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The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century

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The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century

Andrew I. Schoenholtz*

Abstract

When the fledgling U.N. negotiated a treaty to protect refugees after the Second World War, member states focused on Europe as well as on events causing forced migration that occurred prior to 1951. No one imagined that cross-border escape from persecution would become a global phenomenon and remain one more than sixty years later, or that this human rights treaty would be needed in the twenty-first century. In fact, as increased numbers of asylum seekers from developing countries reached the most developed regions of the world during the last thirty years, critics have questioned the merits of this treaty and argued that the Refugee Convention has become outmoded and obsolete.

This Article considers how well suited this treaty is for the protection of refugees fleeing persecution in today's world. The author first looks at how the nature of the state itself has evolved and finds that too many governments today fail at providing significant portions of their citizenry with the most basic level of human security. A new cast of persecutors apart from the state now exerts authority and power in such societies, targeting particular societal groups using new forms of persecution. Examining how states have adapted this multilateral agreement to these changing circumstances, the author finds that this treaty continues to be vital in protecting the human rights of refugees thanks to two important treaty elements: a clear and fundamental purpose to protect individuals whose governments have been unwilling or unable to do so, and flexible terms that have enabled jurists and government officials to adapt the refugee definition to the changing nature of forced migration. Accordingly, the author's analysis confirms the conclusion of the International Law Commission Special Rapporteur on Treaties over Time that "subsequent practice by the parties may guide an evolutive interpretation of a treaty."

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Table of Contents

I. Introduction: Protecting the Human Rights of Refugees.....	83
II. The Beginnings of the Modern International Refugee Law Regime.....	85
III. Challenges to the Refugee Convention	86
IV. Why and How the Refugee Convention Matters Today: An Examination of New Agents and Targets of Persecution	91
A. The Changing Nature of the State and Agents of Persecution	92
B. The New Agents of Persecution under the Refugee Convention.....	100
C. The New Targets of Persecution under the Refugee Convention: Particular Social Groups Today	107
V. What Has Enabled the Refugee Convention to Adapt to Changes over Time?.....	119
VI. Conclusion.....	124

“The sine qua non of the political commonwealth is to defend the citizen ‘from the invasion of foreigners and the injuries of one another.’”¹

I. INTRODUCTION: PROTECTING THE HUMAN RIGHTS OF REFUGEES

When governments established the U.N. in 1945, war and persecution had displaced over forty million people in Europe alone. Today’s state system continues to produce large numbers of forced migrants in connection with such causes. At the same time, new forms of displacement related to natural disasters and climate change challenge governments and civil society to respond in humane and effective ways to ensure that the crisis needs of all people are met in a non-discriminatory fashion.² Experts agree that new norms beyond those established for persecution and war refugees need to be developed.³ As the international community carefully considers how to deal with the latest forms of forced migration, officials, advocates, and scholars of human rights might learn from the evolution and implementation of the core human rights treaty on forced migration created in 1951—the Convention Relating to the Status of Refugees (“Refugee Convention”).⁴ For that reason alone, why and how this treaty matters today merits reflection.

An even more compelling reason to investigate this human rights treaty is that State Parties have tried for some time to minimize its relevance to today’s forced migrants. In a 2000–2001 report for the Australian Parliament, one researcher called the treaty “outdated” and “obsolete.”⁵ In contrast, I argue that

¹ Andrew E. Shacknové, *Who Is a Refugee?*, 95 ETHICS 274, 278 (1985) (quoting THOMAS HOBBS, LEVIATHAN 105 (1651)).

² See generally Alexander Betts, *Survival Migration: A New Protection Framework*, 16 GLOBAL GOVERNANCE 361 (2010).

³ See, for example, *id.* at 362 (addressing the protection needs of survival migrants who face “an existential threat to which they have no access to a domestic remedy or resolution” and who fall outside the scope of the international refugee regime) (internal quotation marks omitted); Etienne Piguet, *Climate Change and Forced Migration* (UNHCR New Issues in Refugee Research, Research Paper No. 153 2008), available at <http://www.unhcr.org/47a316182.pdf> (discussing the protection needs of environmental refugees).

⁴ Convention relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

⁵ Adrienne Millbank, *The Problem with the 1951 Refugee Convention* (2000), available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/tp/tp0001/01RP05. This same researcher more recently called for the Australian government to “ditch” the Refugee Convention. Adrienne Millbank, *Ditch the Refugee Convention*, THE AUSTRALIAN, May 3, 2013, <http://www.theaustralian.com.au/national-affairs/opinion/ditch-the-un-refugee-convention/story-e6frgd0x-1226634223906>.

the treaty created in 1951 to address then-contemporary international displacement is reasonably alive and well with respect to today's persecuted refugees and has enabled states to protect many of these particular forced migrants.

This study, then, will closely examine the Refugee Convention's application to the changing nature of forced migration. As such, it aims to contribute to the recent and ongoing examinations being conducted by the International Law Commission regarding "Treaties over time/Subsequent agreements and subsequent practice in relation to interpretation of treaties."⁶

My focus will be on the evolution of the substantive law in terms of whom this treaty protects as refugees pursuant to the international definition, which has remained unchanged since its creation. States negotiated this definition in a particular Western historical context: the aftermath of the Second World War and the very early days of the Cold War. How viable is this definition in today's world?

I will argue that this definition possesses core characteristics that have enabled adjudicators, advocates, the United Nations High Commissioner for Refugees (UNHCR), and scholars to apply it to the protection needs of persecuted refugees in today's world. While this has not occurred without struggle and challenges, my claim is that the "refugee" definition, now in its seventh decade of life, has proven adaptable to the changing nature of persecution.

One clarification before I present this analysis: I am on record elsewhere critiquing a significant limitation of the international refugee regime as well as ways that states have implemented the treaty.⁷ While the 1951 Convention addresses the protection of persecuted refugees, it does not deal with the protection of refugees fleeing conflict that does not involve targeted, individual persecution. States have had many opportunities since establishing the Refugee Convention to develop a global treaty for *conflict* refugees, but one does not yet exist. That subject continues to deserve the attention of states, advocates, and scholars. But it does not take away from the considerable accomplishments of the 1951 Refugee Convention. As to the shortcomings in implementation, an important role of researchers is to document such problems as they occur. But

⁶ Treaties Over Time/Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties, INTERNATIONAL LAW COMMISSION, http://legal.un.org/ilc/summaries/1_11.htm (last visited May 1, 2015).

⁷ See, for example, Andrew I. Schoenholtz, *Improving Legal Frameworks*, in THE UPROOTED: IMPROVING HUMANITARIAN RESPONSES TO FORCED MIGRATION 30–72 (Susan F. Martin et al. eds., 2005); Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUMAN RIGHTS L. REV. 323 (2005).

such shortcomings should not prevent us from recognizing implementation successes.

II. THE BEGINNINGS OF THE MODERN INTERNATIONAL REFUGEE LAW REGIME

Born in 1951 in the aftermath of the failure to save the persecuted who perished at the hands of the Nazis, the Refugee Convention set out both to protect refugees from persecution and to ensure their widest possible exercise of fundamental rights and freedoms without discrimination, as affirmed by the 1948 Universal Declaration of Human Rights. Through this treaty substituting a willing sovereign for an irresponsible or incapable one, State Parties created an international legal regime that respected the stabilizing and humanitarian value of the state-citizen relationship. Via the *non-refoulement* obligation set out in Article 33, states committed themselves not to return an individual who reasonably feared serious harm in her state of nationality or residence. The treaty strongly encourages governments to naturalize refugees, and most of the Refugee Convention provisions speak to a set of political, social, and economic rights as well as State Party obligations that enable refugees to rebuild their lives through a relationship with a new sovereign.

Of course, this international agreement started out principally as a European treaty limited in time to events occurring before 1951 that had caused cross-border displacement. In fact, Contracting States could limit their obligations to the territory of Europe.⁸ During the Convention's adolescence, these temporal and geographical limitations became outmoded when the General Assembly called on UNHCR primarily to protect and assist large numbers of refugees in the developing world. Accordingly, in 1967, the General Assembly adopted the Protocol Relating to the Status of Refugees,⁹ removing these limitations and essentially universalizing the international refugee definition and the rights set forth in the Convention.

In the 1950s and 1960s, most of the Convention refugees in the West fled the Communist states controlled by the Soviet Union and migrated as individuals. The exception was the mass exodus of 200,000 Hungarians fleeing the Soviet repression of the 1956 uprising.¹⁰ The treaty faced a special challenge, because the agreement only applied to "events occurring" before 1951. Dr. Paul

⁸ See Refugee Convention, *supra* note 4, art. 1(B)(1).

⁹ Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol].

¹⁰ U.N. High Comm'r for Refugees, *State of the World's Refugees—2000: Fifty Years of Humanitarian Action* 26–27, 29–30 (2000).

Weis, the Legal Advisor to the High Commissioner, did what jurists, legal experts, and advocates have done ever since when presented with this problem of interpretation: he analyzed how the treaty applied to a contemporary situation. In this case, he articulated the connections between the causes of the 1956 refugee flight and events that occurred before 1951.¹¹

III. CHALLENGES TO THE REFUGEE CONVENTION

The Refugee Convention has spent much of its adult life under attack in both developed and developing countries. Starting especially in the 1980s, European states began to interpret the refugee definition more strictly in response to larger flows of individuals from the developing world applying for refugee status through formal screening procedures.¹² The rate of recognition in Western Europe fell from forty-two percent in 1983 to sixteen percent in 1996.¹³ Western states acted to some degree as if the political purposes of the treaty, less important as the Cold War waned, mattered more than the humanitarian ones.¹⁴

States began restricting territorial access to refugees in significant ways. The Reagan Administration established an agreement with Baby Doc Duvalier to return Haitians interdicted on the high seas unless U.S. officials determined on the spot that they needed Refugee Convention protection.¹⁵ In reality, this meant that the U.S. returned over 22,000 Haitians who tried to reach the U.S. on boats and admitted around one hundred who could then apply for asylum.¹⁶

¹¹ See *id.* at 30–31.

¹² See Jerzy Sztucki, *Who Is a Refugee? The Convention Definition: Universal or Obsolete?*, in *REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES* 55, 69–71 (Frances Nicholson & Patrick Twomey eds., 1999).

¹³ *Id.* at 71. In 1996, another ten percent were allowed to remain on humanitarian grounds. *Id.* at 71–72.

¹⁴ See generally Charles B. Keely, *The International Refugee Regime(s): The End of the Cold War Matters*, 35 *INT'L MIGRATION REV.* 303 (2001); see also Schoenholtz, *Improving Legal Frameworks*, *supra* note 7, at 39–46; T. Alexander Aleinikoff, *State-Centered Refugee Law: From Resettlement to Containment*, in *MISTRUSTING REFUGEES* 257, 262, 265 (E. Valentine Daniel & John Chr. Knudsen eds., 1995).

¹⁵ See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 159–62 (1993).

¹⁶ U.N. High Comm'r for Refugees, *STATE OF THE WORLD'S REFUGEES—2012: IN SEARCH OF SOLIDARITY* 176 (2012) [hereinafter *STATE OF THE WORLD'S REFUGEES 2012*]. The U.S. continues to interdict asylum seekers on the high seas and, at times, return them without determining whether they are refugees. Other countries have followed suit. Australia started doing so in 2001; in contrast with the U.S. direct returns, Australia made some determination (though not necessarily with a fair process) as to an individual's need for protection. See Jessica Howard, *To Deter and Deny: Australia and the Interdiction of Asylum Seekers*, 21 *REFUGEE* 35, 36 (2003). Most recently, Italy and Spain, with the assistance of the European Union through FRONTEX, have taken this to the next legal level and teamed up with Libya, Senegal, and Mauritania, respectively, to interdict asylum seekers and other migrants in the territorial waters of these states before they can reach the high seas. See FRONTEX Risk Analysis Unit, *Report for the Second Quarter of 2010*

The number of asylum seekers that reached the West increased significantly over time, and the origins of those claiming protection shifted from Eastern Europe to the developing world. Between 1985 and 1995, the industrialized world received about five million asylum applications.¹⁷ Western nations responded to these increases and demographic shifts by more aggressively controlling their borders, changing their procedures, and revising their laws and policies in a variety of ways. To limit access to their territories, some states established pre-clearance and pre-inspection programs abroad.¹⁸ Some imposed new visa requirements on nationals from countries that produce refugees. Several began to detain arriving asylum seekers. Many Western States created fast-track asylum procedures aimed at “manifestly unfounded” claims.¹⁹ Some established filing deadlines. Aimed in part to control abuse, many European governments imposed new policies regarding claimants who came from what were called “safe countries of origin” as well as those who had passed through “safe third countries.”²⁰ Western governments started to deny asylum claims where persecution was not countrywide (invoking so-called “internal flight alternatives”),²¹ and a few European states denied protection involving certain non-state agents of persecution.²²

According to Professor Aleinikoff, the exilic bias of post-World War II refugee law lost its appeal in the developed West in the 1980s, such that “states,

(April–June) 5–6 (2010). This approach continues to dominate European state thinking in the context of over 220,000 arrivals by sea and more than 3,200 deaths at sea in 2014. See Judith Sunderland & Bill Frelick, *EU’s Approach to Migrants: Humanitarian Rhetoric, Inhumane Treatment*, Apr. 15, 2015, available at <https://www.opendemocracy.net/beyondslavery/judith-sunderland-bill-frelick/eu%E2%80%99s-approach-to-migrants-humanitarian-rhetoric-inhuman>.

¹⁷ U.N. High Comm’r for Refugees, *State of the World’s Refugees—1997–98: A Humanitarian Agenda* 184 (1997) [hereinafter *State of the World’s Refugees 1997*].

¹⁸ See Schoenholtz, *Improving Legal Frameworks*, *supra* note 7, at 39–46; STATE OF THE WORLD’S REFUGEES 1997, *supra* note 17, at 191–94; U.N. High Comm’r for Refugees, *STATE OF THE WORLD’S REFUGEES—1993: THE CHALLENGES OF PROTECTION* 38–39 (1993) [hereinafter *STATE OF THE WORLD’S REFUGEES 1993*].

¹⁹ See U.N. High Comm’r for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, EXCOM Conclusion No. 30 (1983), available at <http://www.unhcr.org/3ae68c6118.html>.

²⁰ Schoenholtz, *Improving Legal Frameworks*, *supra* note 7, at 43–45.

²¹ See Nergis Canofe, *The Fragmented Nature of the International Refugee Regime and Its Consequences: A Comparative Analysis of the Applications of the 1951 Convention*, in *CRITICAL ISSUES IN INTERNATIONAL REFUGEE LAW: STRATEGIES TOWARD INTERPRETIVE HARMONY* 174, 176–78 (James C. Simeon ed., 2010) (discussing the use of internal flight alternatives as legal foundation for limiting access to asylum as applied to Sikh activists returned to other regions of India, Tamils to southern Sri Lanka, and Turkish Kurds to Istanbul); see also *id.* at 199–200 (describing European restrictions, such as lower grant rates, returns, and procedural limitations).

²² See *STATE OF THE WORLD’S REFUGEES 1997*, *supra* note 17, at 191–94.

as matters of domestic law, have adopted narrow readings of the [C]onvention's definition of refugee."²³ States replaced the original exilic bias with what Aleinikoff calls "source control bias" and "policies of containment."²⁴ The laws, policies, and practices described above support this thesis.

Some governments, analysts, and journalists directly attacked the Refugee Convention. Some states reportedly threatened to opt out of the treaty.²⁵ For example, the British head of the Conservative Party and Opposition to Prime Minister Blair pledged to pull out of the 1951 Convention.²⁶ In a 2000 paper prepared for the Australian Parliament, commentator Adrienne Millbank asserted that "the problem with the Convention is that it was developed in and for a different era,"²⁷ and "the Convention definition of refugee is outdated, as is its notion of exile as a solution to refugee problems."²⁸ Millbank echoes this criticism repeatedly, and she notes that some Austrian and British leaders have espoused similar views.²⁹

Concerned about large numbers of refugees requesting asylum in the U.K. under the Refugee Convention, Prime Minister Blair's government considered removing asylum seekers who reached the U.K. to protection areas near their countries of origin in 2003.³⁰ The deported asylum seekers would have had to stay in these UN zones for six months before processing of their claims. The opposition party leadership pushed the concept further to include a strict quota

²³ Aleinikoff, *supra* note 14, at 262.

²⁴ *Id.* at 263, 265 (emphasis omitted).

²⁵ See Eiko R. Thielemann & Torun Dewan, *The Myth of Free-riding: Refugee Protection and Implicit Burden-sharing*, 29 WEST EUROPEAN POLITICS 351, 354 (2006).

²⁶ See *Howard Defends Immigration Stance*, BBC NEWS, Sept. 23, 2004, http://news.bbc.co.uk/2/hi/uk_news/politics/3682310.stm.

²⁷ Millbank, *The Problem with the 1951 Refugee Convention*, *supra* note 5, at 2, 4.

²⁸ *Id.* at 3.

²⁹ For example, she states: "The crux of criticism is that the Convention is obsolete and inappropriate to deal with contemporary challenges." *Id.* at 5. "The essence of criticism of the 1951 UN Refugee Convention is that it is anachronistic." *Id.* at 6 (internal citation omitted). She provides examples of Western leaders who espouse this view: "In 1998 the Austrian Presidency of the EU suggested replacing the Convention with an EU asylum law 'which meets today's requirements rather than those of a geopolitically outdated situation.'" In April 2000, "the UK Home Secretary, Jack Straw, criticized the Convention as 'too broad for conditions in the 21st Century.'" *Id.* at 8.

³⁰ See *Safe Haven Plans to Slash Asylum Numbers*, THE GUARDIAN, Feb. 4, 2003, <http://www.theguardian.com/society/2003/feb/05/asylum.immigrationasylumandrefugees>. The British government proposals can be found in a letter sent by Tony Blair on March 10, 2003 to the Greek Prime Minister, Costas Simitis, prior to the Thessaloniki European Council meeting of June 2003, available at <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf>.

from among those found to be Convention refugees.³¹ Noting that these problems have not gone away in 2011, journalist Ed West declared the 1951 Refugee Convention “unfit for purpose”: “the very concept of asylum,” he asserted, is “an outdated and unworkable relic from the mid-20th century.”³²

Why do Millbank, these Western leaders, and journalists such as Ed West view the Refugee Convention in this way? One reason concerns how refugees flee their homes outside of the controlled channels of immigration: “The use by the boat people of people smugglers to circumvent visa and border controls has prompted Australia to join other countries in openly questioning the operation and continuing viability of the Convention itself.”³³ Millbank goes on to point out that “asylum systems in Western countries have come under increasing strain through their use as a migration channel,” though this is particularly true for European countries without traditional avenues of legal immigration.³⁴ At times, public reaction in certain Western nations to increasing numbers of refugees and other migrants entering from developing countries has been particularly negative:

Asylum seekers, along with those who enter via family reunion, have comprised the bulk of the sizeable immigrant intakes into Western European countries in recent years. Asylum-driven immigration ranks high among voter concerns, anti-foreigner sentiment is widespread, and right-wing anti-immigration parties are getting up to 30 per cent of voter support.³⁵

Political elites in numerous European nations, including France, Germany, Italy, the U.K., Sweden, and Finland, have taken hard lines on immigration to address public concerns.³⁶ In this context, states have actively tried to restrict access to asylum in myriad ways, including by externalizing border controls.³⁷

³¹ See Alan Travis, *Letwin Pledges to Keep Asylum Seekers Out*, THE GUARDIAN, Oct. 8, 2003, available at <http://www.theguardian.com/society/2003/oct/08/asylum.politics>.

³² Ed West, *It's Not the Home Office's Fault—the UN Convention on Refugees Is Not Fit for Purpose*, THE TELEGRAPH (Jan. 11, 2011), <http://blogs.telegraph.co.uk/news/edwest/100071316/its-not-the-home-offices-fault-%E2%80%93-the-un-convention-on-refugees-is-not-fit-for-purpose/>.

³³ Millbank, *The Problem with the 1951 Refugee Convention*, *supra* note 5, at 3.

³⁴ *Id.*

³⁵ *Id.* at 5.

³⁶ Dr. Matthew Goodwin interviewed by National Public Radio host Rachel Martin, *Watching Extremism: Rise of the European Right*, NPR, Apr. 15, 2012, <http://www.npr.org/2012/04/15/150667555/watching-extremism-rise-of-the-european-right>.

³⁷ See Schoenholtz, *Improving Legal Frameworks*, *supra* note 7, at 39–46; Schoenholtz, *Refugee Protection in the United States Post-September 11*, *supra* note 7, at 360–364; see generally Jane McAdam & Kate Purcell, *Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum*, 27 AUSTRALIAN YEARBOOK OF INT'L LAW 87 (2008); Guy S. Goodwin-Gill, *Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT'L J. OF REFUGEE LAW 443 (2011).

UNHCR's own magazine featured a cover story on the fiftieth anniversary of the Refugee Convention entitled "A 'Timeless' Treaty Under Attack."³⁸ The article stated that in 2001 "the Convention is coming apart at the seams, according to some of the same capitals which had breathed life into the protection regime a half century ago."³⁹ States reported that their asylum systems are being overwhelmed and are "urging a legal retrenchment," concluding that the Convention is "outdated, unworkable and irrelevant."⁴⁰

Given the shift in developed-state attitudes towards the Refugee Convention, UNHCR, the international organization responsible for working with states as they implement this agreement, felt compelled at the end of the twentieth century to redress the deteriorating quality of asylum and to "revitalise a too often criticised, disregarded or abused protection framework."⁴¹ The agency understood that "states face considerable challenges as they try and reconcile their obligations under the Convention with problems raised by the mixed nature of migratory movements, misuse of the asylum system, increasing costs, [and] the growth in smuggling and trafficking of people."⁴² UNHCR proposed Global Consultations to clarify the scope and content of protection with the goal of strengthening the implementation of the 1951 Convention "as the foundation and central refugee protection instrument."⁴³ The agency heard the complaint that the refugee treaty regime was outmoded: "We hear with increasing regularity that the protection regime of which we have been made the guardian no longer exactly fits the problem."⁴⁴ UNHCR's leadership disagreed with that state perspective and asserted that "refugee protection is not a static but a dynamic and action-oriented function. It has and must retain an inherent capacity for adjustment and development in the face of a changed international environment."⁴⁵ Accordingly, one of the goals of the Global Consultations was to "promote the progressive development of international law for the protection of refugees."⁴⁶

³⁸ Marilyn Achiron, *A 'Timeless' Treaty under Attack*, 123 REFUGEES 4 (2001), available at <http://www.unhcr.org/3b5e90ea0.html>.

³⁹ *Id.* at 6.

⁴⁰ *Id.* at 6–7.

⁴¹ U.N. High Comm'r for Refugees, *Revitalizing the Refugee Protection Regime: The Road Ahead as the 1951 Convention Turns 50*, Statement by Ms. Erika Feller, Dep't of Int'l Protection, to the 51st Session of ExCom, Geneva (Oct. 3, 2000), available at <http://www.unhcr.org/429d70e72.html>.

⁴² U.N. High Comm'r for Refugees, Exec. Comm., Note on International Protection, UN Doc. A/AC.96/951, 1 (Sept. 13, 2001).

⁴³ U.N. High Comm'r for Refugees, *supra* note 41.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ U.N. High Comm'r for Refugees, *supra* note 42.

These UNHCR campaigns for the protection of refugee rights appropriately aimed to motivate states to behave as they committed themselves to do when they became signatories to or ratified this treaty and/or its Protocol, or to comply with international customary law (for those states not yet signatories). But more than a decade following UNHCR's Global Consultations, these issues remain.⁴⁷

IV. WHY AND HOW THE REFUGEE CONVENTION MATTERS TODAY: AN EXAMINATION OF NEW AGENTS AND TARGETS OF PERSECUTION

Despite these direct challenges to their effectiveness and the fact that there is no international enforcement mechanism, the Refugee Convention and Protocol are implemented on a daily basis in ways that protect persecuted refugees, even in states that have tried to limit their treaty obligations. While implementation is imperfect, many refugees are protected.⁴⁸ UNHCR reported that states recognized more than 210,000 asylum-seekers as Convention refugees in 2012.⁴⁹

How are states applying the terms of the Refugee Convention to protect today's refugees who show up on their shores? Focusing on two significant legal concepts, I will show that the refugee definition has enabled states to protect refugees from new kinds of persecution and from both non-state and state agents of persecution.

⁴⁷ In 2013, Millbank opined that the Refugee Convention legitimizes unregulated entry, a growing number of voters think the treaty is past its "use-by date," and Australians should "rethink dubious international obligations" and require asylum-seekers to apply for a refugee or humanitarian visa overseas. Millbank, *Ditch the Refugee Convention*, *supra* note 5.

⁴⁸ Asylum grant rates in U.S. immigration courts are considerably higher now than they were in the mid-1990s. See Office of Planning, Analysis, & Technology, Exec. Office for Immigration Rev., FY 2013 Statistical Yearbook K1 (2014), available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf> (showing grants rates over 50 percent in each of fiscal years 2010–2013); FY 2000 Statistical Yearbook O2 (2001), available at <http://www.justice.gov/eoir/statspub/SYB2000Final.pdf> (showing grants rates of 17 percent and 23 percent for fiscal years 1996 and 1997).

⁴⁹ U.N. High Comm'r for Refugees, STATISTICAL YEARBOOK 2012 6 (2013). This number included an estimated 20,500 individuals whose negative decisions were overturned at the appeal or review stage, although UNHCR reports the figure is likely to be substantially higher, as a significant number of decisions rendered by states at the appeal or review stage of the asylum procedure have not been released. In 2012, the U.S. recognized the largest number of Convention status refugees (25,300 during the U.S. fiscal year), followed by Germany (17,100), Rwanda (15,100), Sudan (14,000), Sweden (13,700), Malaysia (13,100), and Turkey (10,900). *Id.* at 46. In 2013, states granted 44 percent of asylum seekers Convention refugee status or a complementary form of protection, a significantly higher value than the 37 percent granted in 2012. U.N. High Comm'r for Refugees, GLOBAL TRENDS 2013 30 (2014).

A. The Changing Nature of the State and Agents of Persecution

As Andrew Shacknove observed almost three decades ago, the absence of state protection is the basis of refugeehood:

In exchange for their allegiance, citizens can minimally expect that their government will guarantee physical security, vital subsistence, and liberty of political participation and physical movement. No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning.⁵⁰

There is a long history of states not living up to this understanding of the social compact, and in that regard, many states today do not protect all their citizens well. In some instances, they are simply not willing to do so—the state itself may persecute individuals or condone persecution carried out by non-state actors. In other situations, states are willing but unable to protect all citizens.

The nature of the state has changed since 1951, resulting in governments with varying degrees of authority and territorial control. The UN consisted of fifty-one countries at its founding in 1945. Thirteen of these states participated in the Ad Hoc Committee on Stateless and Related Problems, as formed in 1949 by the Economic and Social Council (ECOSOC) to prepare and revise draft agreements on the legal status of stateless persons.⁵¹ Pursuant to General Assembly Resolution 429(V) of December 14, 1950, UNHCR convened the Conference of Plenipotentiaries, comprised of twenty-six State participants and two State observers, to prepare what became the 1951 Refugee Convention.⁵² Political scientists and international relations experts report that most governments in 1951 asserted authority throughout their territory, whether they were by nature authoritarian or democratic.⁵³ In contrast, these experts observe a

⁵⁰ Shacknove, *supra* note 1, at 281.

⁵¹ These states were Belgium, Brazil, Canada, China, Denmark, France, Israel, Poland, Turkey, the Union of Soviet Socialist Republics, the U.K., the U.S., and Venezuela. See PAUL WEIS, *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYZED, WITH A COMMENTARY BY DR. PAUL WEIS* 2 (1994).

⁵² Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Germany, Greece, the Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Sweden, Switzerland (also representing Lichtenstein), Turkey, the U.K./Northern Ireland, the U.S., Venezuela and Yugoslavia were the participating states, with Cuba and Iran as observers. See U.N. High Comm'r for Refugees, *Convention and Protocol Relating to the Status of Refugees with Introductory Note by the Office of the United Nations High Commissioner for Refugees* 6 (Jan. 31, 1967), available at <http://www.unhcr.org/3b66c2aa10.pdf>.

⁵³ See, for example, Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 14, 37–39 (2008).

range of capabilities among today's 193 members of the U.N. with respect to how well states protect their populations.⁵⁴

While the model of state sovereigns effectively controlling their territories originated in seventeenth-century Western Europe, that model reached its "apex" by the middle of the twentieth century when "effective sovereignty" meant that governments not only effectively policed their own societies, but also provided public goods and services.⁵⁵ "Ungoverned spaces" where state control is absent, weak, or contested emerged particularly after the end of the Cold War.⁵⁶ Non-state actors, such as Hezbollah in Lebanon, FARC in Colombia, and Mara Salvatrucha in El Salvador, have "provided state-like functions for extended periods of time" in recent years.⁵⁷

The very concepts of "failing," "weak," or "fragile" states are relatively new.⁵⁸ The United States National Security Strategy of 2002 as well as the European Union 2003 Security Strategy named failing or fragile states as major threats to security.⁵⁹ The Fund For Peace and *Foreign Policy* started publishing the *Fragile States Index* (formerly the *Failed States Index*) in 2005.⁶⁰ Based on twelve key political, social, and economic indicators, the Index classifies states into categories that evidence degrees of fragility and concern.⁶¹ The 2014 Index classifies thirty-four states as either Very High Alert, High Alert, or Alert; thirty-two states as Very High Warning; forty-three states as High Warning; seventeen

⁵⁴ See, for example, Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators* (The World Bank Dev. Research Group Policy Research Working Paper No. 5430 2010); see generally Fredrik Soderbaum, *Modes of Regional Governance in Africa: Neoliberalism, Sovereignty Boosting, and Shadow Networks*, 10 GLOBAL GOVERNANCE 419 (2004); Obiora Chinedu Okafor, *Re-Conceiving 'Third World' Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism*, 6 BUFF. HUM. RTS. L. REV. 1 (2000); Elke Krahmman, *National, Regional, and Global Governance: One Phenomenon or Many?*, 9 GLOBAL GOVERNANCE 323 (2003); Tanja A. Borzel & Thomas Risse, *Governance Without a State: Can It Work?*, 4 REGULATION & GOVERNANCE 113 (2010); Magdalena Bexell, Jonas Tallberg & Anders Uhlin, *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors*, 16 GLOBAL GOVERNANCE 81 (2010); Burris, Kempa & Shearing, *supra* note 53.

⁵⁵ Anne L. Clunan & Harold A. Trinkunas, *Conceptualizing Ungoverned Spaces: Territorial Statehood, Contested Authority, and Softened Sovereignty*, in UNGOVERNED SPACES: ALTERNATIVES TO STATE AUTHORITY IN AN ERA OF SOFTENED SOVEREIGNTY 17, 18, 20 (Anne L. Clunan & Harold A. Trinkunas, eds., 2010).

⁵⁶ *Id.* at 17.

⁵⁷ *Id.* at 29.

⁵⁸ Lothar Brock et al., *Fragile States: Violence and the Failure of Intervention* 9 (2012).

⁵⁹ *Id.* at 8–9; see also Liana Sun Wyler, Congressional Research Service, *Weak and Failing States: Evolving Security Threats and U.S. Policy* (2008).

⁶⁰ The Fund for Peace, *The Fragile States Index 2014* 3 (2014).

⁶¹ *See id.*

states as Warning; and twelve states as Less Stable.⁶² Only forty states are classified as Stable, Very Stable, Sustainable, or Very Sustainable.⁶³ This is a very different world than that of the West-dominated U.N. of the post-Second World War period when states created the Refugee Convention.

States that do not or cannot adequately protect their populations pose potential threats to their neighbors. In the extreme, a state may be violently challenged by an internal armed force, and such conflicts can spill over to other states, as occurred in West Africa in the 1990s and 2000s. Less traditional challenges to state authority over territory occur when gangs or organized crime groups control significant geographical areas. The majority of refugees in today's world have fled conflict and other serious violence.⁶⁴

To stabilize a region and protect their own interests, strong states today may attempt to address such problems. In 2012, for example, U.S. Secretary of State Hillary Clinton created the newest bureau at the State Department, the Bureau of Conflict and Stabilization Operations (CSO), to advance "U.S. national security by breaking cycles of violent conflict and mitigating crises in priority countries."⁶⁵ CSO engages in "conflict prevention, crisis response and stabilization, aiming to address the underlying causes of destabilizing violence."⁶⁶ Particularly telling is how the foreign affairs agency of the U.S. government explains why weak states are a "central security challenge."⁶⁷ The State Department is concerned about the destabilizing effects of states unable to control their territories and protect their citizens with respect to increased risk of "weapons proliferation, organized crime, and activity by violent extremists."⁶⁸ In the post-Cold War world, national security involves strengthening civilian security.⁶⁹

Even more revealing is the State Department's high prioritization of Honduras in its first year of operations.⁷⁰ The U.S. government focuses principally on states experiencing traditional civil conflict or political violence—

⁶² *Id.* at 4–5.

⁶³ *Id.*

⁶⁴ See STATE OF THE WORLD'S REFUGEES 2012, *supra* note 16, at 2.

⁶⁵ BUREAU OF CONFLICT & STABILIZATION OPERATIONS, <http://www.state.gov/j/cso> (last visited Apr. 19, 2015).

⁶⁶ *Id.*

⁶⁷ BUREAU OF CONFLICT & STABILIZATION OPERATIONS: WHAT WE DO, <http://www.state.gov/j/cso/what/index.htm> (last visited Apr. 19, 2015).

⁶⁸ *Id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

Syria, Kenya, and Burma.⁷¹ Honduras, in contrast, matters to the State Department because its homicide levels are the highest in the world outside of war zones. CSO focuses on reforming the police and the prosecutor's office there, as well as "supporting a non-governmental coalition to enable citizens to help stem violence in their communities and advocate public security reform."⁷² Criminal violence is the issue—not political rebellion:

In recent years, Central America has become the most violent region in the world. Honduras leads this deadly trend with the world's highest murder rate of 86 per 100,000 in 2011. Increasing criminal violence and high levels of impunity have become so pervasive that citizens increasingly feel powerless to alter the grip of gangs, transnational criminal organizations, and corrupt officials. This corrosive combination of spreading violence and an increasingly resigned public threaten the security and prosperity of Honduras, potentially exacerbating trends of illegal immigration, trafficking in all forms of illicit contraband, and gang activities that reach into the U.S.⁷³

Then the real shocker comes. Belize has a serious gang problem:

Most Americans hear "Belize" and imagine sandy beaches and unspoiled rainforests. But Belize also has one of the world's highest homicide rates, due mostly to gang violence. A gang truce took effect in 2011, but it was fragile, and by January 2012 there was concern that the homicide rate would start to climb again.⁷⁴

The language of diplomats who work in conflict zones—a truce—is used to describe relations among gangs, thus implicitly recognizing the serious security threat posed by these non-traditional armed groups.⁷⁵

The U.S. government is appropriately concerned that nearby sovereigns are unable to protect their citizens from a variety of non-traditional, non-state actors. These powerful groups exercise authority through violence in many different parts of the world. Some groups control particular territories of the state. Corruption and violence enable organized criminal groups, such as drug cartels, to dominate over populations in certain areas.

To get a better picture of states that cannot protect their populations from these non-state actors, this Article closely examines certain Central American

⁷¹ *Id.*

⁷² *Id.*

⁷³ BUREAU OF CONFLICT & STABILIZATION OPERATIONS: WHERE WE WORK: HONDURAS, <http://www.state.gov/j/cso/where/engagements/honduras/index.htm> (last visited Apr. 19, 2015).

⁷⁴ Laura Till & Julie Walton, *Defusing Gang Problems in Belize*, DIPNOTE (May 4, 2013), <http://blogs.state.gov/stories/2013/05/04/defusing-gang-problems-belize>.

⁷⁵ *See id.*

countries, along with Mexico, that have emerged as particularly dangerous.⁷⁶ Different non-state actors operate in this region: street gangs, sophisticated criminal groups, and transnational criminal organizations rule particular territories. Demobilized military, paramilitary, and intelligence groups serve as the armed forces for the sophisticated cartels.⁷⁷ While a significant portion of organized crime involves trafficking in people and arms, the movement of illegal drugs to the U.S. has led to violent struggles for the “strategic control of territories the length and breadth of the Central American land route between Colombia and Mexico.”⁷⁸ This involves territorial control of certain urban and rural areas needed for the cross-border movement of drugs, arms, and trafficked persons.⁷⁹

In the Mexican criminal world, controlling a *plaza* means collecting what is essentially a toll, or tax, on any activity undertaken by the multiple criminal groups operating in that territory. The so-called *piso* supplies a significant revenue stream, as the command group takes upwards of half of the value of the contraband moving through its corridor, whether weapons or humans or drugs.⁸⁰

The cartels have created miniature armies in the battle for territorial control.⁸¹

Gangs working with drug cartels facilitate these movements by exercising control over communities of interest. For example, the transnational gang Mara Salvatrucha extorts small business owners and kills or threatens with death those who don't pay the “*renta*” or “war tax.” In this way, the gang obtains the resources to secure control over their territory.⁸² Organized crime groups such as gangs use extortion, “death threats, rapes, killings, torture, forced recruitment of youth, boys and girls, and kidnapping” to assert authority in their communities.⁸³ They reign with impunity, whether due to ineffective law

⁷⁶ In 2012, for example, Honduras recorded the highest annual homicide rate—several times higher than the rates of intentional homicide and civilian casualties in Afghanistan and Iraq. United Nations Office on Drugs and Crime, *Global Study on Homicide 2013: Trends, Contexts, Data*, 22 (Mar. 2014), http://www.unodc.org/documents/data-and-analysis/statistics/GSH2013/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

⁷⁷ See STEVEN DUDLEY, TRANSNATIONAL CRIME IN MEXICO AND CENTRAL AMERICA: ITS EVOLUTION AND ROLE IN INTERNATIONAL MIGRATION, MIGRATION POLICY INSTITUTE: REGIONAL MIGRATION STUDY GROUP 2–3 (2012).

⁷⁸ Int'l Centre for the Human Rights of Migrants & U.N. High Comm'r for Refugees, *Forced Displacement and Protection Needs Produced by New Forms of Violence and Criminality in Central America* 30 (2012) [hereinafter CIDEHUM/UNHCR].

⁷⁹ See *id.*

⁸⁰ Dudley, *supra* note 77, at 5.

⁸¹ See *id.*

⁸² See CIDEHUM/UNHCR, *supra* note 78, at 31.

⁸³ *Id.* at 14.

enforcement or corrupt officials.⁸⁴ Thousands of law enforcement, prosecutorial, judicial, and elected officials collude with gangs.⁸⁵ At times, organized crime directly infiltrates the offices of the Public Prosecutors of Guatemala, El Salvador, and Honduras.⁸⁶ Those responsible for the rule of law, such as judges, prosecutors, and mayors, are at times threatened or killed to disable the enforcement of the criminal laws. Victim and witness protection programs are limited to a few people, and many do not denounce the perpetrators out of fear.⁸⁷ Reportedly, contacting police is not only futile, but dangerous, as it risks further violence from the gangs in retaliation.⁸⁸

Some 70,000 to 300,000 belong to MS-13 and 18th Street gangs and affiliates (*clicas*) in El Salvador, Honduras, and Guatemala.⁸⁹ One analyst identifies two major forms: youth and adult gangs. Youth gangs rob, extort, and deal drugs on the street, while more highly-organized adult gangs are also active in international trafficking of narcotics, arms, stolen vehicles, and persons.⁹⁰ These adult gangs tend to be connected to drug cartels and corrupt public officials. For all practical purposes, there is no police presence in many gang-controlled areas.

Drug cartels and gangs in this region have adopted the same methods used during decades of civil conflict to terrorize politicians and the public so that they can operate as they see fit. “The strategic use of random violence, kidnapping, torture and murder are employed as part of a coordinated effort to terrorize and co-opt police, bureaucrats, prosecutors, judges and elected officials in order to shape a socio-political environment within which they are free to operate with impunity.”⁹¹ U.S. military analysts characterize this as “asymmetrical warfare” or “insurgency” used to establish political control and domination.⁹² Motives differ from traditional insurgents, but objectives are the same: “to impose their power and undermine the operational capacity and authority of legitimate state

⁸⁴ See *id.* at 15.

⁸⁵ See Thomas Boerman, Central American Gang Related Asylum Cases: Background, Leverage Points, and the Use of Expert Witnesses, *IMMIGR. DAILY* (DEC. 15, 2009), <http://www.ilw.com/articles/2009,1215-boerman.shtm>.

⁸⁶ See CIDEHUM/UNHCR, *supra* note 78, at 32.

⁸⁷ See *id.* at 14–15.

⁸⁸ See Boerman, *supra* note 85.

⁸⁹ *Id.*

⁹⁰ See *id.*

⁹¹ *Id.*

⁹² Lt. Col. Howard L. Gray, *Gangs and Transnational Criminals Threaten Central American Stability*, U.S. Army War College, Strategy Research Project (2009); Max G. Manwaring, *Street Gangs: The New Urban Insurgency*, The U.S. Army War College Strategic Studies Institute (2005).

actors.”⁹³ These gangs act as de facto authorities not to perform civic functions, as some guerilla organizations did, but to undermine states’ “capacit[ies] to fulfill basic functions of governance to the point of making legitimate institutions largely irrelevant.”⁹⁴

The gangs are not monolithic even in the so-called Northern Triangle of Central America. The Los Zetas cartel in Guatemala, for example, works through local criminal “franchises.”⁹⁵ In El Salvador, the *maras* charge a levy from a large part of the population and enforce their rule through lynching and other types of killings. This violence is used also to intimidate those who denounce the gangs to the Public Prosecutor. Reportedly, these intimidation strategies have resulted in increased withdrawal of such denunciations. In addition, the *maras* rely heavily on forced recruitment of young people.⁹⁶ In Honduras, the organized gangs control significant areas of the country. The gangs tend to operate in the cities, while the drug cartels reign in many rural areas.⁹⁷

Gangs have been and continue to be a worldwide phenomenon. Jamaica, Brazil, the Russian Federation, Nigeria, Iraq, Kenya, many Eastern European countries, and, of course, the U.S. are among the nations that have significant gang activity today.⁹⁸ In discussing the challenge posed by such groups to weak states, analysts talk about “criminal conflicts” and “criminal insurgency.”⁹⁹ According to a Wilson Center expert, “[t]he spread of transnational organized crime—fed by drug-trafficking and by a growing number of other illegal economies—is the most significant security challenge for Latin American and Caribbean countries today.”¹⁰⁰

These criminal organizations take on state functions and purposes. Drug cartel violence, for example, has a political goal: to accumulate capital and secure

⁹³ Boerman, *supra* note 85.

⁹⁴ *Id.*

⁹⁵ CIDEHUM/UNHCR, *supra* note 78, at 18.

⁹⁶ *See id.* at 21.

⁹⁷ *See id.* at 25.

⁹⁸ *See* Michael Boulton, *Living in a World of Violence: An Introduction to the Gang Phenomenon* 4, 9–10, 13, 15 (UNHCR Legal and Protection Policy Research Series, 2011).

⁹⁹ *See, for example*, John P. Sullivan & Adam Elkus, *Barbarization and Narcocultura: Reading the Evolution of Mexico’s Criminal Insurgency*, SMALL WARS JOURNAL (Aug. 31, 2011), <http://smallwarsjournal.com/jrnl/art/barbarization-and-narcocultura>.

¹⁰⁰ Juan Carlos Garzon et al., *The Criminal Diaspora: The Spread of Transnational Organized Crime and How to Contain Its Expansion* 1 (Woodrow Wilson Center, The Latin American Program, 2013), available at [http://www.wilsoncenter.org/sites/default/files/CRIMINAL_DIASPORA%20\(Eng%20Summary\).pdf](http://www.wilsoncenter.org/sites/default/files/CRIMINAL_DIASPORA%20(Eng%20Summary).pdf).

economic dominion.¹⁰¹ In essence, cartels have morphed into an alternative society and economy. They don't just tax the population; they "steal from or control utilities such as gasoline, sell their own products and are the ultimate decision-makers in the territories they control."¹⁰²

Given how they assert territorial control, it is no surprise that drug cartel violence results in high rates of displacement. An Internal Displacement Monitoring Centre study examined displacement from states that accounted for 38 percent of Mexico's population but 68 percent of its homicides.¹⁰³ In over one hundred municipalities with the highest levels of violence, the rate of displacement was fifteen times higher than in municipalities without high levels of violence. Controlling for other drivers of migration, including economic, demographic and urbanization ones, the study found that 4.5 times as many people fled violent municipalities than non-violent ones. Drug-cartel related violence has displaced an estimated 220,000 Mexicans in Ciudad Juarez and its surroundings alone.¹⁰⁴ More than one-quarter of the population of certain Mexican cities fled drug violence.¹⁰⁵ One study found that fifty-five percent of Juarez would move out of the city for security reasons if possible.¹⁰⁶

When states cannot provide protection from groups such as drug cartels and gangs, some of the affected population cross borders to find safety. That is when the Refugee Convention comes into play for those targeted by non-state actors in connection with a protected characteristic.

¹⁰¹ See John P. Sullivan, *Criminal Insurgency: Narcocultura, Social Banditry, and Information Operations*, SMALL WARS JOURNAL (Dec. 3, 2012, 5:30 AM), <http://smallwarsjournal.com/jrnl/art/criminal-insurgency-narcocultura-social-banditry-and-information-operations>.

¹⁰² *Id.*

¹⁰³ Internal Displacement Monitoring Centre & Norwegian Refugee Council, *Forced Displacement Linked to Transnational Organized Crime in Mexico* (2012), available at <http://www.internal-displacement.org/assets/publications/2012/2012005-am-mexico-Mexico-forced-displacement-en.pdf>.

¹⁰⁴ Internal Displacement Monitoring Centre & Norwegian Refugee Council, *Mexican Displacement Due to Criminal and Communal Violence* 6 (2011), available at <http://www.internal-displacement.org/assets/library/Americas/Mexico/pdf/Mexico-November-2011.pdf> (citing a 2010 study by the Universidad Autonoma de Ciudad Juarez).

¹⁰⁵ Viridiana Rios, *Security Issues and Immigration Flows: Drug Violence Refugees, the New Mexican Immigrants* 7 (Stanford Univ., 2011), available at http://www.gov.harvard.edu/files/Rios2011_DrugViolenceRefugees.pdf.

¹⁰⁶ *Id.* at 21.

B. The New Agents of Persecution under the Refugee Convention

Given the nature of nation-states in 1951, human rights treaties focused particularly on a sovereign's behavior towards all persons geographically within its authority. In the "European totalitarian experience, . . . refugees were primarily the persecuted victims of highly organized predatory states."¹⁰⁷

Unfortunately, repressive governments continue to dominate their citizenry more than sixty years later. In 2012, Freedom House classified nine governments as the world's worst human rights violators, very closely followed by seven others.¹⁰⁸ The 2014 Maplecroft Human Rights Risk Index classified thirty-four countries as "extreme risk," an increase of 70 percent since 2008.¹⁰⁹ But today's states include as well many that are unable or unwilling to protect their citizens from non-state actors. How have states applied the Refugee Convention definition to these changing circumstances?

The definition itself declares that a refugee is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."¹¹⁰ As to the identity of the persecutor, the definition is silent. Not surprisingly, this silence produced some debate among adjudicators regarding non-state actors as persecutors.

Most states interpreting the Refugee Convention readily protected those who fled persecution from both state and non-state actors.¹¹¹ UNHCR's

¹⁰⁷ Shacknove, *supra* note 1, at 276.

¹⁰⁸ Freedom House, *Worst of the Worst 2012: The World's Most Repressive Societies* (2012), available at <http://www.freedomhouse.org/report/special-reports/worst-worst-2012-worlds-most-repressive-societies>. Freedom House has identified Equatorial Guinea, Eritrea, North Korea, Saudi Arabia, Somalia, Sudan, Syria, Turkmenistan, and Uzbekistan as the world's worst human rights abusers in the calendar year 2011. Two disputed territories, Tibet and Western Sahara, are also included in this category. These countries and territories received Freedom House's lowest ratings for both political rights and civil liberties. Seven other countries (Belarus, Burma, Chad, China, Cuba, Laos, and Libya) and one other territory (South Ossetia) fell just short of receiving these indicting ratings.

¹⁰⁹ Maplecroft Global Risk Analytics, *Human Rights Risk Atlas 2014*, available at <http://maplecroft.com/portfolio/new-analysis/2013/12/04/70-increase-countries-identified-extreme-risk-human-rights-2008-bhuman-rights-risk-atlas-2014b/>.

¹¹⁰ Refugee Convention, *supra* note 4, art. 1A(2).

¹¹¹ See Volker Turk, *Non-State Agents of Persecution*, in SWITZERLAND AND THE INTERNATIONAL PROTECTION OF REFUGEES 95, §4.2 (V. Chetail & V. Gowlland-Debbas eds., 2002). See generally Walter Kalin, *Non-State Agents of Persecution and the Inability of the State to Protect*, in THE CHANGING NATURE OF PERSECUTION 43–59 (2000); U.N. High Comm'r for Refugees, Opinion of UNHCR Regarding the Question of Non-State Persecution, as Discussed with the Committee on Human

longstanding interpretive guidance on the Refugee Convention observes that persecution can emanate from state as well as non-state agents, including the local populace, when tolerated by the authorities or where the authorities refuse, or are unable, to provide protection.¹¹² Only four European governments determined initially that under certain circumstances, the Refugee Convention did not protect individuals from persecution by non-state actors.

The jurisprudence in Germany, Switzerland, and, to some degree, that of France and Italy, differentiated among four different non-state actor situations. First, where the state instigated, condoned, or tolerated persecution, these four nations agreed with the prevailing interpretation “that persons fleeing such persecution are refugees because the State is unwilling to protect such victims.”¹¹³ Second, where non-state agents of persecution control all or part of the country such that they act as *de facto* authorities, all four agreed in principle that persons fleeing persecution carried out by these actors come within the meaning of the Convention definition. Professor Kalin observes that states have different approaches to determine the necessary conditions for a group to become a *de facto* authority.¹¹⁴ The main area of disagreement with the majority of governmental authorities concerns situations where the State is willing but unable to provide protection. For years, Germany, Switzerland, and France denied asylum to such forced migrants. Finally, while most states recognize as refugees those fleeing persecution where no authority exists that could protect them and other victims of persecution, these four states viewed the inability to protect in the same light as when the country of origin was willing but unable to protect.¹¹⁵

As Kalin points out, the text does not support the interpretation that only state agents of persecution can create Convention refugees: “The wording of the 1951 Convention does not require any direct responsibility of the State.”¹¹⁶ As UNHCR’s current Director of International Protection explained about a decade

Rights and Humanitarian Aid of the German Parliament (Lower House) (29 Nov. 1999), *available at* <http://www.refworld.org/docid/3df755477.html>.

¹¹² U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, §65, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992).

¹¹³ Walter Kalin, Non-State Agents of Persecution and the Inability of the State to Protect, 15 *GEO. IMM. L.J.* 415, 416 (2001).

¹¹⁴ *See id.*

¹¹⁵ *See id.* at 416–17.

¹¹⁶ *See id.* at 418. According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

ago, the refugee definition focuses on the act of persecution rather than the identity of the persecutor. That should not be surprising, given that the purpose of the Convention is to protect people from serious harm.¹¹⁷

How has this issue evolved during the last decade or so? The High Court of Australia articulated its understanding of the non-state agent issue in a 2002 case involving domestic abuse. The High Court explained that “[i]t is accepted in Australia, and it is widely accepted in other jurisdictions, that the serious harm involved in persecution may be inflicted by persons who are not agents of the government.”¹¹⁸ It recognized that where the persecutor is a person or group of people, “the failure of the state to intervene to protect the victim” may be relevant to the victim’s fear of persecution—“whether the failure resulted from a state policy of tolerance or condonation of the persecution, or whether it resulted from inability to do anything about it.”¹¹⁹ The asylum seeker claimed that the persecution resulted from “systematic discrimination against women, involving selective enforcement of the law, which amounts to a failure of the state of Pakistan to discharge its responsibilities to protect women.”¹²⁰ The High Court described this case to be one of alleged tolerance and condoning and cited to Lord Hoffman’s opinion in *Ex Parte Shah*, where he classified the failure of the Nazi authorities to protect a Jewish shopkeeper set upon with impunity by business rivals as an element of persecution based upon race.¹²¹

Recognizing non-state actors conceptually as persecutors, of course, is the first important step adjudicators took. Equally meaningful is determining when individuals do not have access to state protection from persecution by a non-state actor. In 2004, the European Council explained how to understand the State’s responsibility to protect in real terms. Article 7(2) of the European Council 2004 Qualification Directive provides that:

protection is generally provided when the actors [both state and non-state controlling territory] take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.¹²²

In essence, this establishes the rule of law as the measure of the state’s actual protection.

¹¹⁷ See Turk, *supra* note 111 at § 4.2.

¹¹⁸ Minister for Immigration and Multicultural Affairs v Khawar (2002), 210 CLR 1, ¶ 22 (Austl.).

¹¹⁹ *Id.* ¶ 29.

¹²⁰ *Id.* ¶ 25.

¹²¹ See *id.* at 30.

¹²² Council Directive 2004/83, 2004 O.J. (L 304) (EC).

As courts analyze cases where the alleged persecutor is an individual or group of people, they continue to develop this rule-of-law measure. In assessing the adequacy of state protection for victims of domestic violence, the Canadian Federal Court considered critical factors to be access to restraining orders and the training of law enforcement units to facilitate effective implementation of legislation. The record in that case included evidence that the 2009 Hungarian law making restraining orders available was not effective; law enforcement units did not receive special training to facilitate implementation; Hungarian courts issued restraining orders in only twelve percent of reported domestic violence cases in 2010; and no data existed concerning breaches of these orders. As such, the court held that the Immigration and Refugee Board's conclusion that applicants could have found meaningful state protection through the state legislation was not well founded and remanded the case for reconsideration.¹²³

This Canadian court also analyzed the circumstances under which asylum claimants are obliged affirmatively to seek police or state protection. In general, claimants must seek state protection unless the state is "unwilling or unable" to protect them.¹²⁴ In this case, the applicants did not seek such protection. The court held that a totality-of-the-evidence test determines whether an applicant should have sought state protection.¹²⁵ The court focused on evidence in this case of police corruption and abuse against Roma women and of such women experiencing a high incidence of domestic violence. Evidence did not show that government actions actually improved the situation. A study showed that Roma women reported domestic violence less often than non-Roma and lacked trust in law enforcement officials because of police antagonism and failure to provide adequate protection in the past. Accordingly, the Court held that the Board's conclusion that the applicant "should have sought protection cannot be reasonable, in this particular case, when the totality of the evidence demonstrates that state protection would not have been reasonably forthcoming."¹²⁶

Finally, one fascinating development with respect to persecution by non-state actors concerns the issue of the persecutor's mens rea. By their actions, most persecutors intend to harm their victims, but adjudicators have found throughout the last two decades that persecution can proceed without such malice. A leading U.S. case authored by the Chairman of the Board of Immigration Appeals in an en banc decision held that female genital mutilation can be the basis for asylum and, as practiced by a particular tribe in Togo,

¹²³ See *Judit Sebok v. Minister of Citizenship and Immigration*, [2012] F.C. 1107, ¶ 25 (Can.).

¹²⁴ *Id.* ¶ 23 (citing *Canada (Att'y Gen.) v. Ward*, [1993] 2 S.C.R. 689, 723–24).

¹²⁵ *Id.* ¶ 25. The court closely examines the facts on record to reach this conclusion. See *id.* ¶¶ 22, 24.

¹²⁶ *Id.* ¶ 25.

constituted persecution.¹²⁷ “[S]ubjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution.”¹²⁸

In *Chen Shi Hai*, the High Court of Australia held similarly that “[p]ersecution can proceed from reasons other than ‘enmity’ and ‘malignity.’”¹²⁹ The applicant was a three-and-a-half year old “black child,” the offspring of an unauthorized Chinese marriage where the parents had already had more than one child. (This third child was born while the parents awaited removal to China from Australia.) The Refugee Review Tribunal had determined that this child would be denied access to food, education, and health care beyond a very basic level and would probably confront discrimination such that he faced a real chance of persecution. But the Tribunal found that the persecution would not be for reasons of his membership in a particular social group, because the consequences he would likely suffer in China would not “result from any malignity, enmity or other averse intention towards him on the part of the authorities.”¹³⁰ In the Tribunal’s view, it would result from their intention “to penalize those who have children outside the approved guidelines.”¹³¹ In contrast, the High Court held that the state targeted the applicant because he was a “black child,” observing that “from the perspective of those responsible for discriminatory treatment, [persecution] may result from the highest of motives, including an intention to benefit those who are its victims.”¹³²

The 2004 EU Qualification Directive on Minimum Protection Standards included a directive on non-state agents of persecution, broadening protection for refugees in some countries.¹³³ Article 6(c) listed non-state actors as agents of persecution or serious harm, if it could be demonstrated that the government or parties/organizations controlling it or a substantial part of its territory, including international organizations, is unable or unwilling to provide protection against persecution or serious harm.¹³⁴ Inclusion of non-state agents of persecution broadened the refugee definition in Germany, France, and Italy, all of which transposed Article 6 literally into their refugee and asylum laws.¹³⁵ Before 2003,

¹²⁷ See *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

¹²⁸ *Id.* at 365.

¹²⁹ *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, ¶ 35 (Austl.).

¹³⁰ *Id.* ¶ 7.

¹³¹ *Id.*

¹³² *Id.* ¶ 35.

¹³³ See Council Directive 2004/83, *supra* note 122.

¹³⁴ See *id.* art. 6(c).

¹³⁵ See European Council on Refugees and Exiles, *The Impact of the EU Qualification Directive on International Protection* 15 (2008), available at <http://www.ecre.org/topics/areas-of-work/protection->

the French Office for the Protection of Refugees and Stateless Persons (OFPRA) rarely granted asylum status to individuals who suffered persecution at the hands of non-state actors, but the concept of non-state agents of persecution is now part of French law.¹³⁶ France interprets Article 6 of the Qualification Directive as allowing for persecution by non-state actors where the state or its authorities “refuse or are unable to provide protection.”¹³⁷ In practice, France has recognized the following actors: armed rebel groups such as Islamic groups in Algeria, warlords in Afghanistan, *chimeres* and RAMICOS¹³⁸ in Haiti, armed groups in Iraq, revolutionary armed forces in Colombia, rebels in Somalia, and Kurd combatants; family members; and members of the local community, such as in cases regarding FGM, forced marriage, clans, tribes, mafias, and bandits.¹³⁹

Italy has applied the non-state actor principle in situations such as Somalia, where the state is incapable of providing protection because government authorities effectively do not exist, and translated the provision concerning non-state actors directly from the Directive.¹⁴⁰ For example, during civil wars, militias that control parts of a state have been considered non-state agents of persecution.¹⁴¹

Germany incorporated into Section 60(1) of its 2004 Immigration Act the exact definition of non-state actors of persecution that appears in the

in-europe/150.html. Germany transposed most of the Directive in Law on the Transposition of EU Directives on Immigration and Asylum 2007, and specifically transposed Article 6 in the Immigration Act of 2004. *Id.* at 34. Italy incorporated the Qualification Directive in its legislative decree on transposition of Directive 2004/83 on January 1, 2008. *Id.* at 34.

¹³⁶ See Loi 2003-1176 du 10 décembre 2003 modifiant la loi 52-893 du 25 juillet 1952 relative au droit d'asile [Law 2003-1176 of 10 December 2003], amending Act No. 25-893 adopted on 25 July 1952, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000611789&dateTexte=&categorieLien=id>; Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on the Effective Respect for Human Rights in France (Strasbourg: Council of Europe, 2006), ¶ 205, available at <https://wcd.coe.int/ViewDoc.jsp?id=965765&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

¹³⁷ European Council on Refugees and Exiles, *supra* note 135, at 84.

¹³⁸ *Chimeres* were supporters of Haitian President Aristide who used violent means to silence those opposed to the President. See Canada: Immigration and Refugee Board of Canada, *Haiti: The Chimères, Their Activities and Their Geographic Presence; the Treatment of the Chimères by the Authorities and the Presence of Group Members within the Government and the Police (2006–May 2008)*, (June 3, 2008), available at <http://www.refworld.org/docid/4a70409420.html>. RAMICOS (the Assembly of Militants for the Commune of St. Marc) also opposed the Aristide government. See U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *Haiti Report 2004* (2005) available at <http://www.state.gov/j/drl/rls/hrrpt/2004/41764.htm>.

¹³⁹ See European Council on Refugees and Exiles, *supra* note 135, at 86.

¹⁴⁰ See *id.* at 84.

¹⁴¹ See *id.* at 87.

Qualification Directive.¹⁴² The Federal Office guidelines include private persons such as family members as valid agents of persecution.¹⁴³ The Federal Office has also accepted the following non-state agents of persecution: clans, criminals, mafia, bandits, paramilitaries, religious extremists, and terrorists.¹⁴⁴ Some courts ruled that only those agents who possess levels of power and organization comparable to a state's will qualify as non-state agents of persecution, but the higher Federal Administrative Court decided that no such particular requirements will apply in order to qualify a person or group as a non-state actor.¹⁴⁵ Nor do such particular requirements apply in the case law to situations in which the applicant's country of origin possesses no functioning state authority.¹⁴⁶

The concept of a non-state agent of persecution thus has developed over time. From the beginning, most states applied the 1951 Convention to cases involving such persecutors. Germany, Switzerland, and to some degree France and Italy were outliers for some time, but have since aligned their positions on non-state agents of persecution with the majority of other states. The non-state persecutor has raised important issues regarding the state's willingness and ability to protect citizens from serious harms. In conformance with the purpose of the Refugee Convention, adjudicators have applied the terms of the refugee definition to new agents of persecution as the nature of the state has changed.¹⁴⁷ Have they also found the definition capable of addressing new types of persecution?

¹⁴² See *id.* at 84.

¹⁴³ See *id.* at 84, 86–87.

¹⁴⁴ See *id.* at 87.

¹⁴⁵ See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] July 18, 2008, BVerwGE 1 C 15.05 (Ger.); European Council on Refugees and Exiles, *supra* note 135, at 87.

¹⁴⁶ See European Council on Refugees and Exiles, *supra* note 135, at 87; see also Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Apr. 27, 2010, BVerwGE 10 C 4.09 (Ger.).

¹⁴⁷ At the global level, one related development that may have contributed to a shift in this debate followed adoption of the Rome Statute of the International Criminal Court in 1998. This global agreement defines persecution of an identifiable group on political, racial, national, ethnic, cultural, religious, or gender grounds as a crime against humanity, capable of commission by both state and non-state agents. Germany, Switzerland, France, and Italy each signed on to this treaty in the year it was created. STATE PARTIES TO THE ICC, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

C. The New Targets of Persecution under the Refugee Convention: Particular Social Groups Today

Given the significant ways in which the state and agents of persecution have changed since 1951, it should come as no surprise that refugees have fled new forms of persecution. One of the five grounds established by the Convention definition, membership in a particular social group, has played a key role in protecting refugees in the context of the changing nature of persecution. What did this ground mean in 1951, and what does it mean today?

In the first part of the twentieth century before the Second World War, the international community approached refugee flight as group movement. At the request of the League of Nations, the first High Commissioner for Refugees focused his efforts on assisting over one million Russians who fled civil war and famine. The League quickly expanded High Commissioner Nansen's mandate as the Graeco-Turkish War created over two million refugees. The new groups included Greeks, Turks, Armenians, and Bulgarians.¹⁴⁸

This group-based, ad hoc approach to international displacement shifted when the Allied Powers focused on the forty million displaced persons at the end of the Second World War.¹⁴⁹ Most repatriated after the war, some unwillingly, including Ukrainians and those from the Baltic States. When significant numbers of Eastern Europeans resisted repatriation, causing a major diplomatic confrontation in the fledgling UN Security Council, the U.S. led an effort to end these returns and establish an agency mandated to find a durable solution other than repatriation for these refugees. In establishing the International Refugee Organization (IRO) in July 1947, the UN General Assembly declared that no refugees with "valid objections" shall be returned to their country of origin.¹⁵⁰

Which objections were valid? To answer this question, the General Assembly created the IRO Constitution and the first modern refugee definition—an individual rather than group-based concept. Valid objections related to fear of persecution based on race, religion, nationality, and political opinion, derived from the Nazi experience and applicable to the Soviet one. The human rights of individual refugees—reflecting the fundamental dignity of each person—were born.

The IRO refugee definition is very similar to the Refugee Convention definition, created only four years later. The Refugee Convention negotiators

¹⁴⁸ See U.N. High Comm'r for Refugees, *State of the World's Refugees—2000: Fifty Years of Humanitarian Action* 15 (2000).

¹⁴⁹ See *id.* at 13.

¹⁵⁰ *Id.* at 16.

added a fifth ground, membership in a particular social group,¹⁵¹ proposed by the Swedish delegate.¹⁵² The *travaux préparatoires* only briefly mention this ground and give no information as to what the Swedish delegate or the other negotiators had in mind by this term. In introducing it at the 19th Meeting, the Swedish delegate simply said: “Such cases existed, and it would be as well to mention them explicitly.”¹⁵³ This was not at all controversial. In fact, the delegates adopted this ground by unanimous consent without discussion at the 23rd Meeting.¹⁵⁴

Because so much jurisprudence during the last quarter of a century has focused on the types and targets of persecution, it may come as quite a surprise to many that the negotiators did not even discuss this aspect of the definition. As Aleinikoff points out, the delegates seriously debated other aspects of the refugee definition, perhaps more than any other topic. They focused on issues such as the geographical and temporal limitations of the definition. But there is “virtually no discussion” of the kinds of persecution.¹⁵⁵ Aleinikoff concludes:

My best reading of the *travaux* is that the Convention was written with the intent of protecting all persons (and groups) then existing in Europe who had been or were likely to be the victims of persecution. No forms of persecution were intentionally excluded (although various other exclusions were written into the Convention).¹⁵⁶

The concept of particular social group (PSG) may have referred to groups such as gay people persecuted by the Nazis and the wealthy class targeted by the Soviets.¹⁵⁷ Almost fifty years ago, the first major treatise writer on international refugee law, Professor Grahl-Madsen, observed that “[n]obility, capitalists, landowners, civil servants, businessmen, professional people, farmers, workers, members of a linguistic or other minority, even members of certain associations, clubs, or societies, all constitute social groups of various kinds.”¹⁵⁸

¹⁵¹ Conference on Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Nineteenth Meeting*, U.N. Doc. A/CONF.2/SR.19 (1951), available at <http://www.refworld.org/docid/3ae68cda4.html>.

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ *See* Conference on Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Twenty-Third Meeting*, U.N. Doc. A/CONF.2/SR.23 (1951), available at <http://www.unhcr.org/3ae68cda10.html>.

¹⁵⁵ T. Alexander Aleinikoff, *The Meaning of Persecution in U.S. Asylum Law*, in *REFUGEE POLICY: CANADA AND THE UNITED STATES* 292, 297 (Howard Adelman ed., 1991).

¹⁵⁶ *Id.*

¹⁵⁷ *See* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 62–64 (A. Zimmermann, J. Dorschner & F. Machts eds., 2011).

¹⁵⁸ ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW: VOLUME 1* 219 (1966).

Developed increasingly since the 1980s, PSG especially reflects the changing nature of persecution and its agency. Today states apply this ground to a range of groups in need of protection, where the government is unable or unwilling to meet its responsibilities to its citizens. Such groups include those defined by gender, sexual orientation, procreation, age, family, and socioeconomic status.¹⁵⁹

Indeed, gender-related asylum law has developed considerably over time. In 1985, the Executive Committee of UNHCR, which is constituted by governments, observed that “[s]tates, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group.’”¹⁶⁰ In 1999, the U.K. House of Lords granted the claims of two married Pakistani women who were subjected to serious physical abuse by their husbands in *Islam* and *Shah*, defining the social group as “Pakistani women” and acknowledging the applicants’ counsel’s argument concerning the dangers that await Pakistani women who transgress social mores.¹⁶¹ Today, states grant asylum to women and girls who transgress or object to prevailing social mores of their societies.¹⁶²

¹⁵⁹ See *Ram v. MIEA* (1995) 57 FCR 565, 568 (Austl.) (describing class-based executions during the French Revolution and during Pol Pot’s rule in Cambodia as “textbook examples” of persecution for membership in a particular social group); *SZLAN v. MLAC* (2008) 171 FCR 145, [70] (Austl.) (commenting that a Maoist “policy of targeting suitably wealthy victims [for extortion] would tend to support a finding that ‘wealthy Nepalis’ were a relevant particular social group that needed to be considered”); MA6-03043 [2009] CanLII 47104, [18] (Can. I.R.B.) (recognizing that “poor Haitian women with HIV/AIDS” can constitute a PSG); MA0-06253 [2001] CanLII 26873, 2 (Can. I.R.B.) (finding that “in a country where major landholders, with impunity and the use of violence, still oppose agrarian reforms designed to provide poor and disadvantaged peasants with a minimum of dignity and chance for survival, membership in such an agricultural cooperative is a sacred and essential right which no one should be compelled to waive”). In *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992), Judge Posner thought that the kulaks (affluent Russian peasants) who had been persecuted by Stalin were the sort of group intended to be covered by the term “particular social group,” cited in *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 265–66 (Austl.).

¹⁶⁰ U.N. High Comm’r for Refugees, *Executive Committee Conclusions: Refugee Women and International Protection*, No. 39 (1985), available at <http://www.unhcr.org/3ae68c43a8.html>.

¹⁶¹ See *R v. Immigration Appeal Tribunal, Ex Parte Shah; Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629 (H.L.) (appeal taken from C.A.), available at <http://www.refworld.org/docid/3dec8abe4.html>.

¹⁶² See, for example, *Asylgerichtshof [AsylGH] [Asylum Court] Dec. 6, 2012, docket No. C16 427465-1/2012* (Austria) (deciding that an Afghan girl raised in a traditional Afghan-oriented parental home and thus prevented from exercising her fundamental human rights, is a member of a particular social group and eligible for refugee status); *Verwaltungsgericht Stuttgart [VG] [Administrative Court] Jan. 18, 2011, A 6 K 615/10* (Ger.) (stating that “unmarried woman with a ‘Western’ lifestyle” in Iraq would be at risk of gender-based persecution).

For some two decades now, courts and other adjudicators in Europe and North America have recognized many different types of gender-specific persecution and gender-related grounds of persecution,¹⁶³ including women subjected to forced marriage,¹⁶⁴ single Muslim mothers of illegitimate children,¹⁶⁵ Iranian women or divorced women in Iran,¹⁶⁶ women in El Salvador,¹⁶⁷ honor killings,¹⁶⁸ dowry-related deaths,¹⁶⁹ female genital mutilation (FGM),¹⁷⁰ domestic violence,¹⁷¹ forced abortion or sterilization,¹⁷² and trafficking.¹⁷³

¹⁶³ See generally A. Zimmermann, J. Dorschner & F. Machts eds., *supra* note 157; Canada (Att’y Gen.) v. Ward [1993] 2 S.C.R. 689 (Can.).

¹⁶⁴ Verwaltungsgericht Oldenburg [VG] [Administrative Court] Apr. 13, 2011, 3 A 2966/09 (Ger.); S.A.N., Mar. 23, 2011 (No. 1423/2011) (Spain) (Nigerian woman forced to marry tribal chief in connection with her father’s debt).

¹⁶⁵ Rada do Spraw Uchodźców [RdU] [Council for Refugees] Aug. 23, 2012, No. RdU-82/8/S/10 (Pol.) (single Russian mother from radical Muslim family).

¹⁶⁶ SDAV v Minister for Immigration & Multicultural & Indigenous Affairs; Minister for Immigration & Multicultural & Indigenous Affairs v. SBBK (2003) 199 ALR 43 (Austl.) (finding error in lower court’s refusal to recognize Iranian woman who desired to live apart from her husband and obtain a divorce as well as divorced women in Iran as members of particular social groups); see also Refugee Appeal No. 2039/93 (1996) (N.Z.) (finding that the “particular social group” limb of the Convention is particularly relevant to a woman’s asylum claim based on the male domination of women in Iranian society at large).

¹⁶⁷ Decision by Immigration Judge Amy C. Hoogasian, San Francisco Immigration Court, Nov. 7, 2012 (on file with author; non-binding) (this case involved a women targeted by a gang member).

¹⁶⁸ Migrationsöverdomstolen [MIG] [Migration Court of Appeal] 2011-03-09 UM 3363-10 & 3367-10 (Swed.); Nejvyšší správní soudu ze dne 18-05-2011 [Decision of the Supreme Administrative Court of May 18, 2011], 5 Azs 6/2011-49 (Czech); Verwaltungsgericht Stuttgart [VG] [Administrative Court] Sept. 8, 2008, A 10 K 13/07 (Ger.).

¹⁶⁹ CRDD U96-03318, June 9, 1997 (Can.) (Indian woman whose in-laws target her because of their dissatisfaction with dowry).

¹⁷⁰ See *In re Kasinga*, *supra* note 127 (granting asylum to woman who fled Togo to avoid a polygamous forced marriage and feared subjection to FGM upon her return); *Matter of A-T*, 24 I. & N. Dec. 617, 621 (A.G. 2008) (interpreting asylum law’s nexus requirement by concluding that a victim of FGM cannot have her social-group claim rebutted merely on the grounds that she cannot be subjected to the procedure again, but that the government must demonstrate that the applicant is no longer at risk on account of her membership within the particular social group); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (holding that applicant was part of a persecuted social group and eligible for asylum as a Somali female, and noting “the possession of the immutable trait of being female is a motivating factor—if not a but-for cause of the persecution [of FGM]”); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (noting that applicant suffered from FGM on account of being a member of the social group of Somali females).

¹⁷¹ S.A.N., Jan. 13, 2009 (No. 1528/2009) (Spain) (gender-based persecution is included in the Convention ground “membership of a particular social group” because both “sex” and “women” can be considered social groups; sexually violent acts, domestic and family violence, that cause deep physical and mental harm constitute grounds upon which persecution can be claimed); *Ex Parte Shah*, *supra* note 161 (holding that “women in Pakistan” are a particular social group, and granting refugee status to two Pakistani women because, by virtue of the fact that they were female, their husbands suspected them of adultery and the State would not protect them);

Starting in the 1990s, UNHCR and various governments promulgated their own guidelines for gender-related violence and asylum claims.¹⁷⁴ The use of rape in the Bosnian civil war, which received significant media attention, affected adjudicators' understanding of this sexual violence as a form of persecution. International jurists declared rape a war crime for the first time.¹⁷⁵

Domestic violence as a form of persecution has been a particularly challenging issue in terms of the nexus to a PSG. An applicant may be abused by a spouse or a relative for various reasons, but if she can show that her likely subjection to further abuse without state protection is by reason of membership in a PSG, such as "women in Pakistan," then she may be eligible for asylum protection. Questions of systematic discrimination against women involving

Supplemental Brief for Dep't of Homeland Sec. at 4–5, Matter of [L-R-, redacted] (B.I.A. Apr. 13, 2009), available at http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [hereinafter *DHS Brief*] ("Mexican women in domestic relationships who are unable to leave" and "Mexican women who are viewed as property by virtue of their position in a domestic relationship" would meet the requirements for a particular social group).

- ¹⁷² Re VCT, [2000] C.R.D.D., VA0-00592 (Can.) (Chinese woman arrested and forced to have an abortion protected as member of particular social group of women in China who have one child and are faced with forced sterilization); Verwaltunggericht Trier [VG] [Administrative Court Trier] Mar. 23, 2011, 5 K 1181/10.TR (Ger.) (granting refugee status to Chinese mother of two children, connecting fear of forced sterilization to "membership of the particular social group of women"); *A v Minister for Immigration and Ethnic Affairs*, *supra* note 159 (upholding Tribunal's order granting refugee status to Chinese "parents in the reproductive age group").
- ¹⁷³ C.R.D.D. No. 261, V95-02904 (Nov. 26, 1997) (Can.) (determining a Ukrainian woman trafficked into prostitution by Ukrainian organized criminals to be a member of a particular social group, namely "impoverished young women from the former Soviet Union"); *SB* [2008] UKAIT 00002, available at http://www.ait.gov.uk/Public/Upload/j2087/00002_ukait_2008_sb_moldova_cg.doc (concluding that "former victims of trafficking for sexual exploitation" were members of a particular social group); Cour nationale du droit d'asile [CNDA] [National Asylum Court] Apr. 29, 2011, No. 10012810 (Fr.) (granting refugee status to claimant as a member of the particular social group: "prostitutes who come from the State of Edo and who are both victims of human trafficking and anxious to extricate themselves actively from these networks").
- ¹⁷⁴ See U.N. High Comm'r for Refugees, *Guidelines on the Protection of Refugee Women* (1991); Australian Dep't of Immigration and Multicultural Affairs, *Refugees and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers* (1996); Canadian Immigration and Refugee Bd., *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (2003); Swedish Migration Bd., *Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection* (2001); U.K. Home Office, *Asylum Policy Instruction: Gender Issues in the Asylum Claim* (2006); U.S. Dep't of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (1995); U.S. Citizenship and Immigration Serv., *Guidance on Female Asylum Applicants and Gender-Related Claims* (2009).
- ¹⁷⁵ See *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1, Judgment, ¶ 400 (Feb. 22, 2001), *aff'd*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (June 12, 2002); see also *Marlise Simons, U.N. Court, for First Time, Defines Rape As War Crime*, N. Y. TIMES, Jun. 28, 1996, available at <http://www.nytimes.com/1996/06/28/world/un-court-or-first-timedefines-rape4-war-crime.html>.

selective enforcement of the law have been explored in a number of cases. For example, the applicant in *Khavar*:

claims that the violence is tolerated and condoned; not merely at a local level by corrupt, or inefficient, or lazy, or under-resourced police, but as an aspect of systematic discrimination against women, involving selective enforcement of the law, which amounts to a failure of the state of Pakistan to discharge its responsibilities to protect women.¹⁷⁶

In another Australian case, the Refugee Review Tribunal granted refugee protection to a Filipina woman fleeing domestic violence in her home country on the basis of her being a member of the particular social group of women. Tribunal Member Lesley Hunt described how shared immutable and social characteristics bind women as a particular social group *per se*:

That domestic violence . . . is regarded in many countries as a private problem rather than a public crime, can be directly attributed to women's social status; to the fact that historically, in many societies, women have been, and in many instances still are, regarded as being the private property of firstly their fathers then their husbands . . . whilst there does exist separation in lifestyles, values, political leaning, etc., women share a defined social status and as such are differentially dealt with by society as a group. It is women's social status that often leads to the failure of state protection, and this is particularly so with regard to domestic violence.¹⁷⁷

Canadian adjudicators frequently identify highly particularized social groups defined by a combination of gender, nationality, and personal circumstance. Examples of these formulations that Canadian courts have recognized as grounds for granting refugee protection include: "women who are subject to domestic violence in Ecuador";¹⁷⁸ "Trinidadian women subject to wife abuse";¹⁷⁹ "Bulgarian women vulnerable to wife abuse by men with government

¹⁷⁶ *Khavar*, *supra* note 118, at ¶ 25.

¹⁷⁷ N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994) (Austl.) available at <http://www.austlii.edu.au/au/cases/cth/RRTA/1994/1580.html>.

¹⁷⁸ *Narvaez v. Canada* (Minister of Citizenship and Immigration), [1995] 2 F.C. 55 (Can.), available at <http://recueil.cmf.gc.ca/eng/1995/1995fca0185.html> (holding that Board erred in not accepting that "women in Ecuador subject to domestic violence" belong to a particular social group); see also *Diluna v. Canada* (Minister of Employment and Immigration), [1995] 29 IMM. L.R. 2d 156 (Can. F.C.T.D.) (holding that CRDD erred in not finding that "women subjected to domestic violence in Brazil" constitute a particular social group).

¹⁷⁹ *Mayers, Marcel v. MEI*, [1992] 97 D.L.R. 4th 729 (Can. F.C.A.D.), *aff'd*, *Canada* (Minister of Employment and Immigration) *v. Mayers*, [1993] 1 F.C. 154 (Can. C.A.) (Federal Court of Appeal ruled that there was some evidence upon which a tribunal might find that the appellant belonged to a social group comprised of "Trinidadian women subject to wife abuse"), available at <http://reports.fja.gc.ca/eng/1993/1993fca0448.html>.

influence”;¹⁸⁰ and “Westernized Tajik woman in a society moving towards Islamic orthodoxy, with no male protection,”¹⁸¹ to note just a few.¹⁸²

The U.K. House of Lords has recognized that domestic violence victims denied adequate state protection could receive asylum and that “women” from relevant states could comprise a PSG.¹⁸³ In 1999, the Lords deemed in *Shah* that two Pakistani women were harmed by their husbands for personal reasons but found that the applicants were denied state protection in Pakistan because of their gender, supplying the nexus to the particular social group of Pakistani women.¹⁸⁴ Lord Hoffman explained that the central issue in determining the relevant social group was Pakistani women’s deprivation of human rights.¹⁸⁵ In post-*Shah* decisions, the U.K.’s Immigration and Asylum Chamber has rejected women *per se* as particular social groups from applicants in certain states, usually on the ground that women’s treatment in these states was better than Pakistani women’s treatment in *Shah*.¹⁸⁶ However, applicants from some states with egregious gender persecution have received asylum on the basis of membership in a PSG:¹⁸⁷ for example, the Court of Appeal found that the Ethiopian government was complicit in gender persecution because it rarely prosecuted rapes and offered a statutory marital rape exception.¹⁸⁸

Spain’s case law also supports granting asylum to claimants who request protection based on gender persecution by non-state actors. The National High Court granted refugee status to an Algerian woman who alleged physical and mental abuse inflicted on her and her children by her husband, ruling that

¹⁸⁰ C.R.D.D. T92-09592, Sept. 14, 1993 (Can.), *summary available at* <http://www.refworld.org/pdfid/4713831e2.pdf> (claimant granted protection as Convention refugee).

¹⁸¹ Re J, C.R.D.D. T93-04176 et al., Dec. 7, 1993 (Can.), *summary available at* <http://www.refworld.org/pdfid/4713831e2.pdf> (Refugee Division found claimant belonged to PSG).

¹⁸² See also Re ZEK, C.R.D.D. T98-05518 ¶10, Dec. 3, 1998 (Can.) (finding that claimant was a member of particular social group of “abused women in Jamaica who are unable to avail themselves of the strict provisions of the law, which on the face of it might appear to provide some measure of protection”), *summary available at* <http://www.refworld.org/pdfid/4713831e2.pdf>.

¹⁸³ See *Ex Parte Shah*, *supra* note 161.

¹⁸⁴ See *id.* at 654.

¹⁸⁵ See *id.* at 652.

¹⁸⁶ Brendan Kelly, *What Is a “Particular Social Group”?* *A Review of the Development of the Refugee Convention in England*, 24 J. IMMIGR. ASYLUM & NAT’LITY L., 9, 12–13 (2010) (Albania, Latvia, Turkey, Tajikistan, Bangladesh, Ecuador).

¹⁸⁷ See, for example, RG (Ethiopia) v. Sec’y of State for the Home Dep’t, [2006] EWCA (Civ) 339, [45]–[46]; P&M (Kenya) v. Sec’y of State for the Home Dep’t, [2004] EWCA (Civ) 1640, [21], [37]; NL (Pak.) v. Sec’y of State for the Home Dep’t, [2002] UKAIT 04408, [9].

¹⁸⁸ See RG (Ethiopia), *supra* note 187.

gender persecution is included in the Convention's PSG ground because both "sex" and "women" can be considered social groups.¹⁸⁹

PSG issues connected to domestic violence have been controversial in the U.S. While years of litigation and very slow rulemaking have not yet yielded the precise legal guidance needed, the Department of Homeland Security argued in an unusual brief to the administrative appellate Board of Immigration Appeals that the agency believes that women of a particular nationality who are (1) in domestic relationships they are unable to leave or (2) viewed as property by virtue of their position in a domestic relationship, may constitute a particular social group under the refugee definition.¹⁹⁰ In 2014, the Board issued a precedential decision holding that "married women in Guatemala who are unable to leave their relationship" constituted a cognizable particular social group.¹⁹¹

The UN Special Rapporteur on Violence Against Women urges states to fulfill their obligation to eliminate violence against women.¹⁹² It specifically presses states to take protective measures against persecution of women by non-state actors, noting:

International human rights law requires a state to take measures—such as by legislation and administrative practices—to control, regulate, investigate, and prosecute actions by non-state actors that violate the human rights of those within the territory of that state. These actions by non-state actors do not have to be attributed to the state, rather this responsibility is part of the state's obligation to exercise due diligence to protect the rights of all persons in a state's territory.¹⁹³

Claims based on family membership or family status have similarly been found to fall into the PSG framework. Such claims include membership within a family or couple that is involved in honor killings;¹⁹⁴ procreation, either for couples or one member of the couple only;¹⁹⁵ and forced marriage.¹⁹⁶ It is well

¹⁸⁹ S.A.N., Jan. 13, 2009 (No. 1528/2007) (Spain).

¹⁹⁰ See *DHS Brief*, *supra* note 171, at 14.

¹⁹¹ *Matter of A-R-C-G*, 26 I&N Dec. 388, 388–389 (BIA 2014).

¹⁹² See UN Human Rights Council, Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women: Its Causes and Consequences*, U.N. Doc. A/HRC/23/49, ¶11 (2013).

¹⁹³ Id. ¶ 14 (quoting Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 *MODERN L. REV.* 618 (2007)).

¹⁹⁴ See, for example, 1209126 [2013] RRTA 109 (Aust.); *Migrationsöverdomstolen* [Migration Court of Appeal] 2011-03-09 UM 3363-10 & 3367-10 (Swed.).

¹⁹⁵ See, for example, *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003); *AX* (Family Planning Scheme) China CG [2012] UKUT 97 (IAC) (16 Apr. 2012); *A v Minister for Immigration & Ethnic Affairs*, *supra* note 159.

established that a family can constitute a PSG; the main issue with these claims is whether fear of persecution is connected to the individual's status as a family member.¹⁹⁷

Claims based on age have included claims of “black children,” or children born of an unauthorized marriage and in contravention of China's one-child policy;¹⁹⁸ street children;¹⁹⁹ and abandoned children.²⁰⁰ The Canadian Immigration and Refugee Tribunal recognized a young Sri Lankan boy who faced a serious possibility of forced conscription as a child soldier and decided that he was a Convention refugee based on his membership in a PSG.²⁰¹

Sexual orientation claims have become increasingly prominent and accepted. Recognized PSGs in this area have included gay men,²⁰² lesbians,²⁰³ bisexuals,²⁰⁴ and transgendered individuals.²⁰⁵ The interpretation of this term of

¹⁹⁶ See, for example, Verwaltungsgericht Augsburg [VG] [Administrative Court of Augsburg] June 16, 2011, AU 6 K 30092 (Ger.); Verwaltungsgericht Oldenburg [VG] [Administrative Court of Oldenburg] Apr. 13, 2011, 3 A 2966/09 (Ger.); Verwaltungsgericht Stuttgart [VG] [Administrative Court of Stuttgart] Mar. 14, 2011, A 11 K 553/10 (Ger.) (“unmarried women from families whose traditional self-image demands forced marriage”).

¹⁹⁷ See Judit Sebok, *supra* note 123, at 5; *Minister for Immigration & Multicultural Affairs v Sarrazola* (1999) F.C.A. 1134 (Austl.) (finding that claimant whose family was threatened by a Colombian organized crime organization responsible for the death of her brother, is a member of a PSG based on her family membership; granting a protection visa, even though her brother's death was not motivated for a Convention reason); *Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998) (finding parents of Burmese student dissidents a PSG).

¹⁹⁸ See Chen Shi Hai, *supra* note 129.

¹⁹⁹ See Matter of B-F-O-, A78 677 043, (B.I.A. Nov. 6, 2001); *LQ Afghanistan v. Sec'y of State for the Home Dep't.* [2008] UKAIT 0005 (15 Mar. 2007); U.N. High Comm'r. for Refugees, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, U.N. Doc. No. HCR/GIP/09/08 ¶ 49 (2009).

²⁰⁰ See *Re MZJ*, No. V97-03500, [1999] C.R.D.D. No. 118 (Can.).

²⁰¹ See *Savundaranayaga v. Canada* (Citizenship and Immigration), [2009] F.C. 31 ¶ 21(Can.).

²⁰² See *HJ (Iran) v. Sec'y of State for the Home Dep't.*, [2010] UKSC 31, [2011] 1 A.C. 596, 643 (gay man from Iran); Verwaltungsgericht Köln [VG] [Administrative Court of Köln] Sept. 15, 2011, 18 K 6103/10.A (Ger.) (gay man from Guinea); *Amfani v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003) (imputed PSG—Ghanaian mistakenly believed to be gay); Nejvyšší správní soud zed ne 05.10.2006 (NSS) [Decision of the Supreme Administrative Court of Oct. 5, 2006], čj. 2 Azs 66/2006-52 (Czech) (gay man from Armenia).

²⁰³ See *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007) (lesbian woman from Uganda); Verwaltungsgericht Stuttgart [VG] [Administrative Court Stuttgart] June 29, 2006, A 11 K 10841 (Ger.) (lesbian woman from Iran).

²⁰⁴ See *Valoczki v. Canada*, [2004] F.C. 492 (Can. Ont.) (bisexual woman from Hungary).

²⁰⁵ See *Ornelas Chavez v. Gonzalez*, 458 F.3d 1052 (9th Cir. 2006) (transgender woman from Mexico); Asylgerichtshof [Asylum Court] Feb. 24, 2011, A4 213316-0/2008 (Austria) (transgender woman from Egypt).

art as it applies to sexual orientation has evolved. Around 1980, for example, Dutch and Canadian courts disagreed as to whether “sexual disposition” could constitute a particular social group.²⁰⁶

Other accepted PSGs today range from slaves²⁰⁷ to clan members²⁰⁸ to groups based on “former” status, such as former government personnel who possess classified information,²⁰⁹ police officers,²¹⁰ and child soldiers.²¹¹

Given the worldwide prominence of gangs, new PSGs have arisen in connection with those targeted by gang-based violence. Gangs try to recruit the very young,²¹² marginal youth (poor and often homeless), and single women or women heads of household with children.²¹³ Rebuffing such recruitment and refusing to pay extortion demands are considered insults and acts of serious disrespect in gang culture.²¹⁴ Persistent refusal to join often triggers increasing

²⁰⁶ Richard Plender, *International Migration Law* 422 (2nd ed. 1988).

²⁰⁷ See Conseil du Contentieux des Etranger [CCE] [Council for Alien Law Litigation] June 9, 2011, Nr. 62.867 (Belg.).

²⁰⁸ See Verwaltungsgericht München [VG] [Administrative Court München] Sept. 21, 2011, M 11 K 11.30081 (Ger.) (member of Somali Wadaan clan); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, Int. Dec. 3795, 2014 WL 524499 (B.I.A. 2014); *Matter of H*, 21 I. & N. Dec. 337, Int. Dec. 3276, 1996 WL 291910 (B.I.A. 1996) (members of Marchan subclan in Somalia); Migrationsdomstolen [Förvaltningsrätten i Malmö] [Migration Court Malmö] 2011-07-13 UM 1238-11 (Swed.) (Bidoons in Kuwait).

²⁰⁹ See *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006) (former personnel of Colombia’s Attorney General’s office who possessed valuable, classified information); *Velarde v. INS*, 140 F.3d 1305 (9th Cir.1998) (former bodyguard to daughters of Peruvian President); *Koudriachova v. Gonzales*, 490 F.3d 255 (2d Cir. 2007) (defected from the KGB Intelligence Service); *Garcia v. Att’y Gen.*, 665 F.3d 496 (3rd Cir. 2011) (civilian witnesses who assisted law enforcement against violent gangs in Guatemala).

²¹⁰ See *Cruz-Navarro v. INS*, 232 F.3d 1024, 1026 (9th Cir. 2000) (former member of Peruvian National Police); *Matter of Fuentes*, 19 I. & N. Dec. 658, 1988 WL 235456 (B.I.A. 1988) (former members of the National Police of El Salvador); *Matter of Acosta*, 19 I. & N. Dec. 211, 233, Int. Dec. 2986, 1985 WL 56042 (B.I.A. 1985) (“former military leadership”); Nejvyšší správní soud zed ne 02.08.2012 (NSS) [Decision of the Supreme Administrative Court of Aug. 2, 2012], čj. 5 Azs 2/2012-49 (Czech) (“persons involved in Iraqi army and other armed bodies before the fall of Saddam Hussein’s regime”); see also Sergio Garcia, *Asylum for Former Mexican Police Officers Persecuted by the Narcos*, 31 B.C. THIRD WORLD L.J. 245 (2011).

²¹¹ See *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (“former child soldier who escaped LRA captivity”).

²¹² See Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State, *Issue Paper: Youth Gang Organizations in El Salvador* 6 (June 2007).

²¹³ See CIDEHUM/UNHCR, *supra* note 78, at 29–30; U.N. High Comm’r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 2 (2010), available at <http://www.refworld.org/docid/4bb21fa02.html> [hereinafter *UNHCR Gang Guidance Note*].

²¹⁴ See Boerman, *supra* note 85; *UNHCR Gang Guidance Note*, *supra* note 213, at 2.

violence because it is seen as a challenge to the respect and reputation that gang members depend on to thrive.²¹⁵

Even when children succumb to the pressure to join gangs, the persecution that they face does not cease. Youth, particularly those with tattoos, presumed to be gang members are most likely to be targeted by the police, rival gangs, and death squads engaged in “social cleansing.”²¹⁶ “[H]aving one or more tattoos renders a person suspicious in the eyes of the police and of society at large; tattooed youths in particular face discrimination and run a high risk of being attacked as gang members.”²¹⁷ At one point during the Salvadoran government’s Mano Dura campaign, the Anti-Gangs Act of 2003 specified that being tattooed established gang membership.²¹⁸ In some cases, the police have killed persons with tattoos on the spot.²¹⁹

Gang-related claims for protection are one of the most controversial areas of refugee law today in the U.S.,²²⁰ the U.K.,²²¹ Australia,²²² and Canada.²²³ Some

²¹⁵ See Boulton, *supra* note 98, at 16–17.

²¹⁶ NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 181–82 (Laura Pedraza Farina, Spring Miller & James L. Cavallaro eds., 2010).

²¹⁷ *Id.* at 182.

²¹⁸ *See id.* at 110–13.

²¹⁹ *See id.* at 186–91.

²²⁰ *See, for example, Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *In re Orozco-Polanco*, File No. A75-244-012, Exec. Office for Immigration Rev. of El Paso, TX, 123-23 (Dec. 18, 1997). Much of the current juridical debate in the U.S., for example, centers on issues regarding “social visibility or distinction” and “particularity.” First, there is a debate as to whether the refugee definition requires more than a showing that a claimant fears persecution in connection with an immutable characteristic or one that is so fundamental to an individual’s identity that they should not be forced to change. *See A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (B.I.A. 2007), *aff’d, Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72-73 (2d Cir. 2007); *C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006), *aff’d, Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006). At present, there is a circuit split. *See Mendez-Barrera v. Holder*, 602 F.3d 21, 25 (1st Cir. 2010) (upholding both social visibility and particularity requirements and rejecting the proposed social group of “young women recruited by gang members who resist such recruitment”); *Valdiviezo-Galdamez v. Att’y General*, 663 F.3d 582 (3d Cir. 2011) (joining the Seventh Circuit in rejecting visibility and particularity concepts); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (upholding particularity test, but declining to rule on social visibility while noting circuit split), *Orellana-Monson v. Holder*, 685 F.3d 511, 521-22 (5th Cir. 2012) (upholding social visibility and particularity tests). Second, where “social visibility or distinction” and “particularity” are required, judges differ with regard to the meaning of these terms. *See Contreras-Martinez v. Holder*, 346 F. App’x 956, 958 (4th Cir. 2009) (per curiam) (quoting *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009)) (“[T]he Board requires that a particular social group have . . . ‘social visibility, meaning that members possess characteristics . . . visible and recognizable by others in the native country.’”). *But see Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (“[T]he Board cited cases which hold that a group must have ‘social visibility’ to be a ‘particular social group,’ meaning that ‘members of a society perceive those with the characteristic in question as members of a social

states have begun to recognize as refugees individuals who fear persecution in connection with gangs, while others have rejected that understanding of the Refugee Convention. I would argue that such struggles to determine just who merits protection demonstrate the evolving nature of persecution and the ongoing viability of a definition created over sixty years ago.

In recent years, Canada's Immigration and Refugee Board granted Convention protection to a journalist who was targeted by an organized crime group as a result of articles he had written.²²⁴ Australia's Refugee Tribunal granted protection to an applicant based on a fear of persecution as a result of pursuing an occupation (public transport drivers) targeted by gangs to pay extortionate demands.²²⁵ But adjudicators in Canada and the U.K. have also rejected other gang-related claims.²²⁶

As of now, many gang-related claims in the U.S. are rejected with respect to membership in a particular social group. But a close look reveals that in certain gang-related cases, claimants may be eligible for protection. U.S. federal courts have held or indicated support for the concept that membership in a particular social group can involve the following gang-related circumstances: witnesses who have testified against gang members;²²⁷ family members of such witnesses;²²⁸ family members of those who resist forcible recruitment;²²⁹ and

group.”). The BIA itself has now clarified that social “visibility” does not mean “ocular” visibility but rather that the group is perceived by society as distinct. *Matter of M-E-V-G-*, *supra* note 208.

²²¹ *VM (Kenya) v. Sec'y of State for the Home Dep't* [2008] UKAIT 00049, [214] (“Appellant has a well-founded fear of being persecuted in her home area in Kenya at the hands of members of the Mungiki, from whom the state is unwilling or unable to protect her, by reason of her membership of the particular social group ‘women in Kenya’ (alternatively ‘intact women (girls)’”).

²²² *RRT Case No. 0906782* (2009) R.R.T.A. 1063 (Austl.) (concluding that the reason “bus, public transport and truck drivers are targeted [by MS-13 and MS-18 in El Salvador] is their membership of the particular social group they comprise”).

²²³ RPD File No. TA7-04670, TA7-04671, TA7-04672 (Private Proceedings), [2008] CanLII 49548 (Can. I.R.B.) (journalists who have investigated crimes committed by gangs.).

²²⁴ *See id.* at 5. The Board found that the claimant “should not be expected to abandon his vocation and go into hiding in another location in Mexico.” *Id.*

²²⁵ *See RRT Case No. 0906782*, *supra* note 222, ¶ 84 (where the recognized particular social group was “bus, public transport, and truck drivers”).

²²⁶ *See, for example*, Orphée v. Canada (Minister of Citizenship and Immigration), [2011] F.C. 966, [20] (Can.) (dismissing a claim from a taxi driver on the basis that the ‘vocation of taxi driver does not constitute an innate characteristic or one that is fundamental to human dignity’); *Emilia Del Socorro Gutierrez Gomez v. Sec'y of State for the Home Dep't* [2000] UKIAT 00007, [¶ 73(III)] (refusing to recognize participants in community-based group that provides legal advice to victims of gang extortion).

²²⁷ *See Garcia*, *supra* note 209.

²²⁸ *See Crespin-Valladares*, *supra* note 220.

²²⁹ *See Hernandez-Avalos v. Lynch*, No. 14-1331 (4th Cir., April 30, 2015)..

former gang members.²³⁰ One immigration judge held that tattooed youth in such circumstances constitute a particular social group.²³¹ Another immigration judge found an Evangelical Christian eligible for asylum in connection with gang persecution.²³²

As explained earlier, much has changed since the General Assembly adopted the 1951 Refugee Convention in response to Nazi and Soviet persecution. Governments continue to persecute but also create refugees when they prove to be ineffective at protecting their citizens from non-state agents of persecution. Moreover, those non-state agents come in many forms. Some act like governments and control territory and the lives of those who reside under their de facto jurisdiction. Others persecute nuclear family members in societies that enable men to treat women, girls, and boys as property.

While both state and non-state agents target some of the same individuals and groups, many new refugees flee particularly from non-state actors. This is especially the case with respect to targeting connected to gender, sexual orientation, age, and family, as described above.

Identifying the new refugees is an ongoing challenge for states and civil society. Not surprisingly, jurists, advocates, UNHCR, and experts disagree in robust ways over recognizing new targets of persecution. But through such contestation, Member States have determined that many new refugees, too, merit the protection provided by the 1951 Convention.

V. WHAT HAS ENABLED THE REFUGEE CONVENTION TO ADAPT TO CHANGES OVER TIME?

What has made it possible for this treaty to evolve with respect to new agents, forms, and targets of persecution? The State Parties created a treaty with two core and interlocking characteristics enabling this development: a special purpose that goes to the fundamental nature of the state system, and terms that possess a reasonable degree of flexibility. Recognizing these traits, lawyers have continuously adapted the refugee definition to new circumstances.

²³⁰ See *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Urbina-Mejia v. Holder*, 597 F.3d 360, 366–67 (6th Cir. 2010).

²³¹ See Decision of Immigration Judge Steven A. Morley, York Immigration Court, Sept. 13, 2012, available at <http://dl.dropboxusercontent.com/u/27924754/1J%20Morley%209-13-12%20pro%20se%20withholding.pdf>.

²³² See Decision of Immigration Judge Wayne R. Iskra, Arlington Immigration Court, Aug. 10, 2012 (copy on file with author; non-binding). For more information on gang and drug-related violence in Mexico, see Holly Buchanan, *Fleeing the Drug War Next Door: Drug-Related Violence As a Basis for Refugee Protection for Mexican Asylum-Seekers*, 27 *UTRECHT J. INT'L. & EUROPEAN L.* 28 (2011).

First, the Convention focused on one of the central purposes of the modern state: to protect citizens and residents from serious harm in connection with personal characteristics or fundamental beliefs and opinions. Of course, a treaty's purpose generally matters under international norms. According to the Vienna Convention, states must interpret treaties in good faith in accordance with the ordinary meaning of its terms in their context and "in the light of its object and purpose."²³³ As Professor Steinbock explains, the object and purpose are grounded in the terms of the treaty; the terms cannot be fully understood outside that context.²³⁴ He refers to Professor Brownlie's "principle of integration," which holds that the meaning of the terms "emerges in the context of the treaty as a whole and in light of its objects and purposes."²³⁵ According to Steinbock, "[t]his is especially so when the textual approach leaves the decision-maker with a choice of possible meanings."²³⁶

Steinbock identifies the protection of the innocent as one important purpose of the Refugee Convention. "The core concept of the refugee definition is protection against the infliction of harm on the basis of differences in personal status or characteristics."²³⁷ Steinbock locates this purpose "within what is probably the most prevalent theme of post-1945 human rights law: non-discrimination."²³⁸ As Steinbock argues, the object and purpose of the Refugee Convention is to protect an individual targeted in connection with any status or characteristic that is a discriminatory and irrelevant basis for the infliction of harm.²³⁹ The object and purpose itself means that the refugee definition is applicable to a "wide variety of social statuses and affiliations."²⁴⁰ As such, the object and purpose enable the refugee definition to respond to "evolving forms of oppression."²⁴¹

Second, in addition to establishing a special purpose, states created the refugee definition with "flexible" terms that make it open to a variety of interpretations.²⁴² While that allows adjudicators to apply the treaty to new forms

²³³ Vienna Convention on the Law of Treaties, *supra* note 116, art. 31.

²³⁴ See Daniel Steinbock, *The Refugee Definition as Law: Issues of Interpretation*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 13, 19–20 (Frances Nicholson & Patrick Twomey eds., 1999).

²³⁵ *Id.* at 19 (internal citation omitted).

²³⁶ *Id.* at 20.

²³⁷ *Id.* at 21.

²³⁸ *Id.*

²³⁹ See *id.* at 34.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See Sztucki, *supra* note 12, at 58.

and targets of persecution, commentators have noted that it also enables instability: “numerous amendments to national immigration and refugee legislation, which do not in any case follow the same pattern, have demonstrated the ‘flexibility’, or rather the *instability*, of the substance of the Convention definition.”²⁴³ Critics of the 1951 Convention’s definitions have argued that vague wording has forced states to come up with their own definitions, including both expansive and restrictive interpretations.²⁴⁴

Certainly, adjudicators, advocates, experts, and officials debate and disagree about the meaning of these terms. At the same time, consider the ways in which adjudicators have applied the refugee definition to non-state agents of persecution and new forms and targets of serious harm over time. Lord Hoffman analyzed this characteristic with respect to membership in a particular social group in the *Shah* case:

[T]he concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term “particular social group” rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.²⁴⁵

In the same case, Lord Hope explained that the evolutionary approach enables adjudicators to take into account societal changes as well as persecutory forms of discrimination of which the treaty negotiators were unaware.²⁴⁶ In short, the terms possess adequate flexibility to adapt to changed circumstances.²⁴⁷

Finally, lawyers have played a crucial role in understanding and applying the object and purpose of the refugee definition as well as its flexibility to changing times. This happened almost from the start when the first major European refugee crisis occurred following Western support for and Soviet repression of the Hungarian rebellion in 1956, as explained above. UNHCR’s top lawyer, Dr. Weis, applied the Refugee Convention to the already-changing

²⁴³ *Id.* at 75 (internal citation omitted) (emphasis in original).

²⁴⁴ See, for example, Millbank, *The Problem with the 1951 Refugee Convention*, *supra* note 5, at 8, 16.

²⁴⁵ *Ex Parte Shah*, *supra* note 161, at 15.

²⁴⁶ See *Ex Parte Shah*, *supra* note 161, at 21.

²⁴⁷ One of the leading refugee law scholars, Guy S. Goodwin-Gill, finds some of the 1951 Convention refugee definition criteria to be clear-cut, and others to be “open.” “These latter must inevitably be filled out by human experience; there *are* new groups of refugees, as there always have been new groups of refugees.” Professor Goodwin-Gill makes these observations in response to those who view the Convention as a “relic from a bygone era.” Guy S. Goodwin-Gill, *Editorial: Asylum 2001 – A Convention and a Purpose*, 13 INT’L J. OF REFUGEE LAW 1, 7 (2001).

times then, as the chief legal advisors to the High Commissioner have continued to do to this day.

UNHCR's Protection Division (today's legal department) has contributed legal analyses to help guide state behavior through the Handbooks on Voluntary Repatriation,²⁴⁸ Emergencies,²⁴⁹ and Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,²⁵⁰ as well as guidance on such subjects as claims to refugee status based on sexual orientation and/or gender identity,²⁵¹ child asylum claims,²⁵² and religion-based refugee claims.²⁵³ The Division directed the Global Consultations discussed above to meet the six main goals of its program of action: strengthening implementation of the 1951 Convention and its 1967 Protocol, protecting refugees within broader migration movements, sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees, addressing security-related concerns more effectively, redoubling the search for durable solutions, and meeting the protection needs of refugee women and children.²⁵⁴ UNHCR lawyers also argue their interpretations of significant refugee definition issues in amicus briefs and other court submissions in the U.S., Germany, the U.K., and elsewhere. For example, UNHCR has explained its understanding of membership in a particular social group,²⁵⁵ immigration detention,²⁵⁶ well founded fear of persecution,²⁵⁷ gender-

²⁴⁸ U.N. High Comm'r for Refugees, *Voluntary Repatriation: International Protection* (1996), available at <http://www.refworld.org/docid/3ae6b3510.html>.

²⁴⁹ U.N. High Comm'r for Refugees, *Handbook for Emergencies*, (3rd ed., 2007), available at <http://www.refworld.org/docid/46a9e29a2.html>.

²⁵⁰ U.N. High Comm'r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. No. HCR/1P/4/ENG/REV. 3 (2011), available at <http://www.refworld.org/docid/4f33c8d92.html>.

²⁵¹ U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. No. HCR/GIP/12/01 (2012), available at <http://www.refworld.org/docid/50348afc2.html>.

²⁵² U.N. High Comm'r for Refugees, *supra* note 199.

²⁵³ U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. No. HCR/GIP/04/06 (2004), available at <http://www.refworld.org/docid/4090f9794.html>.

²⁵⁴ See U.N. High Comm'r for Refugees, *Global Consultations on International Protection: The End of the Beginning*, available at <http://www.unhcr.org/3d98491d4.html>.

²⁵⁵ See The United Nations High Commissioner for Refugees' Amicus Curiae Brief in Support of Petitioner, *Henriquez-Rivas v. Holder*, 449 F. App'x. 626 (9th Cir. 2011) (No. 09-71571), available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/Henriquez-Rivas%20UNHCR%20Brief.pdf>.

based persecution,²⁵⁸ and internal armed conflict.²⁵⁹ Protection Division lawyers have written thoughtfully about specific definitional matters, as Volker Turk did regarding non-state persecutors discussed earlier. In the tradition of UNHCR legal analysis approaching the new forms of persecution and persecutors, Turk argues that the Convention wording on persecution possesses an open and flexible character that enables it to adapt to changing circumstances and forms of persecution.²⁶⁰

Advocates have contributed significantly to our evolving understanding of the Convention refugee definition. Practitioners and NGOs have articulated legal arguments demonstrating how the refugee definition applies to a particular individual persecuted by a non-state actor in connection with a protected status or characteristic. Leadership and lawyering at non-governmental organizations have made a difference in how adjudicators and policy makers have interpreted this treaty to apply to the new refugees.²⁶¹

Scholars have brought special expertise to bear on analyzing the refugee definition. It is not uncommon for the high courts of various jurisdictions to refer to the analyses that these experts provide.²⁶² When UNHCR sought to

²⁵⁶ See U.N. High Comm'r for Refugees, U.N.H.C.R. Intervention before the Court of Justice of the European Union in Joined Cases of NS and ME and Others, U.N. Doc. C-411/10 and C-493/10 (2011), available at <http://www.refworld.org/docid/4e1b10bc2.html>; U.N. High Comm'r for Refugees, U.N.H.C.R. Oral Intervention before the European Court of Human Rights in the Case of M.S.S. v. Belgium and Greece (2010), available at <http://www.refworld.org/docid/4c7fbf052.html>.

²⁵⁷ See U.N. High Comm'r for Refugees, U.N.H.C.R. Public Statement in Relation to Cases Federal Republic of Germany v Y (Case C-71/11) and Federal Republic of Germany v Z (Case C-99/11) Pending before the Court of Justice of the European Union (2011), available at <http://www.refworld.org/docid/4dfb7a082.html>.

²⁵⁸ See U.N. High Comm'r for Refugees, UNHCR Intervention before the United States Court of Appeals for the Tenth Circuit in the Case of Rivera-Barrientos v. Holder, Att'y General, U.N. Doc. No. 10-9527 (2010), available at <http://www.refworld.org/docid/4c6cdb512.html>; U.N. High Comm'r for Refugees, UNHCR Intervention Before the House of Lords in the Case of Zainab Esther Fornah (Appellant) v. Sec'y of State for the Home Dep't (Respondent) (2006), available at <http://www.refworld.org/docid/45631a0f4.html>.

²⁵⁹ See U.N. High Comm'r for Refugees, UNHCR Public Statement in Relation to Cases UM 8628-08, UM 334-09, UM 133-09 Pending Before the Swedish Migration Court of Appeal (2009), available at <http://www.refworld.org/docid/4acb46d82.html>.

²⁶⁰ Turk, *supra* note 111, at §4.2.

²⁶¹ Many NGO's—too many to name—have made a difference in this way, such as Human Rights First (formerly the Lawyers Committee for Human Rights), the Center for Gender and Refugee Studies, the European Council on Refugees and Exiles, and the various national Refugee Councils.

²⁶² For example, Guy Goodwin-Gill advised on legal issues of statelessness and “returnability” in the case of North Koreans seeking asylum in the U.K. and the scope of exclusion under Article 1F(c) of the 1951 Convention. *Sec'y of State for the Home Dep't v. Al Jeddah* [2013] UKSC 62 (9 Oct. 2013);

engage states in the new millennium on significant protection issues related to the interpretation of the refugee definition, the agency called on well-recognized scholars to provide their analyses as the basis for discussions, asked these experts to further develop their studies based on those roundtables, and then published their work in *Refugee Protection in International Law*.²⁶³

Ultimately, as the above analysis demonstrates, judges have determined that the Convention is applicable to new agents, forms, and targets of persecution. The evolution of interpretations has benefitted at times from the comparative law discussions of this international treaty as it has been applied through domestic legal systems. According to Judge North of the Federal Court of Australia and his co-author, “the people who are best equipped to persuade judges are fellow jurists and experts.”²⁶⁴ Some national high courts have been particularly open to consider the analyses of other high courts and at times adopt such interpretations.²⁶⁵ Certainly the International Association of Refugee Law Judges (IARLJ), made up of jurists throughout the world who focus on interpreting the Convention definition, has contributed to a serious exchange of ideas through their world conferences and publications. In fact, one can argue that the challenges of understanding the refugee definition in light of changing circumstances led to the very establishment of this organization in 1997.²⁶⁶

VI. CONCLUSION

The Refugee Convention and Protocol constitute the major human rights treaty on cross-border forced migration. The International Law Commission’s

R (*DD (Afghanistan)*) v. Sec’y of State for the Home Dep’t, [2012] UKSC 54. The U.S. Court of Appeals for the 6th Circuit cited James Hathaway’s book, *The Law of Refugee Status*, in *Stenaj v. Gonzales*, 227 F. App’x 429, 433 (6th Cir. 2007), regarding human rights violations as evidence of persecution.

²⁶³ Erica Feller, Volker Turk & Frances Nicholson, *Refugee Protection in International Law* (2003).

²⁶⁴ Anthony M. North & Joyce Chia, *Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees*, in *THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW* 226, 242 (James C. Simeon ed., 2007).

²⁶⁵ See, for example, *Ex Parte Shah*, *supra* note 161, at 8; *Ward*, *supra* note 163; *A v. Minister for Immigration & Ethnic Affairs*, *supra* note 159.

²⁶⁶ The IARLJ Constitution states that:

[J]udges and quasi-judicial decision makers in all regions of the world have a special role to play in ensuring that persons seeking protection outside their country of origin find the 1951 Convention and its 1967 Protocol as well as other international and regional instruments applied fairly, consistently, and in accordance with the rule of law.

One of the major goals of the association is to promote “a common understanding of refugee law principles” to jurists worldwide. The IARLJ Constitution is available at <http://www.iarlj.org/general/iarlj/the-association/constitution/english>.

project on examining treaties over time explained the need for studying such significant international agreements as follows:

As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived . . . As their context evolves, treaties face the danger of either being ‘frozen’ into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. . . . Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.²⁶⁷

The Special Rapporteur on “subsequent agreements and subsequent practice in relation to treaty interpretation” based his first report on “the jurisprudence of a, hopefully, representative group of international courts, tribunals and other adjudicative bodies, as well as on documented instances of State practice.”²⁶⁸ This expert found numerous instances where jurists and other decision makers applied an evolutive interpretation of a treaty provision to address changing contexts. The adjudicative bodies that have done so, often guided by Articles 31 through 33 of the Vienna Convention on the Law of Treaties, include the Human Rights Committee,²⁶⁹ the International Tribunal for the Law of the Sea,²⁷⁰ the European Court of Human Rights,²⁷¹ the International Court of Justice,²⁷² and the International Tribunal for the Former Yugoslavia.²⁷³ The Special Rapporteur sums up this issue by stating that “[o]n balance, the jurisprudence of ICJ and arbitral tribunals does not seem to contradict the ‘general support among the leading writers today for evolutive interpretation of treaties,’ as the Tribunal in the *Iron Rhine* case has noted.”²⁷⁴

The present Article has focused on one particular treaty and its interpretation by domestic and regional tribunals and agencies. The analysis presented here confirms the Special Rapporteur’s conclusion that “subsequent practice by the parties may guide an evolutive interpretation of a treaty.”²⁷⁵ As demonstrated by the above analysis, the parties to the Refugee Convention have adapted this agreement—created in 1951 to address a particular European

²⁶⁷ Georg Nolte, *Treaties Over Time, In Particular: Subsequent Agreement and Practice*, Rep. of the Int’l Law Comm’n, 60th Sess., May 5-June 6, July 7-Aug. 8, 2008, U.N. Doc. A/63/10, Annex A, ¶14.

²⁶⁸ *Treaties and Subsequent Practice* 5 (Georg Nolte ed., 2013).

²⁶⁹ *Id.* at 10–11.

²⁷⁰ *Id.* at 11.

²⁷¹ *Id.* at 16–17.

²⁷² *Id.* at 24.

²⁷³ *Id.* at 40.

²⁷⁴ *Id.* at 27.

²⁷⁵ *Id.*

refugee situation—to changes over time with respect to new agents, forms, and targets of persecution. The treaty itself set out a clear purpose concerning a fundamental function of the state system as well as terms with sufficient flexibility that have enabled jurists and government officials—aided, prodded, and persuaded in many cases by advocates, UNHCR, and experts—to adapt the refugee definition to the changing nature of forced migration.

Of course, the treaty continues to protect those fleeing certain types of state persecution much like it did at the outset. But the State Parties that created and adopted the Refugee Convention could not have imagined the changing nature of persecution in its particularities. We now know that states and non-state actors continue to develop new ways and targets to persecute, and that identifying the new refugees can be difficult. While figuring out who the new targets are involves challenging legal analyses and debates, this treaty's capacity to protect both the old and the new refugees today deserves recognition.

As long as the modern state system exists, one of its principal goals will continue to be the protection of citizens and residents. As policy makers, advocates, and experts consider how states can best address the needs of those displaced in connection with natural disasters and climate change, they would benefit from taking into account how the Refugee Convention has evolved over time. Focused on persecutory discrimination, the Refugee Convention has proven capable of protecting the new targets of persecution from new kinds of persecutors when these vulnerable individuals have sought the protection of another state. While some individuals displaced by natural disasters and climate change may be “persecuted” in connection with a characteristic protected by the Refugee Convention, the vast majority of these newest forced migrants will need new norms developed to address their unique situations. No doubt what is understood now in connection with disasters and climate change will evolve over time. Any new norms developed to ensure that states address the needs of these displaced persons should be capable of adapting to such changes.