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## A Fresh Approach To What It Means To Be a Religious Refugee

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# A FRESH APPROACH TO WHAT IT MEANS TO BE A RELIGIOUS REFUGEE

Brienna Bagaric\*

Jennifer Svilar\*\*

## *Abstract*

*The world is currently experiencing an unprecedented displaced persons crisis. There are more than 70 million people worldwide who have been forcibly displaced from their homeland and are in search of a new country in which to settle. There is no international appetite to absorb these people. There is only one legal pathway by which displaced people can claim an entitlement to settle in another country. This is pursuant to the Refugee Convention. More than 140 countries including the United States are signatories to this convention. The difficulty experienced by displaced people is now particularly acute so far as entry into the United States is concerned because the Trump Administration has reduced the number of offshore refugees it will take from 110,000 to 18,000. This is partly as a result of an unprecedented backlog of asylum seekers that are at border points or in the United States. Given the intense competition for settlement places in the United States, it is imperative that decisions regarding refugee eligibility are made in accordance with transparent and coherent legal standards. Refugee status can only be granted if a person fears persecution on the basis of one of five designated grounds. One of the most frequently engaged grounds is religion. This is especially important given the amount of people who are displaced because of wars and turmoil which have a religious basis. Despite*

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*this, there is no coherent or consistent definition that has been given to religion in the context of the Refugee Convention. This article addresses this gap in the literature and the jurisprudence and proposes a definition of religion which is consistent with the objective of the Refugee Convention and accords with concepts that have been utilized in other countries, namely Canada and Australia. The definition this article adopts is wider than that which is currently applied in the United States and will have the effect of increasing the amount of people that can obtain asylum pursuant to the Refugee Convention. This will not only contribute to the flourishing of these individuals but also the integrity of the refugee determination process.*

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## I. INTRODUCTION

The number of displaced persons in the world is at an all-time record high. There are currently more than 70 million people who are displaced from their homeland and are seeking a new country in which to settle.<sup>1</sup> This wave of displaced people has been met with a high level of resistance by other nations, which generally are reluctant to absorb foreigners. There is no tenable solution in the foreseeable future regarding settling these forcibly displaced people. In particular, there is no established or coherent international program which provides an avenue that displaced persons can utilize in order to resettle in another country.

The only international instrument that deals with protecting forcibly displaced people and imposing an obligation on other countries to settle them is the 1951 Refugee Convention.<sup>2</sup> This instrument is now nearly seventy years old and has been ratified by more than 140 countries.<sup>3</sup> It has provided the foundation for the settlement of tens of millions of people.<sup>4</sup> Although the instrument is nearly seventy years old, it is now more relevant than ever given the large number of displaced people. Accordingly, the manner in which the Convention is interpreted and applied is of cardinal importance to the flourishing of tens of millions of people.

In broad terms, the instrument imposes an obligation on signatory countries to provide asylum to people who are outside their homeland and fear persecution on the basis of one or more of five discrete grounds. These are religion, political opinion, particular social group, race, and nationality. If people are outside their homeland and genuinely fear for their safety, but not for one of these five reasons, they cannot seek asylum pursuant to the Convention, and indeed there is no other legal basis upon which they can command protection. Thus, the manner in which the five convention grounds operate can be determinative of whether a displaced person can validly seek

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1. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018, 2 (2019), <https://www.unhcr.org/5d08d7ee7.pdf> [hereinafter GLOBAL TRENDS 2018].

2. *See generally*, Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention] (providing the protocol for nations receiving asylum seekers).

3. *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM'R FOR REFUGEES 1, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>. Note that there are 146 state parties to the 1967 protocol. *Id.*

4. *See History of UNHCR*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/en-us/history-of-unhcr.html> (last visited Jan. 20, 2021) (noting that the UNHCR has "helped well over 50 million refugees" since its creation).

protection under the Convention.

This article examines the meaning and scope of one of the key convention grounds, namely religion. This is an under-researched area of law and one which has received scant judicial attention in the United States. As a result, the scope and contours of this convention ground are poorly defined, thereby leading to inconsistent and incoherent decisions regarding a person's eligibility for refugee status. To clarify the appropriate meaning of religion under the Convention, we analyze the history of the 1951 Refugee Convention, the commentaries in the documents which underpin the Convention, and case law in the United States, Canada, and Australia. It emerges that there is no settled meaning of religion in this context, but consistent with the overarching objective of the Convention and the general meaning of religion, we argue that an expansive view of this concept should be adopted.

An exploration of the meaning of this important convention ground is particularly important at this point in America's history. The United States settles two broad groups pursuant to the Convention. The first is typically called asylum seekers, which essentially comprises displaced people who are at border points or indeed already in the United States. Currently, there is a record backlog of asylees totaling more than 1 million people.<sup>5</sup> The second group is typically called refugees, and these consist of people who are offshore and are seeking to settle in the United States. Under the Trump Administration, the number of refugee places that are available has dropped markedly to a record low. Since President Trump took office in 2017, the number of places that are available for refugees annually has dropped from 110,000 to only 18,000 currently.<sup>6</sup> Given the scarcity of asylum places that are now available in the United States, it is important that decisions made regarding asylum eligibility are based on normatively sound and jurisprudentially accurate criteria. This article aims to enhance the integrity of the refugee determination process by clarifying the meaning of a key convention ground. In fact, this ground is particularly important given that President Trump has indicated recently that his administration is now

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5. See Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, WALL STREET J. (Sept. 18, 2019 9:22 AM), <https://www.wsj.com/articles/u-s-immigration-courts-backlog-exceeds-one-million-cases-11568845885>.

6. See *Presidential Determination on Refugee Admissions for Fiscal Year 2020*, WHITE HOUSE (Nov. 1, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-determination-refugee-admissions-fiscal-year-2020/>.

prioritizing the extent to which freedom of religion is protected.<sup>7</sup> This is a welcome development in the context of refugee determinations given the large amount of people that are displaced because of war and civil unrest that have a religious backdrop.

In this article, we argue that it is not necessary for an asylum seeker to establish that they are part of a mainstream religious ideology or that the ideology has any particular beliefs or convictions. Moreover, asylum seekers should not be required to establish that they participate in any practices which are tangible displays of a commitment to a religion. The central aspect of a religion is belief in an ideology which involves an element of faith, which is shared by some other people in the community. In addition to this, religion often is part of a person's identity or way of life, but this is not essential in every case—it can merely be a core belief held by an individual. The concept of a religious belief is wide-ranging and should include theistic beliefs and convictions about the divine or spiritual aspect of humankind.

There are numerous ways in which people can establish that religion is a key aspect of their identity, including by the attire they wear and ceremonies in which they participate. This means that in order to establish that a person is a member of a certain religion, it is not necessary for him or her to establish a deep understanding of the core elements of the religion or tangible conduct consistent with tenants of the religion. Moreover, religious persecution can arise where an individual is targeted for not belonging to a religion or because they are wrongly believed to practice a certain religion.

The reform proposal suggested in this article will have the effect of widening the scope of this convention ground, thereby facilitating the entry of more asylum seekers into the United States and indeed other Convention countries that adopt the proposed definition.

In the next Part of this article, we provide an overview of the current displaced persons crisis. This is from the international perspective and then from the perspective of the current situation in the United States. This is followed by a history of the 1951 Refugee Convention. In Parts IV and V, we examine the current approach to the refugee convention ground of religion and propose a coherent and workable definition of this concept. Our reform proposals are summarized in the concluding remarks.

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7. See Elana Schor, *Trump Condemns Religious Persecution Amid Refugee Squeeze*, ASSOCIATED PRESS (Sept. 29, 2019), <https://apnews.com/9562626425d74765bf89ff91931de0d0>.

## II. THE DISPLACED PERSONS CRISIS

A. *Overview of the Current Displaced Persons Crisis*

The magnitude of the displaced persons phenomenon, in terms of number and impact, is unprecedented. We are experiencing record levels of forced displacement. The starkest figures are set out in the most recent annual study by the refugee agency, the United Nations High Commissioner for Refugees (UNHCR), in its *Global Trends Report* (UNHCR Report),<sup>8</sup> which sets out in detail the current state of the displaced persons crisis. According to the report, the world's forcibly displaced population stood at 70.8 million people in 2018<sup>9</sup>—increasing for the eighth consecutive year.<sup>10</sup> This is the highest number of displaced persons recorded since the agency began collecting data on displaced persons in 1951.<sup>11</sup> It should also be noted that this figure, according to Filippo Grandi, the United Nations High Commissioner for Refugees, is a conservative one. For example, the total number of persons who have been forced to flee the ongoing political crisis in Venezuela is not yet known—in what has become one of the worst displacement crises in recent history.<sup>12</sup>

The displaced persons population is comprised of different cohorts. The United Nations estimates that there are about 26 million refugees, over 41 million internally displaced persons (that is, within their own countries), and 3.5 million asylum seekers who make up the global total number of displaced persons.<sup>13</sup> Stateless persons are not accounted for in this global total of

8. See GLOBAL TRENDS 2018, *supra* note 1.

9. *Id.* at 5.

10. *Id.*

11. See *id.*; Press Release, U.N. High Comm'r of Refugees, Worldwide Displacement Tops 70 Million, UN Refugee Chief Urges Greater Solidarity in Response (June 19, 2019), <https://www.unhcr.org/en-us/news/press/2019/6/5d03b22b4/worldwide-displacement-tops-70-million-un-refugee-chief-urges-greater-solidarity.html> [hereinafter Worldwide] (reporting that 70.8 million is the highest number of displaced persons in the last seventy years since the agency began collecting data).

12. Nick Cumming-Bruce, *Number of People Fleeing Conflict is Highest Since World War II*, *U.N. Says*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/world/refugees-record-un.html>; see also U.N. HIGH COMM'R OF REFUGEES, VENEZUELA SITUATION: RESPONDING TO THE NEEDS OF PEOPLE DISPLACED FROM VENEZUELA 46 (Mar. 2018), <https://www.unhcr.org/5ab8e1a17.pdf>.

13. GLOBAL TRENDS 2018, *supra* note 1, at 2.

displaced persons.<sup>14</sup> These are individuals who are not considered a citizen of any country and thus are denied basic civil and social rights such as access to education, healthcare, and freedom of movement.<sup>15</sup> In 2018, the UNHCR conservatively estimated that there were at least 10 million stateless persons worldwide.<sup>16</sup>

The global population of forcibly displaced people today is larger than the population of Thailand.<sup>17</sup> In fact, if the total global population of forcibly displaced people today were to be combined to form their own country, it would be the twentieth most populous country in the world.<sup>18</sup>

The growth in the population of displaced people over the most recent decade shows an even more pronounced increase.<sup>19</sup> In the ten-year period from 2009 to 2018 (inclusive) the displaced population increased by 27.5 million people.<sup>20</sup> This is an almost 40% increase in a single decade. This rapid growth in the world's forcibly displaced population is set out in the graph below.<sup>21</sup>

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14. See *Persons of Concern to UNHCR*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/ph/persons-concern-unhcr> (last visited Jan. 20, 2021) (providing the breakdown of the 70.8 million figure and explaining that stateless people are accounted for separately).

15. *Id.* (explaining that stateless people are denied nationality, and that ultimately the power to assign nationality rests with governments).

16. *Id.*

17. See Worldwide, *supra* note 11 (describing the number of displaced persons as “correspond[ing] to a population between that of Thailand and Turkey”).

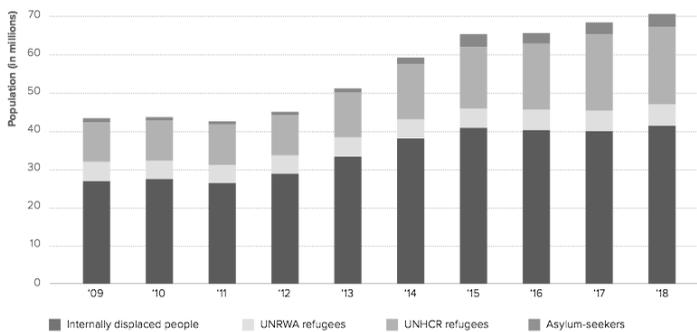
18. *Most Populous Countries in the World (2020)*, WORLDOMETER, <https://www.worldometers.info/population/most-populous-countries/> (last visited Jan. 20, 2021) (providing the top twenty most populous countries in the world, with Thailand ranked twentieth at 69.8 million people).

19. See GLOBAL TRENDS 2018, *supra* note 1, at 4–5 (showing the increase over the past ten years of forcibly displaced persons).

20. *Id.* at 4. It was 43.3 million in 2009. *Id.*

21. *Id.* at 5.

Figure 1 | Global forced displacement | 2009-2018



Approaching the issue from a somewhat wider lens further illuminates the extent of the crisis. In 1996, there were 37.3 million displaced people in the world.<sup>22</sup> This is an increase of 33.5 million people in just over twenty years.<sup>23</sup>

Currently, the largest driver of forced displacement is the Syrian Civil War, which began in 2011.<sup>24</sup> It has resulted in the most profound refugee and displaced persons problem in the world since World War II (WWII).<sup>25</sup> The UNHCR Report states that Syria recorded the largest population of displaced persons for the fifth consecutive year with a total of 13 million displaced Syrians.<sup>26</sup> This figure is comprised of 6.7 million refugees, 6.2 million internally displaced within the borders of Syria (of which 2.5 million are children), and 140,000 asylum seekers.<sup>27</sup> Other countries that registered large displaced persons populations in 2018 include Colombia (8 million), Democratic Republic of the Congo (DRC) (5.4 million), Afghanistan (5.1 million), South Sudan (4.2 million), and Somalia (3.7 million).<sup>28</sup>

22. See U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, 6 (June 20, 2016), <https://www.unhcr.org/576408cd7.pdf>.

23. See GLOBAL TRENDS 2018, *supra* note 1, at 4.

24. See GLOBAL TRENDS 2018, *supra* note 1, at 3–4 (finding that a large portion of the displaced person population comes from the Syrian Arab Republic).

25. See Euan McKirdy, *UNHCR Report: More Displaced Now Than After WWII*, CNN (June 20, 2016, 9:29 AM), <https://www.cnn.com/2016/06/20/world/unhcr-displaced-peoples-report/index.html>.

26. GLOBAL TRENDS 2018, *supra* note 1, at 6, 14.

27. *Id.* at 6; *Internally Displaced People*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/sy/internally-displaced-people> (last visited Jan. 20, 2021) (providing the number of internally displaced children from Syria).

28. GLOBAL TRENDS 2018, *supra* note 1, at 6–7.

As noted above, refugees account for a significant proportion of the global displaced population—there are currently more refugees worldwide than at any time since WWII.<sup>29</sup> These are persons who are fleeing conflict, violence or persecution. The number of refugees under UNHCR’s mandate increased for the eighth consecutive year—from 10.5 million in 2010<sup>30</sup> to a record high of 20.4 million in 2018.<sup>31</sup> To further illustrate the enduring nature of this crisis, about 80% of these refugees have lived in displacement for five years, and about one-fifth for twenty years.<sup>32</sup> There were an additional 5.5 million Palestinian refugees registered under the United Nations Relief and Works Agency’s mandate.<sup>33</sup> When combined, the total number of refugees in 2018 stood at 26 million, and according to the UN, only half of one percent will be resettled.<sup>34</sup> The significance of the refugee crisis is further underlined by the fact that half of the world’s refugees continued to be children.<sup>35</sup>

### *B. Unremitting Increase in Numbers of Displaced People*

The most recent data regarding displaced persons relates to the 2019 calendar year.<sup>36</sup> The trend for this year was consistent with the large increase in displaced persons in recent years leading up to 2019.<sup>37</sup> This is the result of a rise in general violence, conflicts, and both new and ongoing political challenges which have seen large scale deterioration in several countries.<sup>38</sup> According to UNHCR data, there were 13.6 million people newly displaced

29. See McKirdy, *supra* note 25 (discussing the high numbers of refugees in comparison to other points in history).

30. U.N. HIGH COMM’R FOR REFUGEES, *Global Trends 2010* 3 (2011), <https://www.unhcr.org/4dfa11499.pdf>.

31. GLOBAL TRENDS 2018, *supra* note 1, at 13.

32. *Id.* at 22.

33. *Id.* at 4.

34. Press Release, U.N. High Comm’r for Refugees, UNHCR Troubled by Latest U.S. Refugee Resettlement Cut (Nov. 2, 2019), <https://www.unhcr.org/en-us/news/press/2019/11/5dbd87337/unhcr-troubled-latest-refugee-resettlement-cut.html> [hereinafter *Troubled*].

35. GLOBAL TRENDS 2018, *supra* note 1, at 61.

36. See generally U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2019 (June 18, 2020), <https://www.unhcr.org/5ee200e37.pdf>.

37. *Id.* at 8 (reporting 79.5 million displaced people in 2019, nearly double the number from 2010); GLOBAL TRENDS 2018, *supra* note 1, at 4 (reporting an increase from 43.3 million displaced people in 2009 to 70.8 million in 2018).

38. See generally GLOBAL TRENDS 2018, *supra* note 1, at 4; INTERNAL DISPLACEMENT MONITORING CTR., GLOBAL REPORT ON INTERNAL DISPLACEMENT, (May 2018), <https://www.internal-displacement.org/global-report/grid2018/downloads/2018-GRID.pdf>.

during 2018 alone.<sup>39</sup> To put this figure into perspective, that is 37,000 new displacements each day of the year.

Of the total number of new displacements in 2018, 1.1 million people were registered as new refugees.<sup>40</sup> These are persons who sought protection outside their country of origin and have either been recognized as a refugee on a prima facie basis or granted temporary protection following a refugee status determination. Over half of the newly recognized refugees were Syrians (520,000), of whom almost 400,000 were located in Turkey.<sup>41</sup> There were an additional 1.7 million new asylum claims submitted in 2018.<sup>42</sup>

The United States was the world's largest recipient of individual asylum applications for the second consecutive year—with 254,300 applications submitted.<sup>43</sup> Peru and Germany received the second and third highest number of new applications in 2018—192,500 and 161,900, respectively.<sup>44</sup>

The ongoing displacement of Syrians continued to contribute markedly on global displacement figures. In 2018 alone, there were 889,400 newly displaced Syrians; of this total, 632,700 Syrians fled the country to find safety and the remainder were internally displaced within the country.<sup>45</sup> However, the largest producer of new displacements was Ethiopia, registering 1.6 million newly displaced Ethiopians during the course of 2018.<sup>46</sup>

A substantial number of new displacements in recent years is also attributable to the mass exodus of Venezuelans. The deteriorating political and economic conditions in Venezuela has resulted in a mass exodus of Venezuelans that is comparable to that experienced by war-ravaged Syria.<sup>47</sup> It is estimated that an average of 5,000 Venezuelans left the country each day in 2018.<sup>48</sup> Alarming, one million of these displacements occurred in the

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39. GLOBAL TRENDS 2018, *supra* note 1, at 2, 6.

40. *Id.* at 20.

41. *Id.*

42. *Id.* at 41.

43. *Id.* at 42.

44. *Id.* at 3.

45. *Id.* at 6.

46. *Id.*

47. *See id.* at 4, 24.

48. Siegfried Modola, *Venezuelan Outflow Continues Unabated, Stands Now at 3.4 Million*, U.N. HIGH COMMISSIONER FOR REFUGEES (Feb. 25, 2019), <https://www.unhcr.org/ph/15238-venezuelan-outflow-continues-unabated-stands-now-at-3-4-million.html>; Press Release, International Org. for Migration, *Venezuelan Outflow Continues Unabated, Population Abroad Now Stands at 3.4 Million* (Feb. 22, 2019), <https://www.iom.int/news/venezuelan-outflow-continues-unabated-population-abroad-now>

seven months since November 2018.<sup>49</sup> More recent data shows that by the end of 2019, 16% of the total population (that is, 4.6 million Venezuelans) had fled the country since the country's humanitarian crisis began four years ago.<sup>50</sup> It is estimated that the total figure could reach 6.5 million by the end of 2020.<sup>51</sup>

### C. Countries That Have Produced Highest Numbers of Refugees

The top ten refugee-producing countries accounted for a staggering 82% of the world's refugees registered under UNHCR's mandate, which has been a consistent trend over recent years.<sup>52</sup> That is, 16.6 million of the global total of 20.4 million refugees are under UNHCR's responsibility.<sup>53</sup> Even more remarkably, about two-thirds of these refugees originate "from just five countries: Syria, Afghanistan, South Sudan, Myanmar and Somalia."<sup>54</sup>

Syria has continued to produce the world's highest number of refugees for the fifth consecutive year.<sup>55</sup> As noted above, there were 6.7 million Syrian refugees reported in 2018.<sup>56</sup> This is unprecedented in recent history for a single country and is a significant increase since 2014, when the internally displaced population was estimated to be 7.6 million, of which about 3.9 million were refugees.<sup>57</sup> This is the world's largest refugee crisis.<sup>58</sup>

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stands-34-million.

49. Press Release, U.N. High Comm'r for Refugees, Refugee and Migrants From Venezuela Top 4 Million: UNHCR and IOM (June 7, 2019), <https://www.unhcr.org/en-us/news/press/2019/6/5cfa2a4a4/refugees-migrants-venezuela-top-4-million-unhcr-iom.html>.

50. See Press Release, U.N. High Comm'r for Refugees & International Org. for Migration, US\$1.35 Billion Needed to Help Venezuelan Refugees and Migrants and Host Countries (Nov. 13, 2019), <https://www.unhcr.org/en-au/news/press/2019/11/5dcbd7284/us135-billion-needed-help-venezuelan-refugees-migrants-host-countries.html>.

51. *Id.*; see also ORG. FOR AM. STATES, OAS WORKING GROUP TO ADDRESS THE REGIONAL CRISIS CAUSED BY VENEZUELA'S MIGRANT AND REFUGEE FLOWS 20 (2019) <http://www.oas.org/documents/eng/press/OAS-Report-to-Address-the-regional-crisis-caused-by-Venezuelas-migrant.pdf> (predicting "between 7.5 and 8.2 million").

52. GLOBAL TRENDS 2018, *supra* note 1, at 14.

53. *Id.* at 2, 14.

54. *Id.* at 14.

55. *Id.*

56. *Id.* at 3.

57. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2014, 13 (June 18, 2015), <https://www.unhcr.org/en-au/statistics/country/556725e69/unhcr-global-trends-2014.html> [hereinafter GLOBAL TRENDS 2014].

58. GLOBAL TRENDS 2018, *supra* note 1, at 6, 14 (noting Syrians were the largest forcibly

The second largest group of refugees were Afghans.<sup>59</sup> In fact, Afghanistan was the largest refugee-producing country for more than 30 years, until 2014 when it was surpassed by Syria.<sup>60</sup> In 2018, it was estimated that some 2.7 million Afghans had fled the country in search of international protection.<sup>61</sup> The majority of these refugees (more than 1.4 million) are located in Pakistan and a further 951,000 in the Islamic Republic of Iran—combined, these two countries alone have taken on 88% of the total Afghan refugee population.<sup>62</sup>

The ongoing civil conflict in South Sudan produced the third largest refugee group under UNHCR's mandate, with 2.3 million refugees worldwide in 2018.<sup>63</sup> The remaining top ten refugee-producing countries in 2018 were Myanmar (1.1 million), Somalia (949,700), Sudan (724,800), DRC (720,300), Central African Republic (590,900), Eritrea (507,300) and Burundi (387,900).<sup>64</sup>

Moreover, 2.1 million protection applications were submitted by asylum seekers across 158 countries in 2018.<sup>65</sup> An asylum seeker is an individual who has sought asylum protection outside of their country of origin, but their application has yet to be assessed.<sup>66</sup> A considerable proportion of these applications, 1.7 million, were new applications lodged by individuals for the first time.<sup>67</sup> The largest number of asylum applications were made by Venezuelans (341,800), with the majority seeking protection in Peru, Brazil, and the United States.<sup>68</sup> Afghans and Syrians lodged the second and third highest number of asylum claims in 2018, with both groups lodging just over 100,000 claims.<sup>69</sup>

To further complete the picture regarding countries that have produced the highest numbers of displaced persons, just ten countries account for 76%

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displaced population in the world at the end of 2018).

59. *Id.* at 14 (“Refugees from Afghanistan were the second largest group by country of origin”).

60. GLOBAL TRENDS 2014, *supra* note 57, at 13.

61. GLOBAL TRENDS 2018, *supra* note 1, at 3.

62. *Id.* at 14.

63. *Id.* at 3.

64. *Id.* at 15–17.

65. *Id.* at 41.

66. *Id.* at 63.

67. *Id.* at 41.

68. *Id.* at 44–45.

69. *Id.*

of the world's internally displaced person (IDP) population.<sup>70</sup> As noted above, IDPs constituted the largest cohort of displaced people in 2018, totaling 41 million.<sup>71</sup> Colombia registered the highest number of IDPs due to conflict or violence within the country—7.8 million.<sup>72</sup> Other countries reporting a large number of internal displacements included Somalia (2.6 million), Ethiopia (2.6 million), and Yemen (2.1 million).<sup>73</sup>

#### *D. Developing Nations Disproportionately Absorbing Refugees*

The data shows that there is an unremitting trend of poor countries bearing a disproportionate burden of the refugee intake.<sup>74</sup> The incidence of displaced and refugee persons is heavily concentrated within just a few regions. Nine of the top ten refugee-hosting countries in 2018 were developing countries, which combined hosted 84% of the world's refugees.<sup>75</sup> Germany was the only developed country to feature among the top ten recipients of refugees in 2018.<sup>76</sup> Just over half of the one million refugees settled in Germany are of Syrian origin.<sup>77</sup> The top ten refugee-absorbing nations are set out in the table below.<sup>78</sup>

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70. *See id.* at 35–38.

71. *Id.* at 35.

72. *Id.*

73. *Id.* at 36–37.

74. *Id.* at 17 (“Developing regions continued to shoulder a disproportionately large responsibility for hosting refugees”).

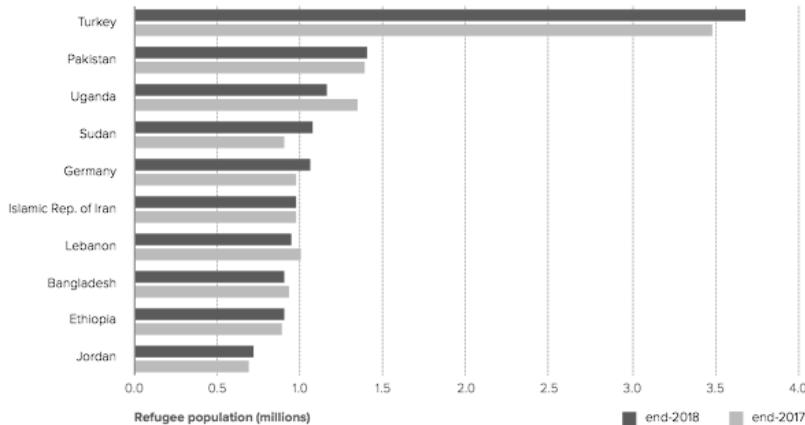
75. *Id.* at 18.

76. *Id.* at 17 fig.6.

77. *Id.* at 18.

78. *Id.* at 17 fig.6.

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



More broadly, the world's least developed countries (this includes South Sudan, DRC, and Ethiopia—which each are among the top ten refugee-hosting countries) currently host one-third of the global refugee total.<sup>79</sup> In other terms, 6.7 million refugees under the UNHCR's mandate are located in the world's most impoverished countries with unstable political and rule-of-law institutions.<sup>80</sup> The world's least developed countries account for only 1.25% of global GDP.<sup>81</sup> By comparison, only 16% of refugees are hosted by high-income, developed countries.<sup>82</sup>

Looking at it from another measure, low-to-middle income countries host an average of 5.8 refugees per 1,000 of population.<sup>83</sup> This is in stark contrast to the average of 2.7 per 1,000 of population in high-income countries.<sup>84</sup>

For the fifth consecutive year, Turkey absorbed the largest number of refugees in 2018, totaling 3.7 million.<sup>85</sup> Since 2014, Turkey's refugee population has significantly increased by 2.1 million refugees.<sup>86</sup> The refugee

79. *Id.* at 17, 17 fig.6 (noting the least developed countries host 33% of the world's refugees).

80. *Id.* at 17–18.

81. *Id.*

82. *Id.* at 2.

83. *Id.* at 21.

84. *See* Worldwide, *supra* note 11.

85. GLOBAL TRENDS 2018, *supra* note 1, at 3.

86. GLOBAL TRENDS 2014, *supra* note 57, at 12 (noting a refugee population in Turkey of 1.6

population in Turkey is comprised almost exclusively of Syrians (98%)—this is the largest Syrian refugee intake by any single country.<sup>87</sup> Over the course of 2018 alone, Turkey took in about 400,000 new refugees—and over 100,000 were newborns.<sup>88</sup> The second largest country of asylum was Pakistan with a refugee population of 1.4 million, which was almost exclusively made up of Afghans.<sup>89</sup> Uganda took in the third largest refugee group (1,165,000) as a result of the conflict in neighboring South Sudan.<sup>90</sup> According to UNHCR, other countries that provided safety for a high number of refugees in 2018 included Sudan, Germany, Islamic Republic of Iran, Lebanon, Bangladesh, Ethiopia, and Jordan.<sup>91</sup> Thus, it is clear from this data that responsibility for the world’s refugee crisis is overwhelmingly carried by countries with the least resources to absorb and accommodate the needs of those seeking refuge.<sup>92</sup>

The contrast between refugees and asylum seekers is not the source countries of these respective groups, but rather the destinations where they are seeking to be located.<sup>93</sup> In contrast to the placement of refugees, as outlined above, asylum seekers are invariably applying for safety in first world, wealthy countries with the exception of Peru, which experienced a drastic increase in asylum applications as a result of the crisis in Venezuela. Peru received the second largest number of claims for asylum in 2018 with 192,500 claims lodged.<sup>94</sup> This is compared to 37,800 in 2017 and 4,400 in 2016.<sup>95</sup>

For the second consecutive year, the U.S. led the world in the number of new applications submitted in 2018<sup>96</sup> with approximately 250,000 claims lodged.<sup>97</sup> Consistent with the trend in recent years, about half of these claims

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million).

87. GLOBAL TRENDS 2018, *supra* note 1, at 14, 18.

88. *Id.* at 18.

89. *Id.* at 3, 14.

90. *Id.* at 3, 8 fig.4, 18.

91. *Id.* at 70–73 tbl.2.

92. *Id.* at 17–18.

93. *See id.* at 3, 15 fig.5, 17 fig.6, 43 fig.17, 45 fig.18 (showing similarities between origin countries of refugees and asylum seekers but contrasting the destination countries these two groups are fleeing to).

94. *Id.* at 3.

95. *Id.* at 42.

96. *Id.* at 3; *see also* U.S. DEP’T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2019, 4–5 (2019) [hereinafter PROPOSED REFUGEE ADMISSIONS], <https://www.state.gov/wp-content/uploads/2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-2019.pdf>

97. GLOBAL TRENDS 2018, *supra* note 1, at 42.

were made by applicants from Central America and Mexico, specifically El Salvador, Guatemala and Venezuela<sup>98</sup>—areas that are considered some of the most violent in the world largely due to the ongoing increase in gang-related violence.<sup>99</sup> A total of 94,000 of these asylum applications originated from these three countries alone.<sup>100</sup>

Germany continued to receive a high number of asylum claims in 2018, recording a total of 161,900 claims lodged.<sup>101</sup> However, this is a significant decrease from the 722,400 that were submitted in 2016.<sup>102</sup> To further complete the picture, other countries that registered the largest numbers of asylum applications in 2018 were France (114,500), Turkey (83,800), Brazil (80,000), Greece (65,000), Spain (55,700), Canada (55,400), and Italy (48,900).<sup>103</sup>

#### *E. U.S. Policy and Practice Relating to Displaced People*

The empirical data shows that the world is currently experiencing an unprecedented problem associated with the forced displacement of people. Despite this, states have become increasingly reluctant to absorb or increase their intake of displaced people. This is certainly true of the United States, which is one of the most common target countries by prospective refugees.

The number of people seeking asylum in the United States is rapidly increasing, particularly given the recent upheaval in Venezuela and other parts of Central America. However, this increase in refugee numbers has paradoxically been met with ongoing, sweeping policy changes to the asylum and refugee system.

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98. *Id.* at 8; see also Nora Sturm, *UNHCR Calls for Urgent Action as Central America Asylum Claims Soar*, U.N. HIGH COMM’R FOR REFUGEES (Apr. 5, 2016), <http://www.unhcr.org/en-au/news/latest/2016/4/5703ab396/unhcr-calls-urgent-action-central-america-asylum-claims-soar.html>.

99. See Joshua Partlow, *Why El Salvador Became the Hemisphere’s Murder Capital*, WASH. POST (Jan. 6, 2016), [https://www.washingtonpost.com/news/worldviews/wp/2016/01/05/why-el-salvador-became-the-hemispheres-murder-capital/?utm\\_term=.6695dbb3d9b5](https://www.washingtonpost.com/news/worldviews/wp/2016/01/05/why-el-salvador-became-the-hemispheres-murder-capital/?utm_term=.6695dbb3d9b5) (discussion violence and crime in this region); Amelia Cheatham, *Central America’s Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (Oct. 1, 2019), <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle>.

100. GLOBAL TRENDS 2018, *supra* note 1, at 42.

101. *Id.*

102. U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016, 1, 3 (2017), <https://www.unhcr.org/5943e8a34.pdf>.

103. GLOBAL TRENDS 2018, *supra* note 1, at 42–43.

Reshaping U.S. immigration has been a key objective of the Trump Administration. Since taking office, President Trump has proposed and implemented a number of wide-ranging immigration policy changes to reduce access to the United States.<sup>104</sup> These changes have largely focused on, in particular, the refugee and asylum system, making it nearly impossible to obtain protection in the U.S.<sup>105</sup>

Perhaps the most aggressive of these changes is the dramatic reductions to the refugee resettlement program.<sup>106</sup> The U.S. government is responsible for setting a cap on the maximum number of refugees that can be admitted into the United States in any given fiscal year.<sup>107</sup> In fact, the Trump Administration considered “a virtual shutdown of refugee admissions” by proposing a reduction in the number of admissions to nearly zero in 2020.<sup>108</sup> Ultimately, on November 1, 2019, President Donald Trump issued a Presidential Determination setting the fiscal year 2020 refugee ceiling at 18,000.<sup>109</sup> This is the lowest ceiling since the creation of the Refugee Program in 1980, which established the ceiling system.<sup>110</sup> It is also “well below the number of people already waiting in the U.S. resettlement pipeline,” thereby

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104. See SARAH PIERCE & JESSICA BOLTER, *DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 1* (July 2020) (providing a comprehensive look at President Trump’s sweeping immigration changes since taking office); see also Zolan Kanno-Youngs & Michael D. Shear, *Trump Virtually Cuts Off Refugees as He Unleashes a Tirade on Immigrants*, N.Y. Times (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/politics/trump-refugees.html> (describing the new cap on refugee admissions for fiscal year 2021, which is down to 15,000 from 18,000 in the 2020 fiscal year).

105. See Kanno-Youngs & Shear, *supra* note 104 (“The 15,000 cap is the latest step in one of the central aims for Mr. Trump during his first term: to close the United States to immigrants.”).

106. See *id.* (explaining that though the current cap is only 3,000 less than that of the fiscal year 2020, it is well below the 110,000 slots approved by President Barack Obama in 2016); PIERCE & BOLTER, *supra* note 104, at 64.

107. Claire Felter & James McBride, *How Does the U.S. Refugee System Work?*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/backgroundunder/how-does-us-refugee-system-work> (last updated Oct. 10, 2018) (explaining that the president proposes the cap, which requires congressional approval, and giving a brief history of the cap on refugees, which “stayed between seventy thousand and eighty thousand” from 2001 to 2015).

108. Ted Hesson, *Trump Officials Pressing to Slash Refugee Admissions to Zero Next Year*, POLITICO (July 18, 2019, 9:04 PM), <https://www.politico.com/story/2019/07/18/trump-officials-refugee-zero-1603503>.

109. *Presidential Determination on Refugee Admissions for Fiscal Year 2020*, *supra* note 6. For a discussion of the Trump administration’s proposed cap of 15,000 for fiscal year 2020, see Kanno-Youngs & Shear, *supra* note 104.

110. ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, *REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 1*, 5 (2018), <https://fas.org/sfp/crs/misc/RL31269.pdf>.

effectively putting a stop to bringing new refugees into the United States.<sup>111</sup>

Unlike past refugee ceilings, which have been guided by regional allocations, the U.S. State Department has divided the fiscal year 2020 ceiling amongst “[p]opulation[s] of special humanitarian concern.”<sup>112</sup> Under the ceiling, the U.S. will accept no more than 5,000 refugees claiming religious persecution.<sup>113</sup> This is despite President Trump claiming that “protecting religious freedom is one of [his] highest priorities.”<sup>114</sup> A further 4,000 places have been allocated to Iraqis who have assisted the U.S. government or who have other United States connections and 1,500 from the Northern Triangle countries of Guatemala, El Salvador, and Honduras.<sup>115</sup> This leaves only 7,500 places for other legitimate refugees.

This is not the first time the refugee admissions program has been dramatically reduced. In the first week of his presidency, President Trump issued an executive order reducing the 2017 ceiling from 110,000—which had been set by President Obama only a few months earlier—down to 50,000.<sup>116</sup> The refugee ceilings were again reduced in 2018 and 2019 to 45,000<sup>117</sup> and 30,000, respectively<sup>118</sup> (each of these ceilings was a new low at the time).

It is important to emphasize that these ceilings are simply targets; there is no obligation on the United States to meet them. For example, in fiscal year 2018, actual refugee admissions totaled 22,491.<sup>119</sup> This is currently the lowest number of admissions in United States history, and is lower than the 27,131 admissions in fiscal year 2002 after the U.S. largely suspended admissions

111. Troubled, *supra* note 34.

112. U.S. DEP’T OF STATE, REPORT TO CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2020 (2020), <https://www.state.gov/reports/report-to-congress-on-proposed-refugee-admissions-for-fy-2020/> (last visited Jan. 20, 2021) [hereinafter PROPOSED REFUGEE ADMISSIONS 2020].

113. *Presidential Determination on Refugee Admissions for Fiscal Year 2020*, *supra* note 6 (stating that 5,000 slots apply to people who “have been persecuted or have a well-founded fear of persecution on account of religion”).

114. *Remarks by President Trump at the United Nations Event on Religious Freedom*, WHITE HOUSE (Sept. 23, 2019, 11:47 AM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-united-nations-event-religious-freedom-new-york-ny/>.

115. *Presidential Determination on Refugee Admissions for Fiscal Year 2020*, *supra* note 6.

116. See Exec. Order No. 13,780, 3 C.F.R. § 201 (2018).

117. Presidential Determination No. 2017-13, 3 C.F.R. 488 (Oct. 23, 2018).

118. Presidential Determination No. 2019-01, 83 Fed. Reg. 55,091 (Oct. 4, 2018).

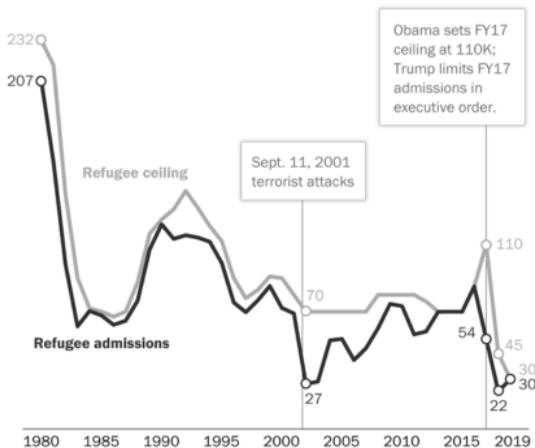
119. Nayla Rush, *Refugee Resettlement Roundup for FY 2019*, CTR. FOR IMMIGRATION STUDIES (Oct. 4, 2019), <https://cis.org/Rush/Refugee-Resettlement-Roundup-FY-2019>.

following the events of September 11, 2001.<sup>120</sup> In 2019, actual refugee admissions reached the 30,000 ceiling on the last day of the fiscal year.<sup>121</sup>

From January 20, 2017 to September 30, 2019, the United States, under the Trump administration, admitted just over 76,000 refugees.<sup>122</sup> This is in stark contrast to the almost 85,000 refugees who were admitted during the course of 2016 alone, the last full year under President Obama.<sup>123</sup> The rapid decline in both the refugee ceiling and admissions in recent years is shown in the graph below<sup>124</sup>:

### U.S. refugee ceiling and admissions have declined in recent years

*In thousands, by fiscal year*



Note: Fiscal years end on Sept. 30 of the years shown. Figures rounded to the nearest thousand. Refugee ceiling is the maximum number of refugees allowed to enter the U.S.; the ceiling is set by the U.S. president after consultation with Congress.  
Source: U.S. State Department's Refugee Processing Center, accessed Oct. 1, 2019. U.S. Yearbook of Immigration Statistics, 1980-2017. "Refugee Admissions and Resettlement Policy," Congressional Research Service, December 2018.

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120. *Id.*

121. *Id.*

122. Jens Manuel Krogstad, *Key Facts About Refugees to the U.S.*, PEW RESEARCH CTR. (Oct. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/>.

123. *Id.*

124. *Id.*

As noted above, the annual refugee cap is currently at its lowest level since the beginning of the refugee resettlement program.<sup>125</sup> The White House has largely attempted to justify the decision to cut the fiscal year 2020 ceiling to just 18,000 on the basis that priority needs to be given to the separate asylum system.<sup>126</sup>

For clarity, the United States offers both refugee and asylum status. Both refugees and asylum seekers seek asylum in the U.S. under the same standards; however, the major difference lies in where these persons are at the time of seeking protection.<sup>127</sup> Refugees seek protection from abroad and do not enter the United States until they have legal permission to do so.<sup>128</sup> In contrast, asylum seekers apply from within the U.S. or when arriving at a border, without first having legal permission to enter the country.<sup>129</sup>

According to the State Department, “the current burdens on the U.S. immigration system must be alleviated before it is again possible to resettle [a] large number of refugees.”<sup>130</sup> The U.S. State Department further estimates that 350,000 asylum seekers will arrive over the 2020 fiscal year.<sup>131</sup>

In January 2017, when President Trump took office, there were just over 540,000 cases pending.<sup>132</sup> Today, there are over 1 million cases waiting to be processed.<sup>133</sup> To further illuminate the extent to which this backlog has grown, in 2014, there were only 40,000 cases in the asylum backlog.<sup>134</sup> Although this backlog predates the Trump presidency, the number of pending

125. See Kanno-Youngs & Shear, *supra* note 104 (noting that the 18,000 cap in fiscal year 2020 is a record low).

126. PROPOSED REFUGEE ADMISSIONS 2020, *supra* note 112.

127. See Felter & McBride, *supra* note 107 (explaining the distinction between refugees and asylum seekers under United States law).

128. *Id.*

129. *Id.*

130. Press Release, U.S. Dep’t of State, Report to Congress on Proposed Refugee Admissions for FY 2020 (Sept. 26, 2019); see PROPOSED REFUGEE ADMISSIONS 2020, *supra* note 112.

131. *Id.*

132. See *Immigration Court Backlog Tool*, TRAC IMMIGRATION (2020), [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/); see also Hackman, *supra* note 5.

133. *Immigration Court Backlog Tool*, *supra* note 132; see also *Immigration Court’s Active Backlog Surpasses One Million*, TRAC IMMIGRATION. (Sept. 18, 2019), <https://trac.syr.edu/immigration/reports/574/>.

134. CHERI ATTIX, AM. IMMIGRATION LAW. ASS’N, THE AFFIRMATIVE ASYLUM BACKLOG EXPLAINED 1 (Apr. 2, 2014), [https://www.immigrantjustice.org/sites/immigrantjustice.org/files/AILA\\_Explanation%20of%20the%20Affirmative%20Asylum%20Backlog\\_4.2.14.pdf](https://www.immigrantjustice.org/sites/immigrantjustice.org/files/AILA_Explanation%20of%20the%20Affirmative%20Asylum%20Backlog_4.2.14.pdf).

cases has risen at a record pace during his presidency.<sup>135</sup> For example, the Trump administration significantly slowed the asylum process when it directed immigration authorities to reopen thousands of nonviolent (low-level) removal cases.<sup>136</sup> This backlog, coupled with increased security screening, has undoubtedly led to significant delays in the grant of asylum, with the average asylum application taking 578 days to complete.<sup>137</sup>

This backlog of asylum applications has also had a significant effect on the number of refugees resettled into the United States. Because of the backlog and sheer number of asylum applications submitted, the Department of Homeland Security, in fiscal years 2017 and 2018, shifted a large number of immigration officers to conduct affirmative asylum processing, which decreased the number of refugee interviews that could be conducted.<sup>138</sup> It should also be noted that in 2017, the Trump administration implemented measures to begin “implementing program enhancements to raise the bar for vetting and screening procedures,”<sup>139</sup> which has also led to unduly long processing times—with the average refugee application taking up to two years to complete in the United States.<sup>140</sup> This is despite the fact the refugee vetting process in the United States was already considered to be among the most extensive in the world.

In another step in his administration’s aggressive drive to reshape the U.S. refugee program, President Trump signed an executive order in September

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135. *Immigration Court Backlog Tool*, *supra* note 132; *see also* Hackman, *supra* note 5.

136. *See* Zolan Kanno-Youngs & Caitlin Dickerson, *Asylum Seekers Face New Restraints Under Latest Trump Orders*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/politics/trump-asylum.html?module=inline>; Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL’Y INST. (June 7, 2017), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-6>.

137. Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html?mtrref>; *see also* PROPOSED REFUGEE ADMISSIONS, *supra* note 96, at 6.

138. *See* PROPOSED REFUGEE ADMISSIONS, *supra* note 96, at 5–6.

139. *Improved Security Procedures for Refugees Entering the United States*, U.S. DEP’T HOMELAND SECURITY (Oct. 24, 2017), <https://www.dhs.gov/news/2017/10/24/improved-security-procedures-refugees-entering-united-states>; *see also* *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, WHITE HOUSE (Sept. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

140. *Fact Sheet: U.S. Refugee Resettlement*, NAT’L IMMIGRATION FORUM (Sept. 28, 2020), <https://immigrationforum.org/article/fact-sheet-u-s-refugee-resettlement/>.

2019, which requires state and local governments to “consent” to accept refugees.<sup>141</sup> Up until this point, refugees had been resettled throughout the United States. For example, in fiscal year 2019, refugees were resettled in all states (except Wyoming and Hawaii) and the District of Columbia.<sup>142</sup> Noteworthy, a quarter of all refugees admitted in 2019 (8,100) were resettled in just four states: Texas, Washington, New York, and California.<sup>143</sup> However, under the Executive Order, states have now been given power to effectively refuse to accept refugees. Not only may this drive discriminatory and unfair actions against refugees, but it is likely to mean that actual refugee admissions will not meet the 18,000 cap set for fiscal year 2020.

Under the Trump administration, there has also been a profound shift in not only the number of refugees admitted, but also in who is admitted into the United States.<sup>144</sup> Although refugee admissions have fallen from most countries since 2016, those from the Middle East have been most affected.<sup>145</sup> This decline is largely driven by a much-litigated travel ban implemented by President Trump.<sup>146</sup>

In January 2017, just a week into his tenure, Trump signed an immigration Executive Order that attempted to implement an indefinite ban of Syrian refugees.<sup>147</sup> However, after a series of court challenges,<sup>148</sup> a “watered down” order was issued in March 2017.<sup>149</sup> This Order was also the subject of legal

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141. See Exec. Order No. 13,888, 84 Fed. Reg. 52,355 (Sept. 26, 2019); Mark Greenberg, Julia Gelatt & Amy Holovina, *As the United States Resettles Fewer Refugees, Some Countries and Religions Face Bigger Hits than Others*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/news/united-states-refugee-resettlement-some-countries-religions-face-bigger-hits> (last updated Oct. 17, 2019).

142. Krogstad, *supra* note 122.

143. *Id.*

144. Krogstad, *supra* note 122 (noting the fluctuations in refugee admissions over the past thirty years, as well as the marked shift in the percentages of Muslim and Christian refugees admitted in fiscal year 2016 (46% of refugees were Muslim) and fiscal year 2019 (79% of refugees were Christian)).

145. *Id.*

146. *Id.*

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

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

149. See Exec. Order No. 13,780, 3 C.F.R. 390 (2018).

challenges;<sup>150</sup> however, the Supreme Court allowed it to take effect in part.<sup>151</sup> Under the Executive Order, the Trump administration was allowed to implement a 120-day suspension, which took effect in late June 2017, of all refugee arrivals<sup>152</sup> and a ninety-day ban of all citizens from six Muslim-majority countries (including Syria).<sup>153</sup> This is commonly referred to as the “Trump travel ban.”<sup>154</sup>

Although the refugee program resumed in October 2017,<sup>155</sup> citizens of eleven “high-risk” countries continued to be barred from entry into the United States for a further ninety day review.<sup>156</sup> The countries—many, but not all, Muslim majority—were Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen.<sup>157</sup> When admissions resumed for these refugees in January 2018, they did so with “enhance[ed] security vetting [procedures].”<sup>158</sup> It is clear from recent admission statistics that these largely unspecified increased security procedures acted as an additional barrier for legitimate prospective refugees to find sanctuary.<sup>159</sup> Between 2016 and 2019, refugee admissions from these eleven high-risk countries fell by 95%.<sup>160</sup> In 2019, only 1,851 refugees were resettled from these countries.<sup>161</sup>

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

151. Robert Barnes & Matt Zapotosky, *Supreme Court Allows Limited Version of Trump’s Travel Ban To Take Effect and Will Consider Case in Fall*, WASH. POST (June 26, 2017), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-allows-limited-version-of-trumps-travel-ban-to-take-effect-will-consider-case-in-fall/2017/06/26/97afa314-573e-11e7-b38e-35fd8e0c288f\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-allows-limited-version-of-trumps-travel-ban-to-take-effect-will-consider-case-in-fall/2017/06/26/97afa314-573e-11e7-b38e-35fd8e0c288f_story.html).

152. *Id.*

153. *Id.*

154. *Id.*; see also Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html>.

155. Exec. Order No. 13,815, 3 C.F.R. 390 (2018).

156. Peter Baker & Adam Liptak, *U.S. Resumes Taking in Refugees, but 11 Countries Face More Review*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/politics/trump-lifts-refugee-suspension.html>; see Yeganeh Torbati, *U.S. To Resume Refugee Admissions From 11 “High-Risk” Countries*, REUTERS (Jan. 29, 2018 9:17 AM), <https://www.reuters.com/article/us-usa-immigration-refugees/u-s-to-resume-refugee-admissions-from-11-high-risk-countries-idUSKBN1FI27F> (discussing resumption of refugee admissions).

157. See Miriam Jordan, *New Scrutiny Coming for Refugees From 11 “High-Risk” Nations*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/us/muslim-refugees-trump.html>.

158. PROPOSED REFUGEE ADMISSIONS, *supra* note 96, at 6. See also Jordan, *supra* note 157.

159. Greenberg, Gelatt & Holovina, *supra* note 141.

160. *Id.*

161. Rush, *supra* note 119.

In September 2017, President Trump signed a third version of the travel ban, which in a 5–4 decision, the Supreme Court allowed to be implemented in full.<sup>162</sup> As the travel ban stands today, all citizens from five predominately Muslim countries are effectively banned from traveling to the United States.<sup>163</sup> The order also targets certain travelers from North Korea and Venezuela, but to a lesser extent.<sup>164</sup> Unlike earlier iterations, this ban is not temporary.

Taken together, the travel ban and heightened security vetting detrimentally impact the admission of Muslims. State Department data confirms that the number of Muslim refugee admissions fell 86% since fiscal year 2016—from 38,900<sup>165</sup> to 4,900 in 2019.<sup>166</sup> There has also been a 37% decline in Christian admissions during this period—from 35,210<sup>167</sup> to 23,754.<sup>168</sup> This pattern marks a sharp reversal from several years ago. In 2016, Muslim refugees accounted for 46%<sup>169</sup> of all refugees admitted in the year—in 2019, this was only 16.5%.<sup>170</sup> The biggest decline in refugee admissions since 2016 is attributable to “Syria (from 12,587 to 563), Iraq (from 9,880 to 465) and Somalia (from 9,020 to 231)”—all of which are Muslim majority countries.<sup>171</sup>

As a presidential candidate, Donald Trump called for “a total and complete shutdown” of Muslims entering the United States.<sup>172</sup> Despite

162. See Adam Liptak & Michael D. Shear, *Trump’s Travel Ban Is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html>.

163. See generally Proclamation No. 9645, 82 Fed. Reg. 45, 161 (Sept. 24, 2017) (noting that the Secretary of Homeland Security recommends restrictions and limitations on entry from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen—only North Korea and Venezuela’s predominant religions are not Islam).

164. See generally *id.* (showing that the practical effect on North Korean and Venezuelan citizens is limited).

165. *FY 2016 Refugee Resettlement Admissions Under the Obama Administration*, CTR. FOR IMMIGRATION STUDIES (Oct. 1, 2018), <https://cis.org/sites/default/files/2018-10/2016-refugee-admissions.pdf>.

166. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RESEARCH CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>.

167. *FY 2016 Refugee Resettlement Admissions Under the Obama Administration*, *supra* note 165.

168. Rush, *supra* note 119.

169. *FY 2016 Refugee Resettlement Admissions Under the Obama Administration*, *supra* note 165.

170. Rush, *supra* note 119.

171. Greenberg, Gelatt & Holovina, *supra* note 141.

172. Jenna Johnson, *Trump Calls for “Total and Complete Shutdown of Muslims Entering the United States.”* WASH. POST (Dec. 7, 2015 7:43PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering->

retreating on this promise, it is clear from the above that he was successful in imposing a Muslim ban.

### III. HISTORY OF THE REFUGEE CONVENTION AND THE DEVELOPMENT OF REFUGEE DEFINITION

The beginning of international refugee protection took the form of numerous ad hoc inter-governmental agreements and treaties, formulated under the League of Nations in the aftermath of WWII.<sup>173</sup> Although there is a history of human displacement before this time, it was the refugee groups that emerged during the inter-war period who first attracted the attention of the international community.<sup>174</sup> These European refugee groups differed significantly from earlier ones due to their size and the immense difficulty and often impossibility of finding a new home.<sup>175</sup>

These documents were created in response to specific events that triggered significant refugee movements in an attempt to provide some measure of protection to the affected refugees.<sup>176</sup> Importantly, they demonstrated an awareness by governments of the international nature of the refugee problem and established the rules, principles, and definitions that underpinned the beginnings of international legal refugee protection, and would go on to shape the modern era of refugee law in the form of the *1951 Convention Relating to the Status of Refugees*.<sup>177</sup> In the next part of this article, we provide a brief review of a number of these instruments, specifically those which contributed to the development of the definition of a “refugee.”

The League of Nations was an international, inter-governmental organization established in 1919<sup>178</sup> with the primary purpose “to promote

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the-united-states/.

173. See *An Introduction to the International Protection of Refugees*, REFWORLD (June 1992), <https://www.refworld.org/pdfid/3cce9a244.pdf>.

174. See generally CLAUDENA M. SKRAN, *REFUGEES IN INTER-WAR EUROPE* ch. 2 (1995) (describing the origins and dimensions of the major refugee groups of the inter-war years).

175. See generally *id.* at 14.

176. See generally *id.* at 101; JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 86, 88 (2005) (reviewing the history, impact, and legal rights granted to refugees by the 1933 Convention).

177. See generally 1951 Refugee Convention, *supra* note 2.

178. See League of Nations, *Covenant of the League of Nations*, REFWORLD (Apr. 28, 1919), <http://www.refworld.org/docid/3dd8b9854.html>.

international co-operation and to achieve international peace and security” between countries in the aftermath of World War I (WWI).<sup>179</sup> The League provided a forum for its members to discuss and deal with a variety of social and political problems, including refugee issues.<sup>180</sup>

In 1921, the League appointed Dr. Fridtjof Nansen as the first “High Commissioner on behalf of the League in connection with the problems of Russian refugees in Europe.”<sup>181</sup> The High Commissioner’s mandate included securing the assistance and defining the legal status of Russian refugees.<sup>182</sup> It has been estimated that at this time, there were at least 1.5 million Russians who had been displaced from their homes and scattered throughout Europe following the breakdown of the Russian Empire.<sup>183</sup> Thus, this was the most pronounced refugee movement during the inter-war era and the first to attract and receive the attention of the international community.<sup>184</sup>

Although, as noted above, the notion of people being forcibly displaced from their homes and needing safety existed prior to this time, refugee law was virtually non-existent.<sup>185</sup> The absence of legal rules concerning the treatment or legal protection of refugees or obligations on states to assist or take in displaced people created challenges in dealing with the mass exodus of Russian refugees.<sup>186</sup>

Perhaps the most significant challenge was that the mass displacement of Russians coincided with the abrupt end of relatively free international movement of the nineteenth century accorded to refugees during the

179. *Id.*

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

181. COLIN HARVEY, *SEEKING ASYLUM IN THE UK: PROBLEMS AND PROSPECTS* 15 (Butterworths 2000) (defining Nansen’s role as High Commissioner).

182. James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT’L. & COMP. L.Q. 348, 348, 351 (1984).

183. SKRAN, *supra* note 174, at 33. However, it is noteworthy that estimates in relation to this vary significantly. See DANIELE JOLY ET. AL., *REFUGEES IN EUROPE: THE HOSTILE NEW AGENDA* 5 (1990); EVAN MAWDSLEY, *THE RUSSIAN CIVIL WAR* (1987); JOHN C. TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP & THE STATE* (2000); see generally SKRAN, *supra* note 174, at 32–40 (detailing the mass Russian refugee movements during the inter-war years).

184. See SKRAN, *supra* note 174, at 84–88; see also Alessandra Roversi, *The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period*, 22 REFUGEE SURV. Q. 21, 23 (2003).

185. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 9 (1966).

186. SKRAN, *supra* note 174, at 101–02.

nineteenth century.<sup>187</sup> Following the conclusion of WWI, governments rapidly began to implement restrictive immigration policies in an attempt to tighten their borders and control the movements of refugees.<sup>188</sup> These movement restrictions had, in fact, begun in the United States with the enactment of the 1921 and 1924 Immigration Acts.<sup>189</sup> These laws were a sharp departure from existing policy by restrictions imposed not only on the first numerical cap on the number of persons that the United States would accept, but also limits based on ethnicity.<sup>190</sup>

Part of the stricter immigration controls was the increased regulation by governments that all international travelers carry a passport.<sup>191</sup> This was not possible for many of the displaced Russians who had been rendered stateless, thereby deprived of their citizenship, and therefore could not return home.<sup>192</sup> Thus, unlike past refugee groups, it was clear this was not a temporary displacement problem.

Even in the event that such refugees could find a temporary place of safety, “they lived as aliens in foreign lands, often with an insecure legal status and subject to expulsion at a moment’s notice.”<sup>193</sup> Host governments became increasingly reluctant to naturalize or take on financial obligations for refugees, making it difficult for them to integrate fully.<sup>194</sup>

In order to address these problems, specifically the ambiguous legal status and restricted ability to travel to other countries to find asylum, Nansen proposed internationally recognized identification certificates to be issued to Russian refugees.<sup>195</sup> This travel certificate—which became known as the

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187. See Hathaway, *supra* note 182, at 348–49.

188. See *id.* at 348; see also SKRAN, *supra* note 174, at 21–30; Louise W. Holborn, *The Legal Status of Political Refugees, 1920–1938*, 32 AM. J. INT’L. L. 680, 681, 682 (1938).

189. D’Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RESEARCH CTR. (Sept. 30, 2015), <https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/> (examining the history of immigration laws in the United States).

190. See SKRAN, *supra* note 174, at 22 (providing more details and specific numbers). Other countries such as Britain, Australia, and Canada followed the United States in implementing tighter immigration controls. See *id.* at 24.

191. *Id.* at 22.

192. Hathaway, *supra* note 182, at 351.

193. SKRAN, *supra* note 174, at 38.

194. *Id.*

195. Hathaway, *supra* note 182, at 342. For a detailed overview of the Nansen passport system, see *id.* See also SKRAN, *supra* note 174, at 101–12.

“Nansen Passport”<sup>196</sup>—was subsequently adopted under the Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees (“1922 Arrangement”).<sup>197</sup> Although this was a non-binding agreement, it was generally well-received by governments.<sup>198</sup>

Under the Nansen Passport system, governments could issue legal identity certificates to Russian refugees living within their borders.<sup>199</sup> The certificates were valid for one year (however, there was provision for them to be renewed), confirming that the stated bearer was a Russian national by origin, and became invalid if the bearer adopted another nationality.<sup>200</sup> Although the certificates were not equivalent to a national passport in that they did not grant citizenship rights or provide the right to return to the country of issue (unless there was an express permission within), they did give refugees who were effectively stateless somewhat of a recognizable legal identity, and allowed them to cross national borders and travel internationally more freely (and legally) in an attempt to resettle.<sup>201</sup>

The Nansen Passport system marked the beginning of international refugee law and went on to “serve as the foundation of a clearly defined legal status for refugees.”<sup>202</sup> Throughout the following two decades, the League of Nations expanded this system of legal protection on an ad hoc basis to assist and protect other large and diverse groups of refugees in similar circumstances to the Russians and bring them under “refugee” status. For example, the Nansen system was expanded to include Armenian,<sup>203</sup> Assyrian, Assyro-

196. See generally Hathaway, *supra* note 182.

197. Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922, 355 L.N.T.S. 238 [hereinafter 1922 Arrangement].

198. Hathaway, *supra* note 182, at 348; see also SKRAN, *supra* note 174, at 106–07.

199. See Holborn, *supra* note 188, at 684 (“Within its limits, [the Nansen Passport] was an identity paper of international validity for Russian refugees, intended as a substitute for a national passport”).

200. *Id.* at 684.

201. SKRAN, *supra* note 174; see also Holborn, *supra* note 188, at 680, 684.

202. *Russian Refugees: Report by Dr. Nansen, High Commissioner of the League of Nations*, League of Nations, Doc. L.N.O.J. 1922, at 927 (July 20, 1922); see also LOUISE W. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME 9 (1975) (“For any long-range and permanent solution, the primary need of the refugees is a legal status that will give them standing in the country of refuge and thus permit employment or enable them to travel from one country to another in search of opportunities elsewhere.”); SKRAN, *supra* note 174, at 106; Hathaway, *supra* note 182, at 350–51 (examining the development of the Nansen passports into legal rights for Russian refugees).

203. See League of Nations, *Plan for the Issue of a Certificate of Identity to Armenian Refugees*, 5 L.N.O.J. 969–70 (May 31, 1924).

Chaldean, Syrian, Kurdish, and Turkish displaced groups.<sup>204</sup>

Although at first relatively limited, the scope and legal protections afforded by the Nansen Passports grew more comprehensive. For example, the 12 May 1926 Arrangement Relating to the Issue of a Certificate of Identity to Armenian Refugees (1926 Arrangement)<sup>205</sup> significantly improved the 1922 Arrangement by recommending that the certificates make provision for a return visa if the holder departed the country. Thus, governments would undertake to re-admit the holder to the country of issue in an effort to enable the “freedom of movement of the refugees.”<sup>206</sup> As a result, the identity certificates increasingly became accepted as de facto “passports.”<sup>207</sup> Over time, the League also attempted to confer a range of rights to refugees—this included the recognition of the refugees’ personal status, including divorce and marriage rights, and contained other favorable treatment including rights to work, protection against expulsion, and equality in taxation.<sup>208</sup> Notably, as the agreements grew more comprehensive, the number of signatory states declined significantly.<sup>209</sup>

The 1926 Arrangement is also noteworthy for another reason; that is, it was the first international legal instrument to expressly define a refugee. In the earlier documents, identity certificates could be issued to “Russian” or “Armenian” refugees, without any further elaboration.<sup>210</sup> Under the 1926 Arrangement, a refugee was from a specified ethnic group who had been deprived of the *protection* by the government in the refugee’s country of

204. Arrangement Concerning the Extension to Other Categories of Refugee of Certain Measures Taken in Favour of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 65. It should also be noted that although the Nansen passport system was not extended to include German refugees from the Third Reich in the 1930s, a similar system was introduced for these refugees under the Arrangement Concerning the Status of Refugees Coming From Germany (1936 Provisional Arrangement) and the 1938 Convention Concerning the Status of Refugees Coming From Germany. For a detailed discussion of these documents, see SKRAN, *supra* note 174, at chs. 5–7.

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

206. *Id.* at provision 3.

207. See Holborn, *supra* note 188, at 685–86.

208. See, e.g., Arrangement Concerning the Extension to Other Categories of Refugee of Certain Measures Taken in Favour of Russian and Armenian Refugees, *supra* note 204. Notably, the arrangements prior to 1928 did not establish any “specific responsibilities for states other than co-operation in the recognition of League of Nations documentation.” See HATHAWAY, *supra* note 176, at 86.

209. See also SKRAN, *supra* note 174, at 105–07.

210. See 1922 Arrangement, *supra* note 197; 1926 Arrangement, *supra* note 205.

origin and had not acquired another nationality.<sup>211</sup> This definition had been proposed by the High Commissioner.<sup>212</sup>

By the 1930s, governments were experiencing high levels of political and economic instability owing to the economic depression and the rise of fascism. Not only did governments begin enforcing laws that were unfavorable to refugees, particularly dealing with limits on foreign workers,<sup>213</sup> but they also became increasingly unwilling to accept many of the defined categories of refugees under the arrangements.<sup>214</sup>

Thus, it was clear that these agreements, which lacked the binding legal status of treaty law, were no longer a tenable solution to deal with the ongoing mass movements of refugees. As noted in a Secretariat memorandum, “with the exception of the Nansen passport, the existing so-called arrangements are producing practically no effect upon the position of the refugees.”<sup>215</sup> This was largely because the agreements were recommendations only to signatory states, and, ultimately, reliance on goodwill to deal with the mass population flows was insufficient.

In order to secure a more permanent and stable solution to the protection of refugees, the League of Nations formally called for a refugee convention, and a draft was submitted at an intergovernmental conference in Geneva in 1933.<sup>216</sup> The 1933 Convention Relating to the International Status of Refugees (1933 Convention)<sup>217</sup> represents the first attempt to create a comprehensive legal framework for refugees with a convention basis.

The 1933 Convention, which came into force in 1935,<sup>218</sup> guaranteed

211. 1926 Arrangement, *supra* note 205.

212. See Hathaway, *supra* note 182, at 353 (citing REPORT BY THE HIGH COMMISSIONER LEAGUE OF NATIONS Doc. 1926.XLII.2, at 11 (1926)).

213. HATHAWAY, *supra* note 176, at 86–87 (discussing the instability of different governments’ granting of legal status to refugees); see also SKRAN, *supra* note 174, at 123–24.

214. See *Russian, Armenian, Assyrian, Assyro-Chaldean and Turkish Refugees: Report of the Advisory Commission to the High Commissioner for Refugees, Submitted to the Council on June 12th, 1929*, 10 LEAGUE OF NATIONS O.J. 1035, 1077–80 (discussing the impossibility of accepting the defined categories of refugees under previous arrangements).

215. Secretariat memorandum of Feb. 3, 1933, League of Nations Doc. L.N.A, R5614/686; see also SKRAN, *supra* note 174, at 124.

216. See SKRAN, *supra* note 174, at 124; see also *Work of the Inter-governmental Advisory Commission for Refugees During its Fifth Session and Communication from the International Nansen Office for Refugees*, 5(1) L.N.O.J. 854 (1933), at 855 (as cited by HATHAWAY, *supra* note 176, at 87).

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

218. *Id.*

refugees a broad range of basic civil, political, and economic rights. These included rights in respect of identity certificates, education, labor conditions, taxation, expulsion, social welfare, and access to courts.<sup>219</sup> However, drafters seemed to be merely consolidating earlier practices under the earlier arrangements, as many of these rights guaranteed in the 1933 Convention simply formalized or enhanced those in the 1926 Arrangement.<sup>220</sup> For signatory states, the provisions of the 1933 Convention were legally binding and not recommendations for action.

Moreover, there was an emphasis on promoting the principle of equal treatment of refugees by governments. Notably, as highlighted by Hathaway, “the 1933 convention guaranteed almost all refugee rights either absolutely or on terms of equivalency with the citizens of most-favored states.”<sup>221</sup>

Importantly, the 1933 Convention was the first instrument to set a binding obligation on signatory states in relation to expulsion and the non-refoulement of refugees,<sup>222</sup> which became an increasingly common practice during the 1930s.<sup>223</sup> This principle means that governments should not expel or involuntarily return a refugee to not only their country of origin, but any country against their will if there is a risk of persecution—this includes the refusal to admit someone at the frontier. The right to non-refoulement is considered to be fundamental to modern international refugee law.

As for its applicability, the 1933 Convention covered Russian, Armenian, Assyrian, Assyro-Chaldean, and Turkish refugees.<sup>224</sup> This convention continued the practice of defining refugees according to a certain ethnic background.<sup>225</sup> Under this definition, it was also still necessary that the

219. *Id.* For a detailed discussion on the rights and standards set out under the 1933 Convention, see SKRAN, *supra* note 174, at 125–29; HATHAWAY, *supra* note 176, at 87–88.

220. HATHAWAY, *supra* note 176, at 88.

221. *Id.*

222. 1933 Convention, *supra* note 217, at 3–4. Although the obligation not to expel and to avoid refoulement of Armenian and Russian refugees was first set out in the 1926 Arrangement Relating to the Legal Status of Russian and Armenian Refugees, this obligation was in the form of non-binding recommendations. See Arrangement Concerning the Extension to Other Categories of Refugee of Certain Measures Taken in Favour of Russian and Armenian Refugees *supra* note 204; see also SKRAN, *supra* note 174, at 131.

223. *Nansen International Office for Refugees: Discussing the Governing Body's Report*, 109 LEAGUE OF NATIONS O.J., Spec. Suppl. 14, 16–17 (1932).

224. 1933 Convention, *supra* note 217, at 3. *Article I* of the 1933 Convention states that it is applicable to “Russian, Armenian, and assimilated refugees, as defined by the Arrangements of May 12th, 1926, and June 30th, 1928.” *Id.*

225. *Id.*

refugee was deprived of the “protection” by the government in their country of origin and had not acquired another nationality.<sup>226</sup>

By adopting the narrow definition first set out in the 1926 Arrangement, this greatly limited the ambit of protection provided for in the 1933 Convention.<sup>227</sup> It also gave emphasis to the point that the 1933 Convention was intended to deal with those refugees who already fell under the protection of the League of Nations—specifically the Nansen International Office, which had been set up in 1930 following the death of the High Commissioner—and that “its purpose was not to aid refugees in a broader sense.”<sup>228</sup>

Although this narrow definition was criticized, particularly for the lack of scope and emphasis on a lack of diplomatic protection in the definition,<sup>229</sup> there were benefits. As explained by Skran,

from a purely practical point [of] view, [the definition] provided a relatively efficient way of dealing with a mass exodus. Interviewing several million people individually to see if [they] qualified as refugees under one specific definition was unnecessary; instead, refugee assistance could simply be extended to all members of a particular movement.<sup>230</sup>

Further, there was no requirement on refugees to “prove that they left their home countries because of persecution or some other specific reason. Instead, the group designation gave refugee status to people who fled a variety of life-threatening situations.”<sup>231</sup> This approach was also advantageous for governments because it allowed them “to limit their commitments to known categories and stay[] away from any general description of unknown quantity.”<sup>232</sup>

Ultimately, only eight states formally ratified and applied the provisions of the treaty; however, many did so with reservations.<sup>233</sup> The small number

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226. See 1926 Arrangement, *supra* note 205; *supra* text accompanying note 211.

227. Claudena M. Skran, *Historical Development of International Refugee Law*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL* 3, 18 (Andreas Zimmermann et al. eds., 2011).

228. *Id.*

229. See *id.* at 35.

230. SKRAN, *supra* note 174, at 111–12.

231. *Id.*

232. *Id.*

233. See *id.* at 129; HATHAWAY, *supra* note 176, at 88.

of ratifications coupled with the fact that they only applied to certain refugee groups as a result of the narrow definition of a refugee it had adopted meant that the ratifications had very little practical impact.<sup>234</sup>

Nonetheless, the 1933 Convention marked a significant milestone in the history of the international refugee regime. It was the first legally binding, comprehensive instrument addressing the legal protection and standard of conduct to be accorded to refugees. It is also significant because it established important principles and norms in the treatment of refugees which would serve as the foundation of the 1951 Refugee Convention. This is perhaps the most important contribution that the 1933 Convention has made to modern international refugee law.

#### *A. The 1951 Refugee Convention*

The Second World War marked a new era of mass displacement for millions of people. It was estimated that there were more than forty million displaced people who were reluctant to or could not return home because of border changes—constituting the largest group displaced in history.<sup>235</sup> Consequently, the need to develop a more durable and comprehensive instrument arose in order to address the ongoing refugee movements.

The 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention)<sup>236</sup> was subsequently drafted and came into force on April 22, 1954.<sup>237</sup> It was clear, however, that the drafters intended for this instrument to simply revise and consolidate the earlier refugee agreements, and to extend their scope of protection.<sup>238</sup> It was also intended that the 1951 Refugee Convention would encourage a more equal sharing of responsibility for refugees through the implementation of binding obligations.<sup>239</sup>

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234. See SKRAN, *supra* note 174, at 129; HATHAWAY, *supra* note 176, at 88.

235. U.N. HIGH COMM’R FOR REFUGEES, THE STATE OF THE WORLD’S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION 1, 13 (2020), <https://www.unhcr.org/en-au/publications/sowr/4a4c754a9/state-worlds-refugees-2000-fifty-years-humanitarian-action.html> [hereinafter FIFTY YEARS].

236. 1951 Convention, *supra* note 2.

237. *Id.*

238. *Id.* at pmb1.

239. *Id.* As noted in the preamble of the 1951 Refugee Convention, “the grant of asylum may place unduly heavy burdens on certain countries, and [a] satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.” *Id.* at 13.

The 1951 Refugee Convention was drafted by a combination of United Nations organs, ad hoc committees, and a conference of plenipotentiaries with the intent of ensuring that states could not again turn their backs on vulnerable groups escaping persecution, and purported to provide a guarantee of non-refoulement.<sup>240</sup>

The 1951 Refugee Convention was the first, and remains the only, binding refugee-protection instrument of a universal character and has become the foundation of the international refugee protection regime post-WWII.

The definition of refugee adopted by the 1951 Refugee Convention was restricted to those persons who had become displaced due to “events occurring in Europe before 1 January 1951”<sup>241</sup> and who were unwilling or unable to return to their country of origin because of a well-founded fear of being persecuted for one of five reasons.<sup>242</sup> For the first time, a refugee was not confined by reference to specific countries of origin. It also allowed signatory states to elect to *limit* their obligations to refugees originating from “events occurring in Europe.”<sup>243</sup> Thus, these limitations make it clear that the 1951 Refugee Convention was originally drafted with the political goal of directly responding to and assisting displaced European refugees who had been affected by the Second World War.<sup>244</sup>

However, following the continuous displacement of persons across the globe and a recognition that individuals may be displaced for reasons outside of these temporal and geographical limitations, the 1967 Protocol Relating to the Status of Refugees<sup>245</sup> (1967 Protocol) removed these limitations and, in theory, strengthened protection for refugees. The 1967 Protocol went into force on October 4, 1967,<sup>246</sup> and is a separate instrument from the 1951 Refugee Convention. Further, accession to it is not limited to those states already party to the 1951 Refugee Convention.

The 1967 Protocol did not change the refugee definition in any material

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

241. 1951 Refugee Convention, *supra* note 2, at 15.

242. *Id.* at 14.

243. 1951 Convention, *supra* note 2, at 15.

244. See HATHAWAY & FOSTER, *supra* note 240.

245. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 268 [hereinafter 1967 Protocol] (amending 1951 Refugee Convention).

246. *Id.* at 267.

way other than by removing the abovementioned temporal and geographical limitations, thereby strengthening the protection of refugees.<sup>247</sup> Article 1.2 of the Protocol states that “[f]or the purpose of the present Protocol, the term ‘refugee’ shall . . . mean any person within the definition of article 1 of the Convention.”<sup>248</sup>

Article 1A(2) of the 1951 Refugee Convention, as amended by the 1967 Protocol, mandates that refugee status should be granted to:

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . .<sup>249</sup>

Thus, as the 1951 Refugee Convention stands today, the rights and protections conferred by the Convention are extended to all refugees, and not just those affected by pre-1951 events in Europe.<sup>250</sup> Moreover, the 1967 Protocol did not broaden rights under the 1951 Refugee Convention, but simply incorporated them by reference under Article 1(1). Thus, in effect, the aim of the 1967 Protocol was to expand the scope of the 1951 Refugee Convention and allow for the universal coverage and protection of refugees.

However, the 1951 Refugee Convention definition only applies to specific types of displaced people. In other words, in order to qualify for refugee status, an individual must have a “well-founded fear of being persecuted” in their homeland and the basis of this persecution cannot be generic.<sup>251</sup> This is in sharp contrast to the refugees of the inter-war era who did not have to fear persecution nor explain their personal reasons for fleeing.<sup>252</sup> The individual must be outside of his home country.<sup>253</sup>

According to the UNHCR, a well-founded fear has both subjective and objective components.<sup>254</sup> Fear is subjective, and whether that fear is well-

247. *Id.* at 268.

248. *Id.*

249. 1951 Convention, *supra* note 2, at 14.

250. *See* HATHAWAY & FOSTER, *supra* note 240, at 10.

251. 1951 Convention, *supra* note 2, at 14.

252. *See* 1933 Convention, *supra* note 217, at 203 (establishing a broad definition of a “refugee” without requiring any explanation for their status).

253. 1951 Convention, *supra* note 2, at 152.

254. U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR

founded requires an objective evaluation.<sup>255</sup> The applicant's fear "should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."<sup>256</sup>

Further, as noted above, the basis for persecution cannot be generic. It must be underpinned by one of five designated reasons.<sup>257</sup> These are race, religion, nationality, political group, or membership in a particular social group.<sup>258</sup> It is clear that the drafters of the 1951 Refugee Convention were heavily influenced by the forms of persecution that were widespread during this time. For example, the inclusion of religion reflects the desire to protect Jewish victims who survived the Holocaust but could not return to Germany.<sup>259</sup>

These five protection grounds, however, have acted as substantial limitations to claiming refugee status. In effect, they restrict many persons who are legitimately facing life-threatening situations from being granted protection in a country outside of their own. Thus, if a person is outside his country of origin and is almost certain to be killed if he returns to his country of origin because of a generalized wide-ranging conflict or targeting by powerful criminal gangs or corrupt government officials, his is not entitled to invoke the 1951 Refugee Convention.

Importantly, the 1951 Refugee Convention continues to provide refugees the guarantee of nonrefoulement under Article 33. According to this principle, refugees cannot be expelled or returned to a country where they may be subject to persecution on account of their "race, religion, nationality, membership in a particular social group or political opinion."<sup>260</sup> However, this right is not conferred upon refugees reasonably regarded as posing a risk to national security or considered a danger to the community.<sup>261</sup> The 1951

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DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION: UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 19 (Feb. 2019), <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [hereinafter UNHCR Handbook].

255. *Id.*

256. *Id.* at 20.

257. 1951 Convention, *supra* note 2, at 14.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

Refugee Convention extends a number of other rights to refugees. For example, refugees are entitled to the same rights as citizens in relation to freedom of religion, intellectual property, access to courts and legal assistance, accessing elementary education, labor rights, and social security.<sup>262</sup>

As of October 2020, the total number of states party to the 1951 Refugee Convention is 146,<sup>263</sup> and those party to the 1967 Protocol is 147.<sup>264</sup> The number of states party to both the 1951 Refugee Convention and the 1967 Protocol stands at 142.<sup>265</sup> There are also three countries (including the United States) which have agreed to the 1967 Protocol only, and two small countries that have agreed to the 1951 Refugee Convention only.<sup>266</sup> Tens of millions of displaced persons have been provided asylum under the Refugee Convention, more than any other international instrument. Thus, despite the somewhat arbitrary limits imposed in the 1951 Refugee Convention, it has proven to be an incredibly successful platform upon which resettlement has occurred for millions of refugees.<sup>267</sup>

#### IV. THE MEANING OF RELIGION FOR THE PURPOSES OF SECURING REFUGEE STATUS

##### A. *Overview of the Meaning of Religion*

Freedom of religion is a well-established and fundamental human right. At the same time, it has also “long been the basis upon which governments and peoples have singled others out for persecution.”<sup>268</sup> Although the context

262. *Id.*

263. *See State Parties, Including Reservations and Declarations, to the 1951 Refugee Convention*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/5d9ed32b4> (last visited Jan. 20, 2021).

264. *See State Parties, Including Reservations and Declarations, to the 1967 Protocol Relating to the Status of Refugees*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/5d9ed66a4> (last visited Jan. 20, 2021).

265. *See* 1951 Refugee Convention, *supra* note 2.

266. *See id.* The countries that have agreed only to the 1951 Refugee Convention are Madagascar and Saint Kitts and Nevis, while the countries that have agreed only to the 1967 Protocol are Cabo Verde, the United States, and Venezuela. *Id.*

267. UNITED NATIONS HIGH COMM’R FOR REFUGEES, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 2 (Sept. 2011), <https://www.unhcr.org/4ec262df9.pdf>.

268. Karen Musalo, *Claims for Protection Based on Religion or Belief*, 16 INT’L J. REFUGEE L. 165, 165–66 (2004) (footnote omitted).

and contours of religious persecution have changed since WWII, its persistence as a present-day issue and its need for protection has continued. As Karen Musalo noted in 2004, many scholars believed that “religion will not only continue to be a significant ground [for claims of protection], but that it is likely to gain increasing prominence as a ground of protection . . . .”<sup>269</sup> In fact, the last fifteen years have seen a marked increase in government restrictions and increasing levels of “social hostilities involving religion” in many parts of the world.<sup>270</sup> Indeed, President Trump recently stated that freedom of religion is one of the central human rights claims he wants to ensure that his government protects and observes.<sup>271</sup>

Religion, however, is not a simple concept. There is “[n]o universally accepted definition of ‘religion’” for the purposes of the Refugee Convention.<sup>272</sup> The concept has become especially complex in recent decades, given the proliferation of large numbers of different ideologies and different versions of what previously appeared to be established ideologies.

Notwithstanding this, a review of the case law reveals that religious persecution claims mostly involve mainstream religions which are clearly recognizable to the decision maker, such as Christianity, Hinduism, and Islam. As a result, there are only a handful of cases which examine whether the asserted belief or idea system constitutes a “religion” under the 1951 Refugee Convention.<sup>273</sup> This is a common theme across all jurisdictions discussed below.<sup>274</sup> For this reason, the case law has contributed little to the analysis. The case law, in fact, glosses over the main complexities underpinning the concept of religion.

Rather, an examination of the case law has shown that a common sticking point in religious persecution determinations is the credibility of the applicant, specifically, whether the asserted religion has been genuinely adopted (or not

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269. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 145, n.72 (1991); DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 398–99 (3d ed. 1999).

270. See *A Closer Look at How Religious Restrictions Have Risen Around the World*, PEW RESEARCH CTR. (July 15, 2019), <https://www.pewforum.org/2019/07/15/a-closer-look-at-how-religious-restrictions-have-risen-around-the-world/>.

271. *Presidential Determination on Refugee Admissions for Fiscal Year 2020*, *supra* note 6.

272. See Holger Sonntag, *Testing Religion: Adjudicating Claims of Religious Persecution Brought by Iranians in the U.S. and Germany*, 68 CASE W. RES. L. REV. 1020, 1021 (2014).

273. See generally Musalo, *supra* note 268, at 165.

274. See *id.* at 178 (stating that there “are very few U.S. cases which provide a clear presentation of a claim based on discrimination on account of religion”).

adopted) by the claimant.<sup>275</sup> This is an especially complicated task in *sur place* claims, which are claims involving post-departure religious conversions. The jurisprudence reveals that claimants' credibility is largely based on their doctrinal knowledge of the asserted "religion" and that this is determined through some form of trivia—which varies depending on the religion.<sup>276</sup> Moreover, different standards have also emerged across jurisdictions.

Multiple sources suggest, however, that the applicant's sincerity cannot be judged based on their knowledge of the religion in question.<sup>277</sup> One reason for this is that decision makers often do not have sufficient knowledge themselves to be able to determine whether an applicant's faith is genuine.<sup>278</sup> An added complexity arises when the "belief or practice is relatively new" and therefore there may not be enough information available to determine whether an individual's fear of persecution on account of the religion is well-founded.<sup>279</sup>

There remains little interpretative guidance beyond the case law. For example, both the *travaux préparatoires* to the 1951 Refugee Convention and the 1951 Refugee Convention itself are silent as to the meaning and scope of "religion" for the purposes of satisfying Article 1A(2).<sup>280</sup>

Perhaps the most extensive discussion on this is found in the UNHCR Handbook.<sup>281</sup> The UNHCR Handbook, which was republished in 2019, has long been recognized as a leading source of guidance in interpreting and applying the 1951 Refugee Convention and the 1967 Protocol.<sup>282</sup> It is not, however, legally binding. The UNHCR Handbook refrains from setting out in any definitive manner the meaning or scope of the term "religion" in the context of refugee determinations; however, it does emphasize that the ground be interpreted and applied "in a manner consistent with international norms," specifically citing the Universal Declaration of Human Rights and the

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275. *See id.* at 218.

276. *See* AMANDA GRAY & ZIYA MERAL, FLEEING PERSECUTION: ASYLUM CLAIMS IN THE UK ON RELIGIOUS FREEDOM GROUNDS 3, 4 (2016) (discussing the use of Bible trivia).

277. *See id.*; Musalo, *supra* note 268, at 225.

278. *See* GRAY & MERAL, *supra* note 276, at 4 (describing an incident in which a "caseworker had not realised that an Anglican Church can also be an Evangelical one and found the applicant's testimony inconsistent as it did not match the church's public information shown on its website.").

279. Musalo, *supra* note 268, at 204.

280. *Id.* at 170.

281. *See generally* UNHCR Handbook, *supra* note 254.

282. *Id.*

International Covenant on Civil and Political Rights (ICCPR).<sup>283</sup>

The freedom of religion as a fundamental right was articulated in Article 18 of the Universal Declaration of Human Rights (UDHR) as follows: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>284</sup> This right was also incorporated into Article 18 of the ICCPR.<sup>285</sup> Article 18 of the ICCPR further “distinguishes between inner freedom of belief, and outer or public freedom to manifest one’s beliefs.”<sup>286</sup> The freedom to manifest beliefs in public “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>287</sup>

The UNHCR Handbook further observes that:

72. Persecution for “reasons of religion” may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.

73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.<sup>288</sup>

In recognizing that “[c]laims to refugee status based on religion can be among the most complex,” and that “[d]ecision makers have not always taken a consistent approach when applying the term ‘religion’ contained in the . . . definition of the [1951 Refugee C]onvention,” the UNHCR issued separate guidelines in 2004 exclusively dealing with the protected ground of “religion.”<sup>289</sup> Again, the guidelines did not define a “religion” but rather

283. *Id.* at 71.

284. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948).

285. *See* Musalo, *supra* note 268, at 171.

286. *Id.* at 173.

287. *Id.* at 178.

288. UNHCR Handbook, *supra* note 254, at 16.

289. *See* U.N. High Comm’r for Refugees, Guidelines on International Protection: Religion-Based

“provide[d] decision makers with guiding parameters to facilitate refugee status determination . . . .”<sup>290</sup> Accordingly, as construed under the 1951 Refugee Convention, religion encompasses “freedom of thought, conscience or belief”<sup>291</sup> and is “not limited . . . to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.”<sup>292</sup> Further, for the purposes of successfully invoking this ground, it does not matter if a person belongs to a religious majority or minority.<sup>293</sup>

The UNHCR Guidelines further state that “[c]laims based on ‘religion’ may involve one or more of the following elements: a) religion as belief (including non-belief); b) religion as identity; c) religion as a way of life.”<sup>294</sup> Belief is interpreted to include “theistic, non-theistic and atheistic beliefs” and may be “convictions or values about the divine or ultimate reality or the spiritual destiny of humankind.”<sup>295</sup> Identity is about belonging to a community “bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry.”<sup>296</sup> There is also an acknowledgment that “persecutors are likely to target religious groups that are different from their own because they see that religious identity as part of a threat to their own identity or legitimacy.”<sup>297</sup> Religion as a way of life may be seen through a variety of activities, like “the wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary requirements.”<sup>298</sup>

However, while this provides some guidance, it is neither definitive nor comprehensive. Questions remain as to how the definition of refugee is to be interpreted. As Holger Sonntag noted, “using a common international definition of refugee, without more, has not resulted in similarly situated

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Claims Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, ¶ 1, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004) [hereinafter UNHCR Guidelines].

290. *Id.*

291. *Id.* at ¶ 2 (citing UNHCR Handbook, *supra* note 254).

292. *Id.* at ¶ 4 (citing U.N. Human Rights Comm., CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993)).

293. *Id.* at ¶ 12.

294. *Id.* at ¶ 5.

295. *Id.* at ¶ 6.

296. *Id.* at ¶ 7.

297. *Id.*

298. *Id.* at ¶ 8.

applicants being treated similarly by the countries where they happen to seek refuge from persecution.”<sup>299</sup>

In the U.S. domain, officials considering such applications must also consider religious persecution under the International Religious Freedom Act (IRFA).<sup>300</sup> The effect of IRFA on asylum adjudications based on religious persecution is to specifically incorporate the UDHR and ICCPR.<sup>301</sup> In doing so, IRFA protects a number of religious freedoms, including a person’s “freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.”<sup>302</sup> These protections also extend to “non-theists, humanists, and atheists.”<sup>303</sup> The U.S. also requires that the State Department train its foreign service officers in international religious freedom.<sup>304</sup> This training focuses not only on U.S. “religious freedom policies,” but also on “religious traditions,” “religious and cultural issues,” and “efforts to [prevent] violent religious extremism.”<sup>305</sup> It is important to note that IRFA is silent as to what makes a particular practice or belief a “religion.”

Broadly, however, it is settled law among major common law countries—the United States, Canada, and Australia—that people may warrant refugee status not only because they risk persecution if they adhere to a particular religion, but also because they do not belong to a certain religion.

In *Prashar v Minister for Immigration and Multicultural Affairs*, the Australian Federal Court expressed that:

The Convention speaks of a “well-founded fear of being persecuted for reasons of . . . religion. . .” In my opinion, if persons are persecuted because they do not hold religious beliefs, that is as much persecution for reasons of religion as if somebody were persecuting them for holding a positive religious belief. The Convention protects

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299. Sonntag, *supra* note 272, at 980. While Sonntag’s article examined a specific refugee group, many of his observations also apply to the overall refugee system. *Id.* Sonntag examined the situation of Iranian refugees attempting to flee to the United States and Germany. *Id.*

300. International Religious Freedom Act of 1998, 22 U.S.C.A. § 6401 (2016).

301. *Id.* at § 6401(a)(2).

302. *Id.* § 6401(a)(3).

303. *See id.* § 6401(6) (2016).

304. Training for Foreign Service Officers, 22 U.S.C. § 4028(a)(2) (2010).

305. *Id.* § 4028(a)(2)(C).

people in relation to the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves.<sup>306</sup>

There is a second dimension to the protected ground of “religion.” Persecution for religion includes the protection of those who are at risk of serious harm because they engage in behavior prescribed by their religious belief, or conversely, they do not participate in such activities or practices.<sup>307</sup>

Further, it is not necessary for the victim to actively promote or observe their belief, or lack thereof.<sup>308</sup> In other words, the Convention protects “the followers as well as the leaders” and “the ordinary person as well as the extraordinary one” in religious pursuits.<sup>309</sup> However, it is widely accepted that freedom of religion encompasses the right to not be expected to desist from public expression or manifestation of a person’s religion. This principle has been recognized across all jurisdictions. For example, U.S. courts have strictly held that officials cannot force people to “forego practicing their beliefs in public to avoid religious persecution, since being forced to practice one’s beliefs underground is itself a form of persecution.”<sup>310</sup> Similarly, in Canada, individuals claiming asylum “cannot be asked to renounce their deeply held beliefs or refrain from exercising their fundamental [human] rights to avoid persecution and as a price to live in security.”<sup>311</sup>

Moreover, as is the case with all of the protected convention grounds, a religious persecution claim can be grounded in a religious belief (or non-belief) that has been externally attributed to the applicant, even if it has been

306. *Prashar v Minister for Immigration and Multicultural Affairs* [2001] FCA 57, [19] (Austl.).

307. *See* *Reul v. Canada (Minister of Citizenship and Immigration)* (2000), 195 F.T.R. 65, paras. 12–16; *Yang v. Canada (Minister of Citizenship and Immigration)*, 2001 F.C.J. No. 1463, paras. 10–11; *Liang v. Canada (Minister of Citizenship and Immigration)* (2011), F.C. 65, para 17; *see also* HATHAWAY, *supra* note 176, at 146–47 (discussing the two dimensions of the protected “religion” ground); GRAHL-MADSEN, *supra* note 185, at 218; GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 27–28 (Ian Brownlie ed. 1983).

308. UNHCR Handbook, *supra* note 254, at 7.

309. *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132, [20] (Austl.); *see also* *Shan Zhu Qiu v. Holder*, 611 F.3d 403, 407 (7th Cir. 2010) (stating that “police are interested in any Falun Gong practitioner, not merely the ‘core leaders’”).

310. Sonntag, *supra* note 272, at 1000 (citing U.S. CITIZENSHIP & IMMIGRATION SERVS., *THE INTERNATIONAL RELIGIOUS FREEDOM ACT (IRFA) AND RELIGIOUS PERSECUTION CLAIMS* 26 (2009), <https://perma.cc/CKA3-MSGC>; *see also* *Shan Zhu Qiu*, 611 F.3d at 408 (stating that the U.S. Court of Appeals for the Seventh Circuit observed that the Convention “exists to protect people from having to return to a country and conceal their beliefs”).

311. IMMIGRATION & REFUGEE BD. OF CAN., *INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION IN THE CASE LAW* 3–1, (2019).

falsely attributed. This is known as the imputed political opinion doctrine and it is widely recognized across all jurisdictions.<sup>312</sup>

The following sections provide information on how refugee claims based on religious persecution are pursued in leading refugee law jurisdictions—the United States, Canada, and Australia. A more unified approach to the religious ground specifically would result in greater protection for legitimate refugees who are at risk for persecution on religious grounds and greater protection of the right to freedom of religion, a fundamental human right.

### *B. United States of America*

The 1951 Refugee Convention definition was first codified in domestic United States law under the Refugee Act of 1980<sup>313</sup>—described as “the most comprehensive U.S. law ever enacted concerning refugee admissions and resettlement.”<sup>314</sup> The Act intended to ensure U.S. immigration law was consistent with its rights and obligations under the 1951 Refugee Convention and, as such, adopted a refugee definition that is almost identical to the one in the 1951 Refugee Convention.<sup>315</sup> If the below definition is met, refugee status may be granted under section 207 of the Immigration and Nationality Act (INA) if the person is outside the U.S., or asylum status may be granted under section 208 of the INA if the person is already in the U.S. or presents himself or herself at a U.S. port of entry.<sup>316</sup>

Section 101(a)(42) of the INA, as modified by the 1951 Refugee Act, defines a refugee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of

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312. See, e.g., UNHCR Guidelines, *supra* note 232, at 9–10.

313. Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (1980). The United States did not sign the Refugee Convention, but it adopted the obligations under the 1951 Refugee Convention by accession to the 1967 Protocol, which explicitly incorporated the 1951 Convention definition of a refugee.

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

315. 126 CONG. REC. 3756 (1980) (Feb. 26, 1980) (statement of Sen. Kennedy).

316. PROPOSED REFUGEE ADMISSIONS, *supra* note 96, at 4.

persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>317</sup>

There is no definition of “religion” in the INA. Further, as is the case with the legislative history of the 1951 Convention, Congress did not provide any guidance as to the meaning intended to attach to the ground under the INA.<sup>318</sup>

Consistent with the UNHCR interpretation of the refugee definition, an applicant must show a nexus between persecution and religion.<sup>319</sup> However, a unique feature of U.S. law, as compared to the other jurisdictions discussed, is that the language of the U.S. definition of refugee differs slightly from the definition provided in the 1951 Refugee Convention. U.S. law replaced the phrase “for reasons of” with “on account of.” This was initially considered an insignificant change.<sup>320</sup> However, the phrase has “spawned a multitude of tests and [has led to inconsistent] interpretations.”<sup>321</sup> Ultimately, the U.S. Supreme Court interpreted the definition to require “a demonstration that the persecutor was motivated by one of the [five protected] reasons [contained] in the refugee definition.”<sup>322</sup> The Court did not meaningfully elaborate on how an applicant is to prove the persecutor’s motive, but “since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial.”<sup>323</sup>

In any context, providing evidence that proves the motivation of another

317. 8 U.S.C. § 1101(a)(42) (2014).

318. See 126 Cong. Rec. 3756–58 (1980).

319. See Sonntag, *supra* note 272, at 1021.

320. Brigitte L. Frantz, *Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms*, 5 AVE MARIA L. REV. 499, 509 (2007).

321. *Id.* at 508.

322. *Id.* at 503 (citing *Immigration Naturalization Serv. v. Elias-Zacarias*, 502 U.S. 478, 482 (1992)); see *Immigration Naturalization Serv. v. Elias-Zacarias*, 502 U.S. at 482 (holding that the “on account of” language in the refugee definition requires the applicant to prove either a nexus between the persecution or the well-founded fear of persecution and the enumerated ground of protection account of race, religion, nationality, political opinion, or membership in a particular social group). Further, under the Real ID Act of 2005, the applicant must also show that one of the five reasons in the refugee definition “was or will be at least one central reason for persecuting the applicant,” which implicitly allows for a persecutor to have mixed motives. 8 U.S.C. § 1158(b)(1)(B)(i) (2009). In fact, a persecutor may have many “central” reasons for persecuting an individual, and “whether one of those central reasons is more or less important than another is irrelevant.” *Ndayshimiye v. Attorney Gen. of U.S.*, 557 F. 3d 124, 129 (3d Cir. 2009).

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

person is an inherently difficult task—including for refugees who, in most cases, due to their circumstances, will not have access to such evidence.<sup>324</sup> It is especially difficult for victims of religious persecution.<sup>325</sup> The primary corroborating evidence available in these cases comes in the form of letters between family members or news articles, “neither of which are given the same deference and attention as official documentation.”<sup>326</sup> Proving a persecutor’s motivation, which is inherently a difficult task, has resulted in a higher burden on asylum applicants. This is an additional burden that applicants must meet to justify the grant of political asylum. Thus, the requirement is that an applicant must also provide corroborating evidence to establish that the persecutor’s motivation has imposed an additional burden on applicants to justify the grant of political asylum.

In a review of religious persecution case law, it is clear that there has been no meaningful analysis by U.S. courts defining the parameters of “religion” as protected under the 1951 Refugee Convention. Rather, many involve issues of review by the Immigration Judge (IJ) or Board of Immigration Appeals (BIA). Several of the cases reviewed for the purposes of this article were appealed based on claims that the IJ or BIA did not give careful consideration to the applicant’s claims.

For instance, in *Kazemzadeh v. United States Attorney General*,<sup>327</sup> an Iranian citizen filed an application for asylum claiming that he feared persecution based on his conversion from Islam to Christianity.<sup>328</sup> The Eleventh Circuit vacated the decisions of the IJ and BIA based on the fact that both failed to give reasoned consideration to Kazemzadeh’s evidence indicating that he had a well-founded fear of persecution based on his conversion to Christianity while in the United States.<sup>329</sup> Kazemzadeh was

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324. See Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265, 333 (2002) (stating that asylum applicants face “evidentiary obstacles” in proving a persecutor’s motivation because they “do not usually have time or ability to gather evidence of their persecutor’s motives” while they are fleeing persecution (quoting *Gafoor v. Immigration & Natural Servs.*, 231 F.3d 645, 654 (9th Cir. 2000))).

325. See Frantz, *supra* note 320, at 523 (noting that “[c]ountries rarely, if ever, document a person’s religion as the motivation for persecutory treatment”).

326. *Id.* (citing Eric T. Johnson, *Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?* 1996 BYU L. REV. 757, 769–70 (1996)).

327. 577 F.3d 1341 (11th Cir. 2009).

328. *Id.* at 1345.

329. *Id.* at 1345, 1353–56. Kazemzadeh also appealed the IJ and BIA decisions holding that evidence did not support a finding that Kazemzadeh had a well-founded fear of persecution based on his political opinion, but the Eleventh Circuit agreed with the IJ and BIA on this ground. *Id.* at 1352–

arrested a couple of times while engaging in freedom of speech and religious rallies in Tehran; he was beaten and detained for four days; he was monitored after his release; he was expelled from his university for “not following the Islamic tradition”; and after leaving Iran, he was “sentenced *in absentia* to six years imprisonment for his participation in anti-government activities.”<sup>330</sup> According to the IJ and BIA, Kazemzadeh failed to prove that he had a well-founded fear of persecution because not only did he fail to prove that anyone in Iran knew of his conversion, he also failed to prove that there was a pattern or practice of persecuting converted Christians.<sup>331</sup> However, the IJ did not make an explicit finding that Kazemzadeh’s testimony was not credible, and as a result, the Eleventh Circuit accepted his testimony as credible.<sup>332</sup>

In addition to his testimony, Kazemzadeh presented evidence of his personal interactions with the Iranian regime, as well as other evidence that converts avoided such punishment by practicing underground, and the Eleventh Circuit agreed with the Seventh Circuit’s decision that “having to practice religion underground to avoid punishment is itself a form of persecution.”<sup>333</sup> Further, evidence indicated that while “[a]postasy, specifically conversion from Islam, is punishable by death” in Iran, the anti-apostasy laws were not enforced often.<sup>334</sup> However, this evidence, in conjunction with Kazemzadeh’s information about converts practicing underground, may be sufficient to show a pattern or practice of persecution.<sup>335</sup>

53. The protected ground of political opinion is outside the scope of this article.

330. *Id.* at 1347–48.

331. *Id.* at 1350.

332. *Id.* at 1354 (citing *De Santamaria v. Attorney Gen. of the U.S.*, 525 F.3d 999, 1011 n.10 (11th Cir. 2008)).

333. *Id.* (citing *Muhur v. Ashcroft*, 355 F.3d 958, 960–61 (7th Cir. 2004)); *see also id.* at 1358 (Marcus J., concurring) (“The suggestion that a petitioner seeking asylum on account of religious persecution may be required to practice his faith in the dead of night collides with our nation’s ideals about the exercise of religious freedom. The right to practice only surreptitiously and under fear of death is not free exercise.”); *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1003 (8th Cir. 2006) (“Absent physical harm, subjecting members of an unpopular faith to hostility, harassment, discrimination, and even economic deprivation is not persecution unless those persons are prevented from practicing their religion or deprived of their freedom.”); *Iao v. Gonzales*, 400 F.3d 530, 532 (7th Cir. 2005) (“[T]he fact that a person might avoid persecution through concealment of the activity that places her at risk of being persecuted is [not] inconsistent with her having a well-founded fear of persecution. On the contrary, it is the existence of such a fear that motivates the concealment.” (citation omitted)); *Zhang v. Ashcroft*, 388 F.3d 713, 719–20 (9th Cir. 2004) (requiring a petitioner “to practice his beliefs in secret is contrary to our basic principles of religious freedom and the protection of religious refugees”).

334. *Kazemzadeh*, 577 F.3d at 1349.

335. *See id.* at 1354–55.

Ultimately, the Court remanded this case for further analysis of the religious persecution claim.<sup>336</sup>

In another case—this one involving a young Chinese woman who fled China after being investigated for practicing Falun Gong—the Court focused on the failure to make a reasoned decision because, as the Seventh Circuit noted when it vacated the decision, “[t]he immigration judge’s opinion cannot be regarded as reasoned; and there was no opinion by the Board of Immigration Appeals.”<sup>337</sup> After learning of Li’s activities, Chinese officials “made repeated visits to the house in which she lived with her parents to tell her to abandon Falun Gong, but she eluded them by residing mainly in her aunt’s house.”<sup>338</sup> Li received a summons but did not comply, and after police continued to come to her home to ask questions, she fled the country.<sup>339</sup> Unlike the previous case, Li did not claim past persecution, but rather claimed a well-founded fear of future persecution on the basis of her religion.<sup>340</sup> The Seventh Circuit did not decide that she was entitled to asylum, but rather that “she is entitled to a rational analysis of the evidence.”<sup>341</sup>

Although the outcomes of *Iao* and *Kazemzadeh* are the same, the applicants’ asserted “religions” differ. In *Kazemzadeh*, the applicant had converted from Islam to Christianity, both of which are very common religions.<sup>342</sup> On the other hand, *Iao* involves the religion of Falun Gong, which is “often referred to as a ‘religion’ . . . though it is not a religion in the Western sense.”<sup>343</sup> Followers of Falun Gong do not worship a deity.<sup>344</sup> Instead, “[t]he emphasis is on spiritual self-perfection through prescribed physical exercises,” and China “persecutes adherents to Falun Gong,” making it even more likely that Li would suffer persecution if she returned to China and attempted to practice Falun Gong.<sup>345</sup>

Notably, neither the IJ nor the Seventh Circuit appeared to question the type of religion at issue in *Iao*, nor did they embark on any attempt to ascertain

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336. *Id.* at 1355–56.

337. *Iao*, 400 F.3d at 533.

338. *Id.* at 531.

339. *Id.*

340. *See id.* at 532.

341. *Id.* at 533.

342. *See Kazemzadeh*, 577 F.3d at 1345.

343. *Iao*, 400 F.3d at 532.

344. *Id.*

345. *Id.*

the meaning of a religion, but the IJ did question Li's credibility based on her knowledge of the religion.<sup>346</sup> According to the IJ, Li was "quite vague concerning her beliefs" and did not know that Falun Gong had a symbol, though she was familiar with the exercises, which make up the core of Falun Gong.<sup>347</sup> There were also inconsistencies in her testimony regarding police visits to her home, as well as her efforts to evade police.<sup>348</sup> The Seventh Circuit did not give much credence to these reasons, as it remanded the case for a more reasoned analysis,<sup>349</sup> but *Iao* is not the only case in which an applicant's knowledge of the religious beliefs they claim has been questioned.

A determination as to the applicant's credibility must be made in all asylum claims.<sup>350</sup> Where an applicant claims persecution on the basis of his or her religion, adjudicators are to determine "whether an applicant 'adopted a belief system solely for the purposes of trying to obtain asylum,'" but there is no room for challenging the belief system itself.<sup>351</sup>

The issue of credibility is particularly difficult in *sur place* claims.<sup>352</sup> In *sur place* claims, applicants are often "suspected of opportunism, and the genuineness of their [own] conversion becomes a key issue."<sup>353</sup> Thus, the U.S. government, like many governments dealing with the refugee crisis, has concern regarding refugees *sur place*. These are "individuals who did not express their religious faith until they were away from their home country and in the United States; as such, their refugee claims did not come into existence until they were already outside the jurisdiction of their home countries."<sup>354</sup> Different courts have different views on *sur place* claims. For instance, the Ninth Circuit Court of Appeals noted:

As with any form of relief available to immigrants and refugees

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346. *Id.* at 532–33.

347. *Id.* at 532.

348. *Id.*

349. *Id.* at 533.

350. *See* Frantz, *supra* note 320, at 519–20.

351. Sonntag, *supra* note 272, at 1022.

352. *See* Musalo, *supra* note 268, at 223 (stating that *sur place* refugees claims, which occur when an individual converts to a religion persecuted in their home country when they arrive in their host country, are "suspected of opportunism" and questioned in their "genuineness").

353. *Id.*

354. Michael J. Churgin, *Is Religion Different? Is There a Thumb on the Scale in Refugee Convention Appellate Court Adjudication in the United States? Some Preliminary Thoughts*, 51 TEX. INT'L L.J. 213, 224 (2016) (citing UNHCR Handbook, *supra* note 254, at 26).

seeking to make their life in this country, there is some risk of abuse. Our decision today serves another worthy policy interest. Indeed, it is one of our oldest and most foundational policy interests—allowing individuals to freely choose and exercise their own religion. The timing of one’s religious choice is not determinative of one’s rights. . . . If an individual’s religion places him at risk of persecution, then this country provides a refuge.<sup>355</sup>

On the other hand, the Third Circuit saw it differently, noting that “there is a perfectly plain basis for distinguishing between an applicant who converted to Christianity after being ordered removed and one who was already a Christian prior to such an order.”<sup>356</sup> In any event, a well-founded fear of persecution must be shown.

The applicant’s doctrinal knowledge of the claimed religion is also relevant to a finding of credibility, irrespective of whether the applicant held the religion prior to departure from their home country or converted whilst in their host country. An applicant’s knowledge of religion, which is often determined through some form of trivia, varies based on the religion.<sup>357</sup> However, this has added a layer of complexity and uncertainty to the adjudication of such claims.

For instance, in *Rizal v. Gonzales*,<sup>358</sup> the Second Circuit faced the question of “whether a certain degree of doctrinal knowledge of an asylum applicant’s claimed religion is necessarily a prerequisite for asylum eligibility” on religious grounds.<sup>359</sup> In that case, the IJ issued an oral decision denying Rizal’s claim because he “failed to persuade the Court of the genuineness of his professed Christian faith *based on his inability to demonstrate basic knowledge of Christianity*,” and “[t]he BIA affirmed without opinion.”<sup>360</sup> According to the Second Circuit:

Both history and common sense make amply clear that people can identify with a certain religion, notwithstanding their lack of detailed knowledge about that religion’s doctrinal tenets, and that those same

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355. *Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014) (internal citations omitted).

356. *Zhang v. Attorney Gen. of the U.S.*, 543 F. App’x 277, 285 (3d Cir. 2013).

357. See GRAY & MERAL, *supra* note 276, at 3, 27–28 (discussing the use of Bible trivia).

358. 442 F.3d 84 (2d Cir. 2006).

359. *Id.* at 86.

360. *Id.* at 88–89 (internal quotations omitted).

people can be persecuted for their religious affiliation. Such individuals are just as eligible for asylum on religious persecution grounds as are those with more detailed doctrinal knowledge.<sup>361</sup>

The Second Circuit went on to note that there may be instances where level of knowledge is relevant, but *Rizal* was not such a case, and Rizal's testimony, if credible, should "have been sufficient to establish his identity as a Christian, regardless of whether he could pass the doctrinal quiz posed to him by the government and the IJ."<sup>362</sup>

In another case examining this issue, the Eleventh Circuit vacated a decision based on the fact that the IJ and BIA deemed an applicant's knowledge inadequate and did not give reasoned consideration to the applicant's claim that he had suffered past persecution because of his adoption of the Jehovah's Witness faith in the country of Georgia.<sup>363</sup> According to the Eleventh Circuit, the IJ did not "make a 'clean' adverse credibility determination," relying "instead on his view that Mezvrishvili had exhibited insufficient commitment to the faith while in the United States and had insufficient knowledge of the religious doctrine of Jehovah's Witnesses."<sup>364</sup> However, the Eleventh Circuit noted that the issue in these cases is "whether the applicant suffered religious persecution, not whether he displays the knowledge of a seminarian during 'a mini-catechism administered at the hearing.'"<sup>365</sup> The court did not dismiss an evaluation of an applicant's religious doctrinal knowledge as wholly irrelevant, noting that a lack of key doctrinal facts could trigger suspicion.<sup>366</sup>

The decisions of *Rizal* and *Mezvrishvili* also raise the potential for imputed religion, which involves a person being persecuted on account of others' perception of their religious beliefs. In the case of imputed religion,

361. *Id.* at 90 (footnote omitted) (citing *Ahmadshah v. Ashcroft*, 396 F.3d 917, 920 n.2 (8th Cir. 2005)) ("We are . . . not convinced that a detailed knowledge of Christian doctrine is relevant to the sincerity of an applicant's belief; a recent convert may well lack detailed knowledge of religious custom. Even if [petitioner] did not have a clear understanding of Christian doctrine, this is not relevant to his fear of persecution.").

362. *Id.* at 90–91.

363. *Mezvrishvili v. Attorney Gen. of the U.S.*, 467 F.3d 1292, 1293–94 (11th Cir. 2006).

364. *Id.* at 1296.

365. *Id.* (citing *Yan v. Gonzales*, 438 F.3d 1249, 1255 (10th Cir. 2006)).

366. *Id.* (citing *Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005)) ("[Of course] a purported Christian who didn't know who Jesus Christ was, or a purported Jew who had never heard of Moses, would be instantly suspect . . .").

an individual may have no knowledge of religious customs, but is persecuted anyway.<sup>367</sup> For this reason, applicants' knowledge of their religion may be relevant, but it is not the only important factor to consider.

Thus, even if an applicant converted to a religion only to obtain asylum, such a conversion could still lead that person to be persecuted, and "[a]n agent of persecution in another part of the world may not care about the sincerity of someone's beliefs or practices, but may simply impute these beliefs or practices with or without objective justification."<sup>368</sup>

Judge Posner, recognizing that many of the problems plaguing asylum cases reoccur, created a list of "six disturbing features . . . that bulk large in the immigration cases."<sup>369</sup> The six features are: (1) "[a] lack of familiarity with relevant foreign cultures"; (2) "[a]n exaggerated notion of how much religious people know about their religion"; (3) "[a]n exaggerated notion of the availability, especially in poor nations, of documentary evidence of religious membership"; (4) "[i]nsensitivity to the possibility of misunderstandings caused by the use of translators of difficult languages, . . . and relatedly, insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American, such as the Chinese"; (5) "[r]eluctance to make clean determinations of credibility"; and (6) "[a]ffirmances by the Board of Immigration Appeals either with no opinion or with a very short, unhelpful, boilerplate opinion, even when, as in this case, the immigration judge's opinion contains manifest errors of fact and logic."<sup>370</sup>

For the first feature, Judge Posner noted that "[d]ifferent religions attach different weights to different aspects of the faith. Falun Gong, remember, is not theistic; nor is it hierarchical. So far as appears, what is central is neither doctrine nor symbol, but the exercises."<sup>371</sup> For the second feature, there is a recognition that someone who does not know key facts about their religion will be suspect, but also an admission that even the most religious may know

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367. *Id.*; *Rizal v. Gonzales*, 442 F.3d 84, 90 n.7 (2d Cir. 2006) ("Indeed, even an individual who does *not* subscribe to a certain religion, but is nonetheless being persecuted on account of others' perception that he does, may well be able to establish a religious persecution claim under a theory of 'imputed religion . . . .'").

368. Sonntag, *supra* note 272, at 1023–25.

369. *Iao*, 400 F.3d at 533.

370. *Id.* at 533–35 (external citations omitted).

371. *Id.* at 533.

very little about certain aspects of their faith.<sup>372</sup> For the third feature, Judge Posner noted that “[a]n acephalous, illegal religious movement is particularly unlikely to issue membership cards.”<sup>373</sup> For the fourth feature, Judge Posner pointed out that behaviors that may be indicative of unreliability in one culture may be indicative of respect in another culture.<sup>374</sup> The fifth and sixth features speak directly to the IJ’s failure to create an opinion that is useful upon review.<sup>375</sup>

### C. *Canada*

Canada is also party to the 1951 Refugee Convention and the 1967 Protocol.<sup>376</sup> Canada’s Immigration and Refugee Protection Act (IRPA) implements the 1951 Refugee Convention and is the primary mechanism for management of Canada’s refugee system.<sup>377</sup> Canada’s refugee system consists of two parts: the Refugee and Humanitarian Resettlement Program for individuals “seeking protection from outside of Canada,” and the In-Canada Asylum Program for individuals making protection claims from inside Canada.<sup>378</sup> As part of the Refugee and Humanitarian Resettlement Program, two categories of applicants exist, and the category of “Convention Refugee Abroad Class” refers to individuals “who meet the definition of refugee” under the 1951 Refugee Convention.<sup>379</sup> Under the IRPA, a convention refugee is defined as:

[A] person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself[ves] of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear,

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372. *Id.* at 534.

373. *Id.*

374. *Id.*

375. *Id.* at 534–35.

376. See 1951 Refugee Convention, *supra* note 2, at 138; 1967 Protocol, *supra* note 245, at 268.

377. *Refugee Law and Policy: Canada*, LIBRARY OF CONGRESS, <https://www.loc.gov/law/help/refugee-law/canada.php> (last updated June 21, 2016) [hereinafter *Law and Policy: Canada*].

378. *Id.*

379. *Id.*

unwilling to return to that country.<sup>380</sup>

As in the U.S., an applicant must establish a well-founded fear of persecution.<sup>381</sup> Further, a nexus must be proven between the persecution and the protected ground, as indicated by the “by reason of” language present in the definition under Canadian law.<sup>382</sup> Thus, unlike the U.S., Canada strictly adopts the language of the 1951 Refugee Convention definition; however, there is inconsistency in its interpretation across different courts.

Where the U.S. looks to the intent of the persecutor, Canadian law takes various approaches, considering intent in some cases and the effect of the persecution in others.<sup>383</sup> In any event, a nexus must be shown, and the court must consider all of the 1951 Refugee Convention grounds—even if they were not raised by the claimant.<sup>384</sup>

Under Canadian law, “[f]reedom of religion includes the right to manifest the religion in public, or private, in teaching, practice, worship and observance.”<sup>385</sup> Further, much like in the U.S., individuals claiming asylum “cannot be asked to renounce their deeply held beliefs or refrain from exercising their fundamental [human] rights to avoid persecution and as a price to live in security.”<sup>386</sup>

*Yang* marked the first attempt by a superior court to delineate the scope of “religion” for the purposes of refugee law.<sup>387</sup> In this case, the Federal Court undertook the rare task of determining whether or not the applicant’s belief system fell within the ambit of “religion” under the 1951 Refugee

380. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 96 (Can.).

381. *Law and Policy: Canada*, *supra* note 378.

382. See IMMIGRATION & REFUGEE BD. OF CAN., *supra* note 311, at 4-1.

383. Compare *Nejad v. Canada (Minister of Citizenship & Immigration)*, [1997] F.C.J. 1168, para. 3–4 (Can.) (external citation omitted) (“[To] the extent that an agent of persecution intentionally plays upon or exploits the fact that a person suffers from a particular frailty or condition in order to cause harm, an act not normally or inherently persecutorial, may be transformed into an act of persecution. That is beautiful in theory, but who knows what is the intention of the persecutor? Who knows what is the particular knowledge of the persecutor? One must look at the act and the effect.”), with *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, para. 83 (“[t]he examination of the circumstances should be approached from the perspective of the persecutor”).

384. *Suvorova v. Canada (Minister of Citizenship & Immigration)*, [2009] F.C. 373, para. 27, 28 (Can.).

385. See IMMIGRATION & REFUGEE BD. OF CAN., *supra* note 311, at 4-5 (footnote omitted).

386. *Id.* at 4-3.

387. See generally *Yang v. Canada (Minister of Citizenship & Immigration)*, 2001 F.C. No. 1463, para. 10 (Can.).

Convention.<sup>388</sup>

The applicant, Yang, claimed that she feared that Chinese authorities would persecute her on the basis that she ascribed/adhered to the beliefs and practices of Falun Gong.<sup>389</sup> In supporting her claim that Falun Gong was a “religion” for the purposes of the Refugee Convention, she described the impact and meaning of Falun Gong to her.<sup>390</sup> She expressed that prior to discovering Falun Gong, she had been suicidal and that the practice had become “essential for her to cope with problems in her life.”<sup>391</sup> The applicant had appealed an earlier decision of the Immigration and Refugee Board, Convention Refugee Determination Convention (Board), who rejected the claim that Falun Gong constituted “a religion or an organization that cultivates religious beliefs.”<sup>392</sup>

The Federal Court began its analysis by recognizing that Canadian courts had not yet clearly defined the meaning of “religion” under the IRPA.<sup>393</sup> In light of this, the Federal Court considered a number of authorities, scholars, and international instruments for guidance, including the UNHCR Handbook.<sup>394</sup>

In delivering the judgment, Judge Dubé observed that

[t]he evidence shows that the applicant took up the practice of Falun Gong because she was depressed to the point of being suicidal. Through Falun Gong she recognized the true meaning of life, enriched her culture and improved her health. She said that following Falun Gong gave her spiritual trust and made her life happier. Finally, group practice is a key part of Falun Gong. Together, the participants can share information, encourage each other, and support each other “just like Christianity . . . if a person go to attend a church” [sic]. All these assertions of the applicant can be found in the transcript.<sup>395</sup>

The Federal Court further observed that any determination under the 1951

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388. *Id.* at para. 19.

389. *Id.* at para. 2.

390. *Id.* at paras. 2, 4.

391. *Id.* at para. 4.

392. *Id.* at para. 7.

393. *Id.* at para. 10.

394. *Id.* at paras. 10–18.

395. *Id.* at para. 25.

Refugee Convention “must be approached from the point of view of the persecutor since that is the motive that incites the persecution.”<sup>396</sup> Therefore, “[if] Falun Gong is considered by the Government of China to be a religion, then it must be so for the purposes of the instant claim.”<sup>397</sup>

The Federal Court held that the Canadian Immigration and Refugee Board had erred in holding that Falun Gong was not a religion under the 1951 Refugee Convention.<sup>398</sup> “The decision of the Board was set aside” and remitted back to the Board.<sup>399</sup> Ultimately, apart from placing emphasis on the persecutor’s view, the Federal Court’s discussion contributed little to the “religion” analysis.<sup>400</sup>

The meaning of the word “religion” in the context of refugee determination has also more recently been considered by the Supreme Court of Canada:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>401</sup>

As noted above, *Yang* marks one of the only cases to have specifically considered the meaning and scope of this convention ground. Beyond this, there is relatively limited guidance in the jurisprudence. The majority of the case law in this area turns to the credibility of the applicant. Canadian courts are also required to make credibility findings and do so by undertaking an evaluation by “assessing the applicant’s knowledge of religion and consistency of actions with the religion.”<sup>402</sup> Thus, similarly to the U.S.,

396. *Id.* at para. 19.

397. *Id.*

398. *Id.* at para. 26. The Federal Court also held that Falun Gong did not constitute a “particular social group”; however, this is beyond the scope of this article. *Id.*

399. *Id.* at para. 27.

400. *Id.* at para. 28.

401. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 39 (Can.).

402. *Id.*; see also UNHCR Handbook, *supra* note 254, at 130 (“Credibility is a central issue in religion-based refugee claims. . . . [K]nowledge tests need to take account of individual

applicants' knowledge of their religion may impact whether Canadian courts determine an applicant is a 1951 Refugee Convention refugee and eligible for protection. In either case, inconsistencies have emerged as to the standard of knowledge or understanding that must be held.

For instance, in *Ullah v. Canada*,<sup>403</sup> Ullah was a Pakistani citizen and member of the Shia Muslim minority, and the Board determined that he was not a refugee under the 1951 Refugee Convention.<sup>404</sup> The Board made a negative credibility finding based on the applicant's lack of "knowledge of the principle doctrines of the Shia religion," which included his lack of knowledge regarding the key figures of the religion.<sup>405</sup> Additionally, the Board determined he was not a practicing Shia, and that he had not had problems with the Sapah-e Sahaba of Pakistan or the police.<sup>406</sup> However, on appeal, it was determined that the Board applied "too high a standard to the Plaintiff's knowledge of his religion" and may have "erroneously expected the answers of the Applicant to questions about his religion to be equivalent to the Board's own knowledge of that religion."<sup>407</sup> The Board also failed to consider other 1951 Refugee Convention grounds for protection.<sup>408</sup> The application for judicial review was approved, and the case was remitted to the Board for a new hearing in front of a different panel.<sup>409</sup>

In a more recent case, an Iranian citizen claimed fear of persecution based on his conversion to Christianity, and his fear materialized upon learning that police had gone to his home and searched it.<sup>410</sup> The applicant testified about his conversion to Christianity, the steps he took, why he chose Christianity, the classes he took, and the locations of churches he attended.<sup>411</sup> The Refugee Protection Division (RPD) determined that he lacked knowledge about various Christian ceremonies and also questioned the fact that he had not been practicing his religion while visiting family members in Canada.<sup>412</sup> According

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circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex.").

403. *Ullah v. Can* [2020] CanLII 16589 at 2 (F.C.).

404. *Id.* at para. 1.

405. *Id.* at para. 2.

406. *Id.* at para. 3.

407. *Id.* at para. 11.

408. *Id.* at para. 12.

409. *Id.* at para. 14.

410. *X (Re)*, [2017] CanLII 87461, paras. 8–9 (C.A. I.R.B.).

411. *Id.* at para. 43.

412. *Id.* at para. 38.

to the applicant's testimony, he had not practiced his religion while in Canada because his family members were Muslim and did not practice Christianity.<sup>413</sup> Additionally, the Refugee Appeal Division (RAD) determined, with regard to the applicant's knowledge, "it is normal that his knowledge would be more limited as he comes from Iran, which is a very closed environment that is focused on Islam and where conversion to that religion is severely punished."<sup>414</sup> According to the RAD, the RPD erred in its conclusion that the applicant was not Christian,<sup>415</sup> and "[t]he appellant demonstrated on a balance of probabilities that he converted to Christianity by being baptized in Montreal. He is facing a serious possibility of being persecuted because his baptism is evidence of his conversion, which is punishable by death."<sup>416</sup>

In another case, an applicant having sufficient knowledge of his claimed religion did not result in a finding that the applicant was a 1951 Refugee Convention refugee and deserved protection.<sup>417</sup> An Iranian citizen claimed refugee protection based on a well-founded fear of persecution due to his conversion to Mormonism.<sup>418</sup> The applicant claimed that he converted to Mormonism in Iran, tried to spread the religion, held meetings, photocopied and distributed the Book of Mormon, and changed his name.<sup>419</sup> He went into hiding once he learned that police were looking for him, and he claimed his friends who had also converted were arrested, detained, and murdered.<sup>420</sup> While the applicant had knowledge about the "beliefs, prohibitions, and voluntary obligations" of Mormonism, the Board discounted his testimony because such "information is accessible to anyone on the internet."<sup>421</sup> The fact that others testified that the applicant did not drink wine also was not persuasive because the same could be said of Muslims.<sup>422</sup> Despite the fact the applicant had some knowledge of Mormonism, the panel ultimately determined that his conversion was one of convenience made to benefit from

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413. *Id.* at para. 45.

414. *Id.* at para. 46.

415. *Id.* at para. 53.

416. *Id.* at para. 76.

417. *See X (Re)*, [2005] CanLII 60021, para. 7 (C.A. I.R.B.).

418. *Id.* at para. 2.

419. *Id.* at para. 4.

420. *Id.* at para. 5.

421. *Id.* at para. 20.

422. *Id.* at para. 21.

refugee protection.<sup>423</sup>

In some cases involving refugee claims on the ground of religious persecution, it is not necessarily the applicant's knowledge that causes problems. Sometimes, it is the immigration officer's method of applying the law in a specific case. For example, in *Zhang v. Canada*,<sup>424</sup> a Chinese citizen who converted to Christianity while living in China learned that his pastor had been arrested, and because he feared he would be arrested if he returned to China, he filed for asylum.<sup>425</sup> The applicant's knowledge regarding general Christianity was tested, and he knew some things but not others.<sup>426</sup> The RPD member concluded that while he had some knowledge, "that knowledge does not necessarily mean he is a genuine practicing Christian."<sup>427</sup> While the applicant produced letters from pastors and a certificate confirming his baptism in Canada, the RPD member determined that these items could "only attest to the claimant's participation in church activities[;] they do not attest to his motivation."<sup>428</sup> The RPD member determined that the applicant was not a Christian and that his claim was not made in good faith;<sup>429</sup> however, on appeal, the court vacated the decision and remanded it for review in front of a different panel.<sup>430</sup> The court determined that the RPD member had conducted a subjective analysis of the applicant's knowledge of Christianity.<sup>431</sup> The court, in rejecting this approach, relied on a decision by the Supreme Court, noting "it 'is not the role of [the] Court to decide what any particular religion believes.'"<sup>432</sup> The court determined that the RPD member's "finding of implausibility that a certain person is not of a certain faith because he or she does not meet a certain subjective standard set by a decision-maker is indefensible as a matter of fact."<sup>433</sup> Furthermore, the RPD member's method of questioning was "indefensible as a matter of law."<sup>434</sup> Because "knowledge

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423. *Id.* at para. 38.

424. [2012] F.C. 503, para. 6 (Can.).

425. *Id.* at para. 3.

426. *Id.* at para. 4.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at para. 28.

431. *Id.* at paras. 6, 13, 18.

432. *Id.* at para. 10 (citing *Ross v. New Brunswick Sch. Dist. No. 15*, [1996] 1 S.C.R. 825, para. 70).

433. *Id.* at para. 16.

434. *Id.* at para. 17. The RPD member's questions can be seen in paragraph 7 of the opinion. *See*

of religious dogma[] does not equate to holding religious faith” and because the RPD member did not properly consider the totality of the circumstances, the decision was vacated.<sup>435</sup>

In yet another case, the RAD characterized as “fundamentally flawed” a decision of the RPD that a Chinese citizen had no reason to fear persecution in China due to her Christian beliefs.<sup>436</sup> The applicant joined a house church after being forced to undergo an abortion to comply with Chinese family planning regulations.<sup>437</sup> The church was raided, after which she fled and learned that agents had come to her home to determine her whereabouts.<sup>438</sup> The applicant preferred the underground church—rather than the state-sanctioned church—because she believed the state-sanctioned church “put the government first whereas her congregation puts Jesus Christ first.”<sup>439</sup> The RPD had concerns about her credibility after her interview, but continued the process and ultimately determined that her “understanding of Christianity was not sophisticated enough that her religious needs could not be met within the framework of the state-sanctioned church structure, her convictions being limited to a belief in God and a belief in the role of Jesus as Savior.”<sup>440</sup> As a result, the RPD found that she had no reason to fear persecution in China.<sup>441</sup> This decision was set aside because the RPD accepted her convictions as sincere but entirely “discount[ed] the subjective aspect of religious belief” by essentially holding that “the legitimacy of a person’s belief can and should be measured against his or her level of religious sophistication.”<sup>442</sup>

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*id.* at para. 7.

435. *Id.* at paras. 23, 27.

436. *Zhu v. Canada*, [2008] F.C. 1066, paras. 8, 12 (Can.).

437. *Id.* at para. 4.

438. *Id.*

439. *Id.* at para. 5.

440. *Id.* at para. 8.

441. *Id.*

442. *Id.* at para. 17. This is consistent with the Supreme Court’s view that “claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.” *Id.* at para. 16 (citing *Syndicat Northcrest v. Amselem*, [2004] S.C. 47, para. 43 (Can.)).

*D. Australia*

In contrast to the U.S. and Canada, more detailed consideration has been given by Australian courts as to the meaning of “religion” in asylum determinations; however, it has yet to be precisely defined. In *Church of the New Faith v Commissioner of Pay-Rolls Tax (Vic)*, the question before the Australian High Court was whether Scientology constituted a religion.<sup>443</sup> Although this was for the purpose of taxation law, the court set out a number of clear principles which have subsequently been cited by courts in the refugee domain.<sup>444</sup>

The hallmarks of a “religion” as set out by Judge Wilson and Judge Deane in that case are summarized in *Butterworths Australian Legal Dictionary*:

A system of ideas and practices, usually involving a belief in the supernatural . . . . There exists no formularised legal criterion, whether of inclusion or exclusion, for determining whether a given system constitutes a religion. However, indicia derived from empirical observation of accepted religions can be used as guidelines, some of which are: that there is belief in the supernatural; that the system of ideas relates to the place of humanity in the universe and its relationship with the supernatural; that the ideas are accepted by adherents as requiring the observation of particular codes of conduct; that the adherents constitute an identifiable group; and that they see the system as constituting a religion.<sup>445</sup>

Further, the Court made clear that these guidelines are simply “aids” in determining “whether a particular collection of ideas and/or practices should

443. (1983) 154 CLR 120, 129 (Austl.).

444. See *id.* at 135; see also, e.g., *Minister for Immigration and Multicultural Affairs v Darboy* (1998) 52 ALD 44, 50 (quoting Judge Mason and Judge Brennan in *Church of the New Faith v Comm’r of Pay-Rolls Tax (Vic)* (1983) 154 CLR 120) (recounting that the Federal Court cited, with approval, the following passage from the High Court’s judgment: “The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself. Conversely, unless there be a real connection between a person’s belief in the supernatural and particular conduct in which that person engages, that conduct cannot itself be characterized as religious.”).

445. *Religion*, BUTTERWORTHS AUSTRALIAN LEGAL DICTIONARY 1007 (1997) (referring to *Church of the New Faith v. Comm’r of Pay-Rolls Tax (Vic)* (1983) 154 CLR 120); see *Church of the New Faith*, 154 CLR at 136 (Mason, A.C.J.; Brennan, J.); *Church of the New Faith*, 154 CLR at 151 (Murphy, J.); *Church of the New Faith*, 154 CLR at 174 (Wilson and Deane, JJ.).

be [] characterised as ‘a religion,’” and ultimately the weight to be accorded to them will differ depending on the situation in which the issue arises.<sup>446</sup>

In *Wang v Minister for Immigration and Multicultural Affairs*, the Full Court of the Federal Court considered the meaning of “religion” for the purposes of Article 1A of the 1951 Refugee Convention.<sup>447</sup> In delivering the main judgement,<sup>448</sup> Judge Merkel, with whom Judge Gray agreed, observed that for the purposes of the Convention, “the Courts have generally taken a broad view of what constitutes the practice of religion.”<sup>449</sup> Further, according to Judge Merkel<sup>450</sup>:

It is clear that there are two elements to the concept of religion for the purposes of Art 1A(2): the first is as a manifestation or practice of personal faith or doctrine, and the second is the manifestation or practice of that faith or doctrine in a like-minded community. I would add that that interpretation is consistent with the commonly understood meaning of religion as including its practice in or with a like-minded community.<sup>451</sup>

In the same case, Judge Wilcox agreed that the concept of religion was made up of these two central elements.<sup>452</sup> He went on to acknowledge that whilst “[s]ome religious rites may be privately practiced by individual believers; [] the major world religions, at least, also require or encourage their adherents to participate in communal rites or practices.”<sup>453</sup> Moreover, “the form and content of [such] rites and practices is often a matter of enormous importance to adherents of a particular faith, as is their system of governance.”<sup>454</sup>

The court ultimately held that the Tribunal had failed to acknowledge the second element, which is the community manifestation of religious faith, and

446. *Church of the New Faith*, 154 CLR at 174.

447. [2000] FCA 1599, ¶ 69 (considering the meaning of “religion” for refugee purposes).

448. *Id.*; see also *Liu v Minister for Immigration & Multicultural Affairs* [2001] FCA 257, ¶¶ 19–22.

449. *Wang*, (2000) 105 FCR at 563 ¶ 69.

450. *Id.* at ¶¶ 73, 79.

451. *Id.* at ¶ 81.

452. *Id.* at ¶ 5.

453. *Id.* at ¶ 7.

454. *Id.* at ¶ 8.

therefore adopted an “unduly narrow interpretation” of the term “religion.”<sup>455</sup>

This above interpretation of “religion” by Judge Merkel was subsequently upheld by the Federal Court, in *W244/01A*.<sup>456</sup> In this case, the applicant, an Iranian male, had claimed that he was a non-Muslim who believed in God but had not told anyone about this.<sup>457</sup> In delivering his judgment, Judge R.D. Nicholson appeared to have taken the two central elements as both essential, stating:

It follows that, absent any manifestation or practice of the applicant’s faith or doctrine in a like-minded community, there was no basis on which he could be found to have a well-founded fear of persecution on the Convention ground of “religion.” The Tribunal was therefore correct to rely on the absence of such communal manifestation for reaching its conclusion there could not be any well-founded fear of persecution on the ground of the applicant’s religion.<sup>458</sup>

Judge R.D. Nicholson concluded that:

As to the applicant’s contention that his faith had been manifested—not by positive conduct—but by non-attendance at Muslim prayers, that is not a manifestation of the requisite type because it does not occur “in a like-minded community” . . . . As I read the views of the Full Court, however, manifestation by practice of abstention from Muslim prayers alone will not be a manifestation or practice of the applicant’s religion unless there first be the presence of the faith or doctrine in a like-minded community. Although therefore it cannot assist the applicant, I note that JC Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) at pp 145–146 considers “an individual’s right to religion implies the ability to live in accordance with a chosen belief, including participation in or abstention from formal worship and other religious acts, expression of views, and the ordering of personal behaviour.”<sup>459</sup>

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455. *Id.* at ¶ 10 (Gray, J.); ¶¶ 20, 101 (Merkel, J., with whom Gray, J. agreed).

456. *W244/01A v Minister for Immigration & Multicultural Affairs* [2002] FCA 52 ¶ 35.

457. *Id.* at ¶ 6.

458. *Id.* at ¶ 36.

459. *Id.* at ¶ 37.

As to the Tribunal's conclusion that the applicant's commitment to his beliefs was not such as would lead him into future conduct giving rise to a likelihood of persecution for the Convention reason of his religion, the Tribunal had evidence before it to justify the conclusion it reached. Further, it was a finding with which this Court cannot interfere or remake.<sup>460</sup>

As to the issue of credibility, testing an applicant on their knowledge or understanding of the religion in question is considered a legitimate technique in order to determine whether that belief has been sincerely adopted.<sup>461</sup>

In *Wang*, despite the Tribunal making a favorable finding that the applicant possessed "rudimentary knowledge" of Christianity,<sup>462</sup> the court expressed concerns as to the emphasis on an applicant's doctrinal knowledge of their claimed religion, stating:

The RRT receives many applications from persons who seek protection visas, claiming well-founded fear of being persecuted by reason of religion. It is inconceivable that every member of the RRT is properly equipped to assess each such applicant on the basis of the applicant's knowledge of the faith that he or she professes. Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion.<sup>463</sup>

In *MZZJO v Minister for Immigration and Border Protection*, the court emphasized that "what must be undertaken is questioning of that particular

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460. *Id.* at ¶ 38.

461. *See, e.g., Minister for Immigration & Citizenship v SZOCT* (2010) 189 FCR 577, 579–80 [6]–[10] (discussing the visa applicant's knowledge of Christianity); *Minister for Immigration & Citizenship v SZLSP* (2010) 187 FCR 362, 375 [39] (discussing the respondent's understanding of Falun Gong doctrine); *Mashayekhi v Minister for Immigration & Multicultural Affairs* (2000) 97 FCR 381 (discussing the applicant's conversion to Catholicism in Iran); *SBC v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 129, [45]–[49] (discussing the appellant's claim that he had become a practitioner of Falun Gong).

462. *Wang v Minister for Immigration & Multicultural Affairs* (2000) 105 FCR 548, 551 [15] (Gray, J.).

463. *Id.* at 552 [16] (Gray, J.).

individual's belief rather than the application of some standardized or assumed level of knowledge."<sup>464</sup> Nevertheless, inconsistencies have arisen as to the standard of knowledge an applicant must possess. For example, in *SZLSP v Minister for Immigration and Citizenship*,<sup>465</sup> the tribunal rejected the applicant's claim to be an adherent of Falun Gong on the basis that the applicant's knowledge of Falun Gong was less than that which would be expected of a genuine practitioner. The court held that the tribunal erred in applying this common knowledge standard.<sup>466</sup> In contrast to this, in *SZONH v Minister for Immigration and Citizenship*,<sup>467</sup> the court found no error in the tribunal rejecting the applicant's claim to be a genuine Christian on the basis of the common knowledge standard:

An evaluation of an internally held attribute—such as an opinion or a belief—is likely to involve questions about how the individual understands that belief, what it means to that individual, how she or he manifests that belief. Testing a claim to hold a particular political opinion may need to be undertaken in this way and the same is true of a claim to hold a religious belief. There is no immunity from scrutiny simply because the Convention ground is religious belief. What the authorities have pointed to, however, is a need for the questioning to be rationally capable of assisting a decision whether the person's claim to hold the belief is genuine or not.<sup>468</sup>

Ultimately, the Federal Court has cautioned that “holding a religious faith is a core, and highly personal, part of an individual's identity,” and that it is a very serious finding for a decision maker to find that an individual does not hold such a faith.<sup>469</sup>

## V. PROPOSED DEFINITION

From the above, it follows that there is no settled definition or meaning of “religion” for the purposes of the 1951 Refugee Convention. Indeed, in the

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464. *MZZJO v Minister for Immigration & Border Protection* [2014] FCR 80, [47].

465. [2012] FCA 451, [35].

466. *Id.* at [44].

467. (2012) FCR 212 [28]–[29].

468. *Id.* at [28]–[29].

469. *See SZVTC v Minister for Immigration and Border Prot.* [2018] FCA 824, [31].

United States, the concept has not even received considered or deep discussion by courts or jurists. This is unacceptable from the perspective of the rule of law and also pragmatically, given the often life-defining importance associated with determinations regarding an individual's right to asylum.

It is accepted that the concept of religion is complex and multi-faceted; however, this does not undermine the need to establish a workable and clear definition of the term. Religion, like many concepts, can be context sensitive. Accordingly, it follows that in ascribing a meaning to this term, it is important to contextualize it by reference to the nature and scope of the relevant legal instrument document. It is for this reason that the discussion in Part II of this article regarding the history and background of the 1951 Refugee Convention is of considerable importance.

As has been noted, the 1951 Refugee Convention was drafted and implemented against the backdrop of large numbers of displaced people who had been forced from their homeland by destabilizing events typically in the nature of war or wide-ranging internal persecution. The other defining backdrop to the 1951 Refugee Convention was a reluctance by other countries to absorb large numbers of displaced people and a desire to inject a degree of order and predictability into this process. At the core of the 1951 Refugee Convention is the desire to provide desperate people who have been forcibly displaced from their homeland with the opportunity to forge a new life in another country. Logically, this aim would be undercut or compromised if arbitrary or technical meanings were ascribed to the 1951 Refugee Convention grounds, which would have the effect of unduly narrowing the pool of people who could qualify for protection.

As we have seen, the instruments underpinning the 1951 Refugee Convention and the UNHCR Handbook, which elaborate on the meaning of religion, provide for an expansive definition which avoids arbitrary and unnecessary qualifications and limitations. This indeed conforms with the wider meaning which is often attributable to the concept of religion in the context of other areas of the law.

To this end, the Australian High Court has had reason to carefully consider the nature and meaning of religion in the context of constitutional law and this has informed the interpretation of the 1951 Refugee Convention in Australia.

Of particular relevance is the meaning ascribed in *Wang*, where the court emphasized that there are two key aspects to the meaning of religion under

the 1951 Refugee Convention.<sup>470</sup> The first is a manifestation of a practice based on personal faith and the second is the manifestation of that practice in a like-minded community.<sup>471</sup> Key to this definition is that there is no requirement that the faith should involve any particular types of beliefs, attitudes, or thoughts. Moreover, there is no minimum number of other individuals that are required to form a community that also manifests the practice of a relevant nature.

However, a core aspect of a religion is that the belief is at least partially dependent upon faith. If all of the key beliefs held by an individual are verifiable by rational inquiry, then it is unlikely that they can constitute a religion. That said, there are no restrictions regarding the key beliefs which are the objects of the faith. The central aspect of a religion is belief in an ideology that involves an element of faith, which is shared by some other people in the community—although there is no minimum number of people that need to comprise such a community.

In addition to this, religion also often is part of a person's identity or way of life, but this is not essential in every case—it can merely be a core belief held by an individual. The concept of a religious belief is wide-ranging and should include theistic beliefs and convictions about the divine or spiritual aspect of humankind. It should not require any particular substantive ideals underpinning the conviction. Thus, practices such as Falun Gong and even Scientology are religions. There are a number of ways in which people can establish that religion is a key aspect of their identity, including by the attire they wear, the food they consume, and ceremonies in which they participate. Thus, while most religious adherents engage in some type of specified conduct or behavior, for example praying or attending a mass, the fact that an individual does not participate frequently in this conduct does not necessarily negate the fact that their belief system does not constitute a religion.

Further, as we have seen, many determinations regarding a person's eligibility for refugee protection pursuant to the religion ground revolve around the individual's credibility and, in particular, whether or not they are genuinely adherent of the religion in question. Religions, as we have seen, often represent a complex set of values and beliefs, which are often equivocal and subject to a fair degree of interpretation—both in terms of the content of

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470. *Wang v Minister for Immigration & Multicultural Affairs* (2000) 105 FCR 548, 565 [81] (Merkel, J.).

471. *Id.*

the religion and the types of rituals and behaviors consistent with the religion. There is also often ambiguity relating to the core behaviors which are required of any religion. Thus, it is often misguided for a court or tribunal to require any individual to have a minimal level of understanding of aspects of a religion or to demonstrate a threshold of behavioral characteristics consistent with a religion, in order for the individual to prove that they belong to a certain religion. It follows that as a general rule, credibility issues regarding membership or belonging to a certain religion should be interpreted in favor of the applicant.

It should also be accepted that persecution on the basis of religion should also extend to persecution where the individual does not ascribe to a particular religion or are wrongly believed to practice a certain religion. The reason for this is that the motivating force for the persecution is the religion, albeit of the persecutor.<sup>472</sup>

## VI. CONCLUSION

The world is experiencing an unprecedented crisis in terms of the amount of displaced people that have been forcibly moved from their country of origin.<sup>473</sup> There is no overarching solution for dealing with this problem. It is clear that most countries, and in particular developed countries, have no desire to absorb large numbers of displaced people. Accordingly, developing countries are forced to disproportionately bear the burden of accommodating millions of displaced people. The absorption into these other countries is not systematic or planned, but rather haphazard, and in most circumstances, there are insufficient resources to properly accommodate asylum seekers.

There is no overarching plan by developed countries to increase their intake of displaced people. This is regrettable, but it reflects the current reality and one which is unlikely to change in the foreseeable future. As a result of this, current mechanisms through which displaced people can obtain asylum in other countries assume even greater importance. The 1951 Refugee Convention remains the main and only vehicle through which displaced people can secure asylum in countries that have ratified the 1951 Refugee Convention, such as the United States. The number of people who can enter the United States pursuant to the 1951 Refugee Convention is of course

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472. See UNHCR Guidelines, *supra* note 289, at 3.

473. See GLOBAL TRENDS 2018, *supra* note 1.

limited by quotas and policies by the receiving country. To this end, the United States has imposed drastic reductions in the amount of people who can enter the country as refugees. Although the amount of people who can enter as asylees remains high, in reality, however, this is significantly limited as a result of slow processing times of such applications and the unwillingness of the United States government to devote meaningful resources to administering such applications.

Thus, refugee places in the United States are now scarcer than at any time in recent history. It follows that in assessing the eligibility of asylum seekers, decisions must be coherent, consistent, and jurisprudentially sound. As we have seen, one of the key requirements for refugee status is that the person fears for their safety on the basis of one of five discrete grounds. One of the most important grounds is religion. This is especially significant given that many disruptive events, such as war, which results in the forcible displacement of large numbers of people, revolve around different religious perspectives. Indeed, persecution on the basis of religion is arguably the most common reason for large flows of people.

Despite the importance of religion as a 1951 Refugee Convention ground, there has been relatively little scholarly and judicial consideration of the meaning of the term in the United States. This obviously increases the likelihood that flawed decisions will be made regarding an asylum seeker's eligibility for protection in the United States. In this article, we have argued that religion in the context of the 1951 Refugee Convention should be interpreted broadly, in a manner which is consistent with the history of the Convention and with a meaning attributed to the term in the key documents underpinning it.

Thus, for this ground to be invoked, it is not necessary for asylum seekers to establish that they are part of a mainstream religious ideology or that the ideology has any particular beliefs or convictions. Moreover, asylum seekers should not be required to establish that they participate in any practices which are tangible displays of a commitment to a religion. The central aspect of a religion is belief in an ideology which involves an element of faith, which is shared by some other people in the community—although there is no minimum number of people who need to comprise such a community. In addition to this, religion also is often part of a person's identity or way of life, but this is not essential in every case—it can merely be a core belief held by an individual. The concept of a religious belief is wide-ranging and should include theistic beliefs and convictions about the divine or spiritual aspect of

human kind. It should not require any particular substantive ideals underpinning the conviction. Thus, practices such as Falun Gong and even Scientology are religions. There are numerous ways in which people can establish that religion is a key aspect of their identity, including by the attire they wear, the food they consume and ceremonies in which they participate. This means that in order to establish that a person is a member of a certain religion, it is not necessary for him or her to establish a deep understanding of the core elements of the religion or show tangible conduct consistent with the principles of the religion. Moreover, religious persecution can arise where an individual is targeted for not belonging to a religion or because they are wrongly believed to practice a certain religion.

The adoption of the above definition will clarify this area of law in a way which is harmonious with the objectives behind the 1951 Refugee Convention and enhance the integrity of decision making in this area of law. It will also increase the number of people who can successfully claim asylum in the United States and other countries that are signatories to the 1951 Refugee Convention. This is an objective that is more important now than at any time in recent human history.

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