to the state or government.²⁵⁷

The clearest articulation of the ground is that by the Federal Court in *Minister for Immigration and Multicultural Affairs v Y*.²⁵⁸ In considering whether the Refugee Review Tribunal was correct in holding that the applicant’s stance against systemic corruption by government officers qualified as a political opinion, Davies J articulated the following principles:

In the context of the Refugees’ Convention, an opinion could be thought to be a political opinion if it were such as to indicate that its holder . . . held views which were contrary to the interests of

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

254. *Minister for Immigration and Multicultural Affairs v Y* [1998] FCA 515 (15 May 1998) (Austl.) [hereinafter *Minister v Y*].

255. *Id.* at 4.

256. *Guo v Minister for Immigration & Ethnic Affairs* (1996) 64 FCR 151, 160 (Austl.) (Beaumont J said that “A mere act or refusal to act may constitute the expression of political opinion.” Beaumont summarized with approval of the broad principles set out in *Canada (Attorney-General) v Ward* [1993] 2 S.C.R. 689 (Can.). Although the High Court of Australia subsequently reversed the Full Federal Court of Australia’s decision (see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559), none of the High Court Justices criticized Beaumont J’s analysis of the term “political opinion.”

Australian courts have continued to adopt Beaumont J’s explanation. See, e.g., *Minister for Immigration and Multicultural Affairs v Y* [1998] FCA 515 (15 May 1998) and *Applicant N403 of 2000 v Minister for Immigration and Multicultural Affairs* [2000] FCA 1088 (23 August 2000).

257. *C v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 366 (Austl.). See also *Devarajan v Minister for Immigration and Multicultural Affairs* [1999] FCA 796 (16 June 1999) (Austl.) (citing *Saliba v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 247 (Austl.)).

258. *Minister v Y*, *supra* note 254.

the State, including the authorities of the State. A person may be regarded as an enemy of the State by virtue of holding and propounding views which are contrary to the views of the State or its Government, or which are antithetic to the Government and the instruments which enforce the power of the State, such as the armed Forces, Security Forces and Police Forces or which express opposition to matters such as the structure of the State or the territory occupied by it and like matters.²⁵⁹

This reasoning was cited with approval by the Full Court of the Federal Court in *V v Minister for Immigration and Ethnic Affairs*,²⁶⁰ which similarly concerned an applicant who had expressed an attitude of resistance to corruption by police officers. Wilcox J stated:

As I understand Davies J, as a matter of law it is enough that a person holds (or is believed to hold) views antithetic to instruments of government and is persecuted for that reasons. It is not necessary that the person be a member of a political party or other public organisation or that the person's opposition to the instruments of government be a matter of public knowledge. Of course, the higher the person's political profile, the easier it may be to persuade a tribunal of fact that the person has been persecuted on account of political opinion, rather than for some other reason; but that is a matter going to proof of the facts, not a matter of law.²⁶¹

In the same case, Hill J stated:

It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by acts . . . With respect, I agree with the view expressed by Davies J in *Minister for Immigration and Ethnic Affairs v Y* . . . that views antithetical to instrumentalities of government such as the Armed Forces,

259. *Id.*

260. *V v Minister*, *supra* note 209.

261. *Id.* at 363.

security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case.²⁶²

In applying the Full Federal Court's decision, Justice Merkel in *Zheng v Minister for Immigration and Multicultural Affairs* held that resistance to systemic corruption and illegality in some circumstances be regarded as a manifestation of a political opinion.²⁶³ The Court held:

. . . exposure of corruption can, in a wide range of circumstances, lead to political persecution. Thus, exposure of corruption in circumstances where it so permeates government as to become part of its very fabric can quite easily lead to a fear that the exposure, of itself, may be imputed to be an act of opposition to the machinery, authority or governance of the state. Likewise, refusal to participate in a corrupt state system can also be seen as an expression or manifestation of political opinion as the refusal to participate may be imputed by the authorities to be a challenge to the machinery, authority or governance of the state. Also, . . . exposure of systemic corruption may be an expression of "political opinion" even if the state is against corruption but is unable to protect the applicant from persecution on this account. In such a case, however, it may be difficult to establish that the exposure of corruption is a manifestation of a political act such as defiance of, or opposition to, the machinery, authority or governance of the state.²⁶⁴

Australian courts have also embraced the imputed political opinion doctrine. In *Minister for Immigration and Ethnic Affairs v Guo*, the High Court confirmed that persons claiming refugee status may do so on the basis of an imputed political opinion. For the purposes of the Convention, a political opinion need not be an opinion that is actually held by the refugee. It is sufficient for those purposes that such an opinion is imputed to him or her by the persecutor. In *Chan*, Gaudron J said:

"persecution may as equally be constituted by the infliction of harm on the basis of perceived political belief as of actual belief."

In the same case, McHugh J said that:

262. *Id.* at 367.

263. *Zheng v Minister for Immigration and Multicultural Affairs* [2000] FCA 670 (23 August 2000) ¶¶ 13-34 (Austl.) [hereinafter *Zheng v Minister*].

264. *Id.* ¶ 32.

“It is irrelevant that the appellant may not have held the opinions attributed to him. What matters is that the authorities identified [Mr Chan] with those opinions and, in consequence, restricted his liberty for a long and indeterminate period.”²⁶⁵

A political opinion may be imputed, for example, based on a person’s membership of a political party, an entity perceived to hold or express political views, or simply on the basis of a person’s family connections, race or ethnicity. It is important to emphasize however that in the Australian context, the determinative factor has centered around the perception and motivation of the persecutor. It is not enough that an applicant may be politically motivated. The ‘critical issue’ is whether the applicant can establish that the persecution is politically motivated.²⁶⁶

In *Zheng v Minister for Immigration and Multicultural Affairs* the Federal Court of Australia held that “exposure of corruption or whistleblowing can result in persecution by reason of an actual or imputed political opinion”,²⁶⁷ however, ‘a critical issue will always be whether there is a causal nexus between the actual or perceived political opinion said to have been manifested by the exposure of corruption and the well-founded fear of persecution’.²⁶⁸

Thus, Australian case law appears to simply endorse the broadly accepted, uncontroversial principles that have arisen in the analysis of the ground. It follows that there has been no considered jurisprudence in Australia on the meaning of political opinion. The cases that turn on this issue often expressly state there is no need for an extensive analysis of the concept and instead base their decisions on the facts of the case.

265. *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567, 570-71 (Austl.). See also *Saliba v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 38, 49 (Austl.); *Minister for Immigration and Multicultural Affairs v Y* [1998] FCA 515 (15 May 1998) (Austl.) and *NAEU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 259 (24 October 2002) (Austl.).

266. See *NAEU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 259 (24 October 2002) (Austl.). See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (Austl.). *Zheng v Minister for Immigration and Multicultural Affairs* [2000] FCA 670 (23 August 2000) [34] (Austl.).

267. [2000] FCA 670 (23 August 2000) [34] (Austl.) at 19.

268. [2000] FCA 670 (23 August 2000) [34] (Austl.) at 34.

V. PROPOSED NEW DEFINITION OF POLITICAL OPINION

It follows from the above that there is no settled and clear meaning of political opinion or the concept of an imputed political opinion. A telling feature of the above analysis is that there is no consistency regarding the approach to political opinion in the above jurisdictions. This is despite the fact that ostensibly, they are all interpreting the same legal instrument. This is of course not uncommon given that each of the three countries is sovereign and not bound to follow or even give meaningful weight to decisions by courts and other legal bodies in other countries. However, what is unusual and unexpected from the analysis of the above cases is the disinclination by courts in all of the above jurisdictions, with the possible exception of Canada, to meaningfully and fully consider the definition and scope of the political opinion ground. This is the case especially given the importance that decisions relating to refugee applications have on the welfare of asylum applicants.

There have been no systematic and deep doctrinal endeavors to articulate in an informative and compelling manner the nature and scope of the definition of political opinion and the boundaries of this concept. This has the regrettable effect of making decisions in this area inconsistent and unpredictable. This uncertainty can also undoubtedly create a hesitation to attempt to claim asylum on this basis. It is imperative that this concept is given fuller legal attention and its parameters more definitively circumscribed. In order to do this, it is necessary to revert to the purpose of the Convention and to also be cognizant of the evidential manner in which refugee claims are determined.

Consistent with the aims and historical backdrop to the Convention, all of the grounds, including political opinion, should be given the broadest interpretation which is coherent and in accordance with the connotation of the phrases. In relation to political opinion, the key concept is that of politics. This is a fluid and evolving term. A strong argument can be mounted that most areas of human endeavor and human discourse have a political aspect given that decisions in the political domain have the capacity to influence all areas of society. It is this reference point that should guide the manner in which political opinion is interpreted.

As we have seen, a sticking point that has arisen is whether or not the decision to not hold a political opinion merits protection. This issue has arisen frequently in the context of a refusal to adhere to the

ideologies of or to join a violent group. In a landmark decision in 2012, the UK Supreme Court held that the expression of neutrality merits protection under the Convention, regardless of the underlying motivation.²⁶⁹ The Court held that doing nothing at all was the essence of an expression of neutrality and refused to draw a distinction between “conscientious or committed” neutrality and that which is simply a matter of indifference.²⁷⁰

This is in stark contrast to the position taken by the US Supreme Court who despite being faced with the question, declined to rule on the issue of neutrality.²⁷¹ It did however indicate that affirmative conduct is needed to support the neutral opinion and said that the motivation behind the neutral opinion is relevant. The failure of the US Supreme Court to provide a firm decision in *Elias-Zacarias* has resulted in confusion and a narrowing of the ground.²⁷² Denying asylum to neutrals is inconsistent with the purposes of the Convention.

This tension is very important regarding current refugee flows to the United States. This is because an increasing majority of asylum claims lodged to the United States are made by applicants who are at risk of persecution by violent criminal groups due to their opposing or, in some cases, neutral political opinions. Examples of such groups include guerilla organizations, drug cartels, and street gangs. These groups are extremely prevalent in Central America, which is considered one of the most violent regions in world, and as noted above, Central America persons make up about half of all asylum applications to the United States.²⁷³

In fact, an enormous amount of recent refugee aspirants to the United States have left their country because of the political volatility and their opposition to events in their homeland. Venezuela is a good example. The violent, fragile and unstable political landscape in

269. *RT (Zimbabwe) v. Secretary of State for the Home Department* [2012] UKSC 38 (UK).

270. *Id.*

271. See *Elias Zacarias*, 502 U.S. at 483.

272. *Mejilla-Romero v. Holder*, 600 F.3d 63, 72 (1st Cir. 2010) (holding that “mere refusal to join a gang does not constitute political opinion” even in circumstances where the Applicant can show that the persecution was motivated by the resistance to gang recruitment). See also *Matter of S-E-G*, 24 I.&N. Dec. 579, 588 (B.I.A. 2008) and *Matter of E-A-G*, 24 I.&N. Dec. 591, 596 (B.I.A. 2008). See also *Sangha*, 103 F.3d at 1490 (“In *Elias Zacarias* the Supreme Court instructed us to change course. It held that an applicant’s refusal to fight in the context of a forced recruitment is not enough by itself to show that the persecutor acted ‘on account of’ his political views.”).

273. See Section I.D.

Venezuela has resulted in the breakdown of the economic and social institutions in that country. It has also led to an almost total fracturing of the rule of law and unwillingness or inability of the government to maintain community safety. In this context, most people simply do not feel empowered to express opposition to any political acts. This will be futile because it will not change events and it is likely in many cases to endanger their safety.

Nevertheless, the core reason that many people are leaving Venezuela is because of the extreme political events currently unfolding in that country. It is these political events and people's beliefs and their opinions relating to those events that have motivated them to seek asylum elsewhere. To assert that people in this group are not seeking asylum because of their political opinion is a fundamental misconception of the events underpinning their decisions and the logical process which they undertook, leading to the decision to leave their homeland. Thus, it is imperative that the reasoning in *Elias-Zacarias* is overturned. A broader definition of political opinion should be adopted in keeping with that in the United Kingdom. This in fact is the approach that has been taken in many parts of Europe, where asylum seekers who are similarly placed to those leaving Venezuela, specifically Syrians, are being granted asylum.²⁷⁴

Another aspect of the definition of political opinion which is unsatisfactorily dealt with in the relevant jurisprudence relates to the issue of causation. There have been numerous decisions in the United States and elsewhere where decision makers have accepted that a refugee applicant has an adverse political opinion, but then ruled that this is not the causal basis for the fear of persecution that the applicant may have.

This approach is in nearly all cases logically and empirically flawed because there is no causal standard that has been set by the courts or legislature that needs to be established in order for a refugee claim to be substantiated. A reading of the relevant authorities suggests that the causation element is being used as a convenient linguistic tool to deny refugee status and to quite often facilitate not carefully grappling with closely examining and defining the meaning of political opinion and its relevance to a particular case.

274. Allison Hall, *Means or Ends? A Comparative Note and Reflection on "Imputed Political Opinion" Asylum in the United States and Europe*, 79 U. PITT. L. REV. 105 (2017) (Note the UNHCR published a guidance note suggesting that this ground serves as a successful basis for protection in the context of Syrians).

Clearly a jurisprudentially sound approach needs to be established and applied by the courts. To this end, in numerous other areas of law including criminal law and torts it has been noted that causation is a nebulous and difficult concept, especially in circumstances where there are multiple events that contribute to a certain outcome. The meaning of causation needs to be context sensitive to the area of law in question and the evidence which is typically available regarding claims in the relevant area. In nearly all refugee cases, the persecutor is not a party and does not give evidence, and therefore it is impossible to interrogate their motives, intentions and beliefs.

Additionally, if an applicant is denied refugee status simply because they do not satisfy one of the grounds but nevertheless is at risk of persecution, this can result in a tragic outcome for the applicant. Thus, it follows that the grounds should be interpreted broadly and in a manner which recognizes the limits of the evidential material that can be tendered in any particular case. It is impossible in most cases for a refugee applicant to tender first hand evidence from their persecutor regarding the exact reason that they are being targeted. It is thus unfair to expect a refugee applicant to demonstrate in a compelling manner the exact casual basis for which they are being targeted.

A more realistic and coherent approach needs to be taken to issues of causation. To this end, it is suggested that the appropriate casual nexus should be satisfied where the evidence suggests that the applicant's political opinion is one or more of the reasons that they are being targeted for persecution; there should not be a requirement that it is an operative or the main reason that they are in fear of their safety.

VI. CONCLUDING REMARKS

The world is experiencing refugee flows which are at unprecedented levels in recent human history. There are no obvious solutions to this crisis and in fact the number of refugees is increasing each year. The refugee crisis is being particularly felt by the United States due to increasing volatility in the political and social situation in its region, especially in Venezuela and other regions in Central America.

The crisis caused by large numbers of asylum seekers has generated a mass amount of media and social commentary. No systematic approach to dealing with the crisis has been suggested. A paradox that has emerged is that the increase in asylum seekers has

been met with a reduction in the asylum cap in the United States and also an increased determination by the United States Government to physically prevent asylum seekers from reaching American soil. This has been accomplished by closing American borders in locations which are often pathways to the United States. Another paradox to emerge regarding the lowering of the asylum cap is that despite the significantly increased refugee demand, the cap in recent years has not been met.

It is clear that the United States like many countries around the world is experiencing difficulties regarding the best way in which to approach the increasing refugee problem. In a large part, the solutions to refugee flows are political and social in nature. The approach will largely turn on the willingness of countries to absorb large amounts of desperate people fleeing their homeland.

The approach however is not solely political. It also has a legal dimension. The fundamental bulwark around which refugee claims have been determined for nearly 100 years now in more than 140 countries including the United States is the Refugee Convention. This instrument has provided the pathway for the settlement of millions of asylum seekers worldwide. However, the instrument is equivocal in relation to the exact profile of people who should be granted refugee status. This uncertainty provides a further obstacle to people being able to persuasively articulate their case for refugee settlement and can diminish their inclination to assert grounds in the Convention as being the basis for settling in a new country.

One of the five refugee grounds is political opinion. This is a particularly important contemporary ground given that millions of current displaced people have left their country of origin on the basis of turmoil and conflict which has a political foundation. The capacity of asylum seekers to use this ground as a pathway for settlement in their country of refuge has been attenuated by the fact that the courts have failed to comprehensively define the meaning of political opinion, and to the extent that they have considered the term, it has been examined in an ad hoc and narrow fashion.

Political opinion needs to be defined in a transparent and coherent manner so that asylum seekers are in a position to foreshadow whether their claims are likely to come within the scope of this concept. As we have seen, two particular shortcomings regarding the current approach that is often adopted to political opinion are that it is necessary for the applicant to have a defined position regarding a political matter and the

requirement to establish that this is a key cause of their fear of persecution.

These approaches are flawed. They are inconsistent with the purpose of the Refugee Convention and its history. A more coherent approach would abolish the requirement that an individual must have an established position regarding a political matter. To this end, an approach in-line Canada should be adopted. Moreover, given the evidential limitations that normally apply in relation to refugee applications, there should be no requirement that an asylum seeker must establish a strong casual nexus between political opinion and the persecution. These changes will make the law in this area clearer and more coherent and provide greater certainty and clarity to both asylum seekers and decision makers, thereby enhancing the consistency and fairness in the processing of refugee claims.