

Spring 5-18-2019

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## Recommended Citation

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# THE NARROWING ROAD TO ASYLUM:


How Limitation and Exclusion Have Shaped the  
1951 Convention Refugee in the Modern Age



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## Abstract

When the United Nations defined the word “refugee” at the 1951 Convention on Refugees, the concept of asylum was very different then it is in the modern day. Although new technology has made it easier than ever for people to move around the world and refugee numbers have climbed to over 25 million<sup>1</sup> in recent years, the central question remains the same: who receives international protection from persecution? Although many national and international protections have been put in place to help vulnerable migrant groups, the changing and ever-expanding landscape of migration has caused a protection gap between these modern asylum seekers and the documents historically written for their protection. This gap is the result of a gradual shift in who receives asylum, occurring at both the international and national level. It is caused by the expansion of national policy regarding asylum and the language used by organizations such as the United Nations High Commissioner on Refugees (UNHCR) in policies which address refugees and asylum seekers. Using a variety of case studies, I argue that although the core definition of refugee has remained relatively unchanged since the document’s inception, it has failed to protect modern asylum seekers in a complete and effective way because of subtle and gradual shifts in the interpretation of the document and the emergence of restrictions on who receives asylum at a national level. I support this argument by tracking the way that the definition of refugee has been interpreted in recent history in order to better accommodate rising flows of asylum seekers and to support the motivations of national state actors. I further argue that this is negatively impacting the level of protection that refugees receive.

KEY WORDS: UNHCR, refugee, asylum, definition, 1951 Convention

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<sup>1</sup> United Nations, “Figures at a Glance,” UNHCR, June 19, 2018, <https://www.unhcr.org/en-us/figures-at-a-glance.html>.

## Introduction

*“A kind of schizophrenia seems to pervade Western responses to asylum seekers and refugees; great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the state where they could receive its protection.” - Matthew J Gibney<sup>2</sup>*

Asylum, or refugee status, has its roots in the aftermath of World War II. It was a concept that was laid forth in 1951 to protect people who were fleeing war or violence in their home country. In the 1951 Convention on Refugees, a refugee is defined as follows:

A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. The Convention is both a status and rights-based instrument and is under-pinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement.<sup>3</sup>

In the time that has passed since the Convention, this definition has prevailed as a widely-used definition of refugee, with a temporal modification thanks to the 1967 Protocol relating to the Status of Refugees. The Protocol removed the limitations on asylum that were laid forth in the original Convention, by expanding the definition of refugee to include migrants who were not a direct result of World War II. This further cemented the document and the UNHCR as a cornerstone of refugee protection. However, in recent years, it seems that nation-states have taken measures to again narrow this path to asylum for a variety of reasons, including being unable or unwilling to accommodate refugees due to national interest.

## Research Question

This definition has been further supplemented by the policies put into place on the

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<sup>2</sup> Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge U.P., 2005).

<sup>3</sup> United Nations, “The 1951 Convention on Refugees,” July 28, 1951.

national level to protect refugees. These additions often either expand or restrict the definition set forward by the Convention and Protocol. Although many of the countries creating national-level policy are signatories of the 1951 Convention, and even use excerpts from the document in policy, the Convention itself is not a document that can be easily enforced on an international scale. Because of the structure of the UNHCR as an international organization, it is dependent upon the cooperation of nation-state actors, who are not obligated to comply with the suggestions of the UNHCR regarding asylum and refugees. It is important here to note that the use of the word “asylum” in this article is a broad term that describes the protection from persecution in ones’ home country. “Asylum” will be used to describe both the protection that refugees and asylum seekers receive. However, eligibility for refugee status primarily controlled by the UNHCR, whereas eligibility to petition for asylum is handled at the national level. Despite this separation, many countries will use the Convention definition of refugee in national-level policy. For example, the United States used the Convention definition in the Refugee Act of 1980, which addresses asylum seekers at US borders.<sup>4</sup> In this way, the United States makes this UNHCR definition enforceable at the national level. At the international level, it is harder to enforce. The UNHCR relies heavily on the concept of “burden-sharing” when it comes to protecting refugees. According to migration scholar Alexander Betts, “asylum can be defined as the obligation that states have toward refugees who reach their territory; burden-sharing represents the obligation that states have toward refugees in the territory of other states, whether to financially support them or to resettle some of them on their own territory.”<sup>5</sup> However, burden-sharing is not as prevalent when it comes to asylum seekers, who are given refugee status at the national level. In many cases, states will pay lip-service to the goals of the UNHCR and

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<sup>4</sup> *Refugee Act of 1980*. 18 Mar. 1980, [www.archivesfoundation.org/documents/refugee-act-1980](http://www.archivesfoundation.org/documents/refugee-act-1980).

<sup>5</sup> Alexander Betts. *The Normative Terrain of the Global Refugee Regime*, 2014. (363).

the Refugee Convention, but will remain unmotivated to allow more asylum seekers to their borders. What ends up playing out is a delicate balance between this idea of “burden-sharing” and that of state sovereignty. Countries must serve as a bridge to narrow the gap between the needs of refugees and those of the state. States assert their sovereignty by having full control of their borders and the people who are permitted to enter the country. For this reason, many states will write up supplementary documents that support their particular national needs and motives that further limit the definition of a refugee.

In the first section of this article, I review the literature on naming and interpretation in the refugee regime. Later, I situate my own research in a theoretical framework that looks at the significance of language. In part three, I present my methods for research and examine illustrative case studies. Finally, I present a discussion of the core findings.

## **Literature Review**

Migration studies is an interdisciplinary field and as such has a wide array of lenses that can be used to analyze data on migrants. For my research, I look at migration policy, specifically within the refugee regime, through the lens of national level policy and language interpretation to see how these factors affect the aid and protection of vulnerable migrants. In order to do this, I explore the literature on language and refugees to better understand the way that language interpretation can have a profound impact on protection. I also examine research on how to update the classification of refugees for the modern age. These articles highlight the interdisciplinary nature of migration studies by looking at the various ways that language and its application can impact refugee policy and the protection of migrants. The literature on refugees and language serves as a foundation for asking how the definition of the refugee has been malleable over time. The work of scholars researching and writing in this area provide a baseline

for how the modern refugee landscape has affected the perception and, most importantly, the protection of refugees. However, gaps remain, including the need for a more specific look at how the 1951 Convention definition specifically has been gradually molded over time to fit the ever-changing needs of both receiving countries and the UNHCR.

These articles allow readers to see how language usage infiltrates every part of refugee protection. I hope to build on this wide base and offer a vision for the future, even if a durable solution may not be plausible at this moment. It is imperative to understand the importance of language and interpretation in any policy, but especially policies that define a person's being and protect vulnerable people in a time of need.

Language is of utmost importance when it comes to protection that migrant groups receive. It is what guarantees the protection of vulnerable groups who are fleeing persecution. Therefore, it is imperative that the ways these protections are defined are consistent and regulated. In "More Labels, Fewer Refugees," author Roger Zetter traces the "formation, transformation and politicization of the label refugee."<sup>6</sup> He argues that the transformation of the label takes place more and more often at the national level. I agree with the argument that now more than ever, states are able to mold the definition of refugee in order to suite their national interests, but I disagree with Zetter's claim that this is a recent phenomenon. Rather, it is a cumulation of subtle, gradual shifts in language and interpretation, combined with national-level policy that has transformed the label of refugee. Andrew E. Shacknove further argues the idea that although many nation-states use the 1951 Convention definition of the refugee, this does not

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<sup>6</sup> R. Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization," *Journal of Refugee Studies* 20, no. 2 (2007): pp. 172-192, <https://doi.org/10.1093/jrs/fem011>.

mean that the use of this definition is consistent across the globe.<sup>7</sup> I hope to take this argument to the next step, by tracing the ways in which this same definition of refugee has been used by various nation-states, while yielding profoundly different results due to the way that the definition is interpreted and supplemented by national policy.

While most can agree that the definition of refugee has changed and evolved over time, some scholars suggest that we live in an era where “refugee status” is not as useful a categorization as it once seemed. Dr. Georgia Cole questions the value of refugee status, asking not only how the label has changed in recent history, but how that reflects “UNHCR’s profound inability to deliver on its mandated responsibilities vis-à-vis solutions.”<sup>8</sup> Cole also writes that the stigma of refugee status has made it less desirable over the years. I have to agree with Cole’s analysis of the UNHCR, but I do not believe that this shift is accurately attributed to the stigma surrounding refugee status. I do not believe that asylum seekers have the space to think about stigma and status. It is a status of survival, where migrants leave their home countries involuntarily and use asylum as a way to protect themselves from having to return.

B.S. Chimni’s “The Meaning of Words and the Role of UNHCR in Voluntary Repatriation” also examines how definitions are changing in the UNHCR. According to the author, the line between “voluntary repatriation” and “involuntary repatriation” has been blurred over the years until migrants have been “forced to voluntarily” migrate, in this case, back to their home country.<sup>9</sup> This is because of the mass numbers of migrants that were applying for status at

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<sup>7</sup> Andrew E. Shacknove, “Who Is a Refugee? \*,” *International Refugee Law*, 2017, pp. 163-173, <https://doi.org/10.4324/9781315092478-7>.

<sup>8</sup> Georgia Cole, “Beyond Labelling: Rethinking the Role and Value of the Refugee ‘Label’ through Semiotics,” *Journal of Refugee Studies* 31, no. 1 (2017): pp. 1-21, <https://doi.org/10.1093/jrs/fex021>.

<sup>9</sup> B. S. Chimni, “The Meaning of Words and the Role of UNHCR in Voluntary Repatriation” *International Journal of Refugee Law* 5, no. 3 (1993): pp. 442-460, <https://doi.org/10.1093/ijrl/5.3.442>.



one time. The definitions of these words changed slowly over time until the protection of the migrants was no longer the top priority. Instead, it was to return migrants to their home countries “voluntarily” (or rather, forced voluntarily). While it seems that “voluntary” and “involuntary” should be complete opposites, in the world of migration politics, it can be a lot harder to distinguish whether a migrant has voluntarily or involuntarily migrated, or whether they have been forced into one category or another at any point in their journey. My research hopes to similarly point out the weaknesses in refugee status and its transformation throughout the years, but I continue to stand by the value of asylum and refugee status. Although I highlight the ways in which refugee status has changed, I do not believe that it is outdated. In my research, I hope to point out the ways in which refugee status has changed in the modern age and the consequence on protection, while acknowledging its importance in the global system.

So how can refugees be redefined so that sufficient protection is given to all groups of vulnerable migrants? In his book *Survival Migration*, Alexander Betts suggests that because of the new and ever-changing reasons that people become refugees, it is necessary to expand the definition to protect any person fleeing basic rights deprivation. He calls this category of migrants “survival migrants.”<sup>10</sup> This category further pushes states to recognize that migration is not black or white, forced or voluntary, but rather exists on a spectrum of experience and factors that cause people to flee their homes. By categorizing all migrants as “survival migrants,” Betts attempts to remove the distinction of asylum, proposing to make it just a sub-category of survival migration. I admire Betts’ desire to expand the categories of people who qualify for protection, but hold firm that asylum and refugee status are necessary in our system to create further distinction for those migrants fleeing persecution in their home countries. However, I do also

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<sup>10</sup> Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (2013).

acknowledge the negative connotation that can come with the term “asylum seeker,” which would be further eliminated under Betts’ suggestions. Jeff Crisp also acknowledges this negative view of the asylum seeker. He writes, “Second, UNHCR’s terminological turnaround was prompted by the rather sad conclusion that the word ‘asylum’ (and even more so that of ‘asylum seeker’) now has overwhelmingly negative connotations in the minds of policymakers, the public and the media, especially in the more prosperous regions of the world.”<sup>11</sup> He also states that the UNHCR has become more involved in migration that exists outside of the traditional definition of refugee. These articles show a move towards an expanded scope of who receives the protection of asylum across the globe. However, this expansion is not happening “on the ground.” What transpires is a molding (and often a restricting) of who is protected by refugee status. These changes do not occur in any grand over-hall of the UNHCR or of the definition of refugee, but instead happen in subtle shifts in the interpretation and enforcement of refugee policy on both the national and international level.

### **Why Language Interpretation in Policy Matters**

When creating policy, it is almost inevitable that the passage of time will further shape the meaning of said policy to resolve new problems that emerge in the field. Although the Convention definition of the refugee has not been dramatically changed since its creation, it has been molded by the needs of modern day asylum seekers and the countries that receive them. But while these slight changes are to be expected, they have actually profoundly changed the protection that comes with being a refugee to the point that it is almost in contrast with the original stated definition.

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<sup>11</sup> Jeff Crisp, *Beyond the Nexus: UNHCR's Evolving Perspective on Refugee Protection and International Migration* (Geneva, Switzerland: UNHCR, Policy Development and Evaluation Service, 2008).

Many countries enact national-level policies in order to alter the Convention definition in some way or another. Because of the unchanging nature of the Convention on an international level, states feel the need to adjust the definition to fit their own needs. Host countries may feel a duty to “burden-share,” but want to do it on their own terms and in their own best interest. This emphasis on state sovereignty is common in politics. What does profoundly affect the protection of asylum seekers and refugees is when this selective interpretation of who is and is not a refugee excludes or restricts asylum seekers with legitimate claims from receiving the protection they need.

However, national governments are not the only catalysts for these subtle changes to the definition. Because of the changing demands of the refugee regime, the UNHCR has also needed to adjust their own interpretation of asylum in order accommodate large numbers of refugees. By subtly changing and shifting the way in which this definition is interpreted, the UNHCR has failed to protect refugees at a consistent level. By tracking the usage and interpretation of the original definition of the refugee, I will show that due to higher flows of refugees, the UNHCR has needed to make subtle changes in their interpretation of the Convention refugee which ultimately leave refugees less protected.

Because of these two levels of alterations to the Convention refugee, the road to asylum has been shaped and (for the most part) narrowed throughout the years. These shifts do not happen because of any grand changes to the original definition itself, but rather because of the deviations from that definition that shape it over time.

### **Restrictions at the National Level**

Many countries use the original 1951 Convention definition at the national-level, but write policy that restricts or otherwise alters refugee status for migrants from certain countries or

backgrounds. This is not a new phenomenon and is an important factor of the Convention. States have sovereignty to alter the definition to fit their national needs. However, with any policy that affects human rights, it is critical to examine the motivations behind the creation of these policies. It will be important to not only look at the national-level alterations to the Convention definition, but also to question why the country created such a restriction. I argue that it is usually due to national political interests and not in the best interest of the migrants it seeks to protect. To prove this, I will look at a few different countries and how they have used or modified the 1951 Convention definition at a national level to restrict the number of asylum seekers able to find protection in their borders. First, I will look at the United States, a signatory of the 1967 Protocol that uses the Convention definition in national level policy. I will examine how the United States created policy to narrow this definition to reflect national interests and values. I briefly compare the methods of the United States to a Convention signatory country, Italy. Finally, I examine South Africa, a signatory of both the 1951 Convention and the 1967 Protocol that uses the original definition to exclude groups of migrants from protection.

In 1980, following the Vietnam War, the United States adopted the Refugee Act of 1980, which utilized the Convention definition of refugee. However, before this change was made, the United States used a definition previously laid out in the Immigration and Nationality Act of 1952. This definition, while similar to the Convention refugee, added a line that gave the United States more sovereignty and control over who entered their borders. It stated that a person could be granted asylum:

[I]n such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-

founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>12</sup>

The key change to this definition is the power given to the President to determine which asylum seekers will be protected.

In 1966, the United States put into effect the Cuban Adjustment Act. This made it easier for Cubans to enter the United States and be granted asylum and other benefits. It was a political move, fueled by the US war on communist countries. Other asylum seekers, such as those from El Salvador, were granted in far fewer numbers. By doing this, the US undermines the “non-discrimination” portion of the original Convention definition. The problem with limiting access to protection for migrants of a particular origin is that it excludes entire groups of migrants from the protections that are ensured in their basic human rights. This concept is referred to as the “Cuban Contradiction” by author Larry Nackerud, who goes on to describe “a contradiction which lingered in U.S. refugee policy. Between 1959 and 1995, U.S. refugee policy towards Cubans was not based on humanitarian equality...but was defined by an anti-Communist political agenda.”<sup>13</sup> The U.S. government at this time was still adamantly against Cuba because of the communist government in place and had placed many restrictions on the country because of it. However, the number of refugees accepted from Cuba was not restricted, but rather, increased. This demonstrated the bias towards Cuban refugees during this time and the tendency to focus less on the humanitarian interests (such as fleeing war and violence) mentioned earlier, but rather a focus on foreign relations and policy. Consistent with the U.S. “anything but communist” policy, the United States was strictly opposed to Cuba’s government and therefore

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<sup>12</sup> “Immigration and Nationality Act of 1952,” June 27, 1952.

<sup>13</sup> Nackerud, Larry, et al. “The End of the Cuban Contradiction in U.S. Refugee Policy.” *International Migration Review*, vol. 33, no. 1, 1999.

let Cuban citizens migrate to the U.S. as refugees to flee it. By allowing high numbers of refugees from Cuba, the United States was demonstrating that communist governments were something that warranted a “serious harm” that citizens would need to flee. Similar policies were put in place for other communist nations across the globe in the 1980s, such as Warsaw Pact countries, but were not extended to countries that the United States funded and supported, such as El Salvador.

A modern example of this phenomenon in the United States is Donald Trump’s “Muslim ban” or the executive order that restricted or banned entry to the United States from seven Muslim countries. This ban, intended to keep travelers from predominantly Muslim countries from coming to the United States, stating fear of terrorism, formerly included Iraq as one of the countries, but it was later removed in the interest of foreign policy concerns. The population of Iraq is made up of approximately 90% Muslim citizens.<sup>14</sup> This means that if the purpose of the executive order was to ban Muslims from entering the United States, as promised by Donald Trump during his campaign, then Iraq should have made the list of countries. However, in order to further the agenda regarding the Islamic State in Iraq, the Defense Secretary Jim Mattis proposed to remove Iraq from the list. After many meetings Iraqi officials, including the prime minister, Trump decided to remove Iraq from the list of banned countries. Originally, the cited concerns about the countries on the list were that the migrants coming from them were not being screened thoroughly enough. That being said, despite all the meetings with officials, Iraq did not end up changing their vetting process. Iraqi Foreign ministry spokesperson Ahmad Jamal is quoted saying “This is considered an important step in the right direction that strengthen and reinforces the strategic alliance between Baghdad and Washington in many fields, in particular

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<sup>14</sup> Wikipedia. “Religion in Iraq.”

the fight against terrorism.”<sup>15</sup> In other words, the decision to remove Iraq from the list was not because the concerns that put it on the list were resolved, but rather, because it was in the best interest of U.S. foreign policy goals. It is the absolute power of the government that makes this kind of decision possible because they are the ones with the final say. Although humanitarian concern, the UNHCR and public opinion may affect the decision, it comes down to what the government decides is best for their country. In this way, Trump was restricting and excluding categories of refugees that would otherwise be protected under the original definition.

Another example of Donald Trump’s narrowing of who can receive asylum in the United States was his 2018 decision to attempt to bar migrants who cross the border illegally from applying for asylum. This move would majorly affect migrants who are coming from Central America and Mexico. This comes at a time when Trump has referred to Mexican migrants as “bad hombres” and has spoken strongly against the migrant caravan coming up through the country. By restricting this specific type of refugee, Trump has been able to further political narratives surrounding Mexican migrants. “Immigrant advocates denounced the administration’s move as unlawful, and said the plan to funnel migrants to ports of entry was just a way to cut asylum claims overall.”<sup>16</sup>

In Italy, similar policy is put into place that further limits the original Convention definition of the refugee. Italian interior minister Matteo Salvini tweeted “either Europe gives us a hand in making our country secure, or we will choose other methods.”<sup>17</sup> According to Reuters, “Italy has become the main route into Europe for economic migrants and asylum seekers, with

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<sup>15</sup> Vogue Ariane de, “Trump Signs New Travel Ban, Exempts Iraq,” *CNN Politics*, March 7, 2017.

<sup>16</sup> Yeganeh Torbati, “Trump Administration Moves to Curb Migrants’ Asylum Claims,” Reuters (Thomson Reuters, November 8, 2018), <https://www.reuters.com/article/us-usa-immigration-asylum/trump-administration-moves-to-curb-migrants-asylum-claims-idUSKCN1ND35K>.

<sup>17</sup> Twitter, Matteo Salvini.

hundreds of thousands making the perilous crossing from North Africa each year and thousands dying at sea.”<sup>18</sup> Italy has employed other “upstream” tactics to curb refugees as well, including a deal with Libya to prevent migrants from ever reaching the shore. Libya’s coastguard, with funding from Italy, has been guarding the Mediterranean Sea due to a deal from February 2017 that encourages this kind of “upstream” deterrence of migration that prevents asylum seekers from ever reaching the border.<sup>19</sup> In doing this, it becomes almost insignificant that Italy uses the Convention definition of refugee when dealing with asylum seekers, because the country has reduced the number of people who are able to reach their borders to receive such protection.

This move has been criticized as inhumane by many left-wing groups. It seems that when countries have agency over refugee policy, they are mostly motivated by political and nationalistic reasons. This is how the government is able to alter the Convention definition of refugee to suite their own national interests.

However, it is also possible to use the 1951 Convention definition of refugee without restrictive national-level policy and still exclude groups of asylum seekers from protection. This is what happened to asylum seekers from Zimbabwe bound for South Africa. Although many of the up to 2 million asylum seekers were pushed out of Zimbabwe because of an unstable political situation, most were actually fleeing the “economic consequences” of this political climate.”<sup>20</sup> In this way, South Africa was able to categorize these groups as economic migrants, who are closer to the voluntary end of the forced/voluntary dichotomy. By using the 1951 Convention definition

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<sup>18</sup> “Italy Will No Longer Be ‘Europe’s Refugee Camp,’ Vows New Government,” Reuters (Thomson Reuters, June 4, 2018).

<sup>19</sup> Angela Giuffrida, “Deaths at Sea Expose Flaws of Italy-Libya Migration Pact,” *The Guardian*, July 23, 2018.

<sup>20</sup> Alexander Betts, “The Normative Terrain of the Global Refugee Regime,” *Ethics & International Affairs*, June 1, 2017.



of refugee, South Africa was able to deport around 300,000 Zimbabweans each year in 2007 and 2008. These statistics may come as a surprise to those who have heard about the large amounts of refugees in South Africa. This is because in South Africa, it is possible to work in the country as an asylum seeker, making it an appealing destination for asylum seekers. However, by redefining Zimbabweans as economic migrants, South Africa has excluded this group from the benefits that come with asylum in the country.

Many nation-states who sign either the Convention or Protocol or both attempt to maintain state sovereignty by creating national-level asylum policy or otherwise changing the way that the 1951 definition is understood. In doing this, states are able to promote national interest and narrow the flows of asylum seekers to their borders. This national-level policy changes the way that states interact with the 1951 definition and with large flows of refugees. This leads to variations in the ways that states interact with refugees and asylum seekers, despite using the same core definition. However, this definition is not only being shaped by national-level policy, but also by the UNHCR itself, which has also molded the 1951 Convention definition to fit modern refugee flows.

### **Mission Creep and the Normalization of Deviation in the UNHCR**

The scope of the UNHCR has changed and expanded over time due to many different factors. This phenomenon is known as “mission creep.” According to Michael Barnett and Martha Fennimore, “IO (international organizations) missions may expand simply because states give them more tasks, but as the term “mission creep” suggests, there is an unintended internal logic at work here as well. As IOs go about their business of defining tasks and implementing mandates, they tend to do so in ways that permit, or even require more intervention by more IOs. This is not bureaucratic imperialism so much as it is a logical outgrowth of the nature of

authority.”<sup>21</sup> This means that the UNHCR has had expansion in the number of tasks that are under its control because of the presence of more tasks and the tendency of other states and state actors to not perform said tasks. The UNHCR has become the primary organization for refugee issues, which has made the scope of the organization far larger than ever intended. They have become renowned experts in the field over time because of their authority over refugee issues.

Similarly, official standing and long experience with relief efforts have endowed the UNHCR with "expert" status and consequent authority in refugee matters. This expertise, coupled with its role in implementing international refugee conventions and law ("the rules" regarding refugees), has allowed the UNHCR to make life and death decisions about refugees without consulting the refugees, themselves, and to compromise the authority of states in various ways in setting up refugee camps.<sup>22</sup>

So how has this widened scope allowed the UNHCR to define the norms of the refugee regime?

And how have these changing definitions allowed for straying from their original mission

statement in the 1951 Convention? The answer is that because of such a broad and ever

expanding scope of responsibilities, the UNHCR has allowed itself to redefine factors of the

refugee regime in order to better handle mass influxes, which has led to a contradiction in their

mission, and ultimately, the final say in refugee decisions.

Barnett and Finnemore argue that because of its status as an international organization,

the UNHCR has taken on many tendencies of a bureaucracy. With these tendencies also come

the pitfalls, or pathologies, of bureaucracy. One of these is a phenomenon known as the

“normalization of deviance.” As defined by the authors, the normalization of deviance is when:

bureaucracies make

small, calculated deviations from established rules because of new environmental or institutional developments, explicitly calculating that bending the rules in this instance does not create excessive risk of policy failure. Over time, these expectations can become

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<sup>21</sup> Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca and London: Cornell University Press, 2004).

<sup>22</sup> (Barnett and Finnemore, 710).

the rule, they become normal, not exceptions at all.<sup>23</sup>

Although I agree with this concept, in the spirit of recognizing the importance of language and words, I have chosen to refer to it as “the normalization of deviation” because of the negative connotation that comes with the word “deviance.” The normalization of deviation happens gradually, but can cause profound changes in an organization and its mission to provide protection. I will illustrate this phenomenon by arguing that the UNHCR underwent a normalization of deviation in subtle changes to the interpretation of repatriation and refoulement until they contradicted their original scope. I argue that this normalization occurred because of a mission creep that left the organization unable to fulfill their duties. The author explains, “To put it differently, only when these words are looked at in the backdrop of the paradigm shift taking place, and the restrictive practices which have all but become the norm in the developed world that they can be given content.”<sup>24</sup> This is key to my research because it may not appear that the definition of refugee is changing at all on the national level, but by putting it against this background of mission creep and gradual changes, the differences in the definition are given more context.

## **Methods and Findings**

By looking at the changes in the interpretation of the Convention definition by the UNHCR through the lens of these deviations and their normalization, it is clear that through subtle shifts in the way that certain words are interpreted, the definition eventually was unrecognizable. To illustrate this point, I traced the usage and interpretation of two words that are central to the definition, repatriation and refoulment. By looking at how these words changed

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<sup>23</sup> Michael Barnett and Martha Finnemore. *The Politics, Power and Pathologies of International Organizations*, 1999. (722).

<sup>24</sup> B.S. Chimni. *The Meaning of Words and the Role of UNHCR in Voluntary Repatriation*. 1993. (459).

as refugee flows increased, I tracked the level of protection that migrants were receiving at that time. Of course, there are limitations to these methods, including the influence of an array of other factors outside of language on the acceptance of asylum seekers.

### **Case Study: Repatriation vs. Refoulement**

In the context of the UNHCR, the changing definitions of “repatriation” and its tendency to look more like “refoulement” in the modern age is concerning because it represents a normalization of deviation that has caused the organization to go against their principle of “non-refoulement.” Over time, because of an inability to resettle refugees (the formerly preferred solution) because of a lack of “burden-sharing” in the international community, has left the UNHCR to shift towards repatriation as a favored solution. The problem is that this repatriation is being done in a way that highly resembles refoulement. Refugees are being sent back to their home countries hastily and without a full evaluation of whether or not the country conditions have changed. “There can be no doubt that the political realities which surround refugee situations may at times force the UNHCR into extremely difficult positions. However, that is no justification for promoting a framework which does not have the protection of refugees as its primary concern.”<sup>25</sup> Repatriation has taken on this problematic form because it borders between voluntary and involuntary. There has been pressure from the UNHCR to repatriate refugees, which makes the protection of these refugees far from the primary concern. Instead, in this new definition of repatriation, we see that the preferred solution has led to many premature returns of refugees. However, with the “mission creep” that has occurred within the organization, other solutions may just not be as plausible. “Repatriation not only has become the preferred durable solution; it is the only available durable solution. Less than 1 percent of the world's refugees are

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<sup>25</sup> Saul Takahashi. *The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection*, 1997. (593).

resettled in third countries and almost none of the countries of asylum are prepared to offer permanent status to their refugees. By default, if the number of refugees is to be reduced it will be by means of repatriation.”<sup>26</sup> Therefore, the burden of responsibility has shifted to the individual refugees. They are made to decide prematurely whether or not to return to their home countries.

This is in essence a defeatist argument; the victims are made to bear the consequences of the lack of burden-sharing by the international community. More importantly, it blurs the distinction between refoulement and spontaneous repatriation. Even worse, it requires the UN to actively participate in the process without seriously determining the circumstances in which refugees are going home.<sup>27</sup>

In order to better serve the refugee populations that are occurring in the modern day, the UNHCR will need to define what conditions make it safe to go home to a country, but even more importantly, it will need to define what voluntary return looks like. “In 1996, UNHCR for the first time officially recognised the need to ‘contextualise standards of voluntary repatriation’, thereby in effect recognising the legitimacy of imposed return under certain circumstances.”<sup>28</sup> By defining this, the organization will be able to move closer to their original stated mission of refugee protection.

### **How to define “voluntary repatriation”**

The central problem in this normalization of deviation is not that repatriation and refoulement are becoming more similar in their definitions, but that repatriation is shifting from voluntary to involuntary. By definition, involuntary repatriation is the return to a country without the consent of the refugee, which is refoulement. Because of increased pressures from the

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<sup>26</sup> Barry N. Stein and Frederick C. Cuny, “Refugee Repatriation during Conflict: Protection and Post-Return Assistance,” *Development in Practice* 4, no. 3 (1994).

<sup>27</sup> (Chimni, 449).

<sup>28</sup> Anne Koch, “The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return,” *Journal of Ethnic and Migration Studies* 40, no. 6 (2013): pp. 905-923.

international community, the UNHCR has become hasty in its repatriation, until reaching a point of resembling refoulement. “Contemporary voluntary repatriations are unlike almost any that have occurred before. In most cases, the peace is fragile, security is tenuous, and the economy and infrastructure of the homeland are devastated. Most returns involve hundreds of thousands, even millions, of refugees returning swiftly and irregularly to ravaged homelands.”<sup>29</sup> In other words, the barriers to repatriating have been lowered in recent years, both in terms of the voluntary nature and the standards of safety that must be met in the home country. There is a profound logical fallacy that occurs because of these changing definitions.

Since the reason for people becoming refugees is a 'well-founded fear of persecution', once that fear can no longer be said to be reasonable, it is logical that refugee status should end. However, it is not clear in the relevant standards how the principle of voluntariness would tie in with this. The connection between the principle of voluntariness and cessation is an ill-defined 'grey zone' in refugee law which results in a dilemma regarding repatriation.<sup>30</sup>

In other words, if the country of origin has dramatically improved in condition, then repatriation should not be necessary, due to the fact that the individual would no longer qualify as a refugee. This means that the standards for improved safety must be lowered in order to reach this middle ground of “voluntary repatriation.”

... 'mandated return,' is to be avoided, and refugees can only be encouraged to return of their own free will. For voluntary return to be promoted, there must have been a fundamental change in the country of origin so that it is indeed truly safe to return. However, if there has been a fundamental change, then the cessation clause should apply and logically, the persons are no longer refugees. This dilemma has been noted as 'one of the unresolved theoretical paradoxes of UNHCR's institutional responsibilities'.<sup>31</sup>

There must be a confidence in the ability of the refugees to voluntarily repatriate if the conditions of the country are indeed improved enough to guarantee safety. This central paradox of the

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<sup>29</sup> (Stein, 2).

<sup>30</sup> (Takahashi, 601).

<sup>31</sup> (Takahashi 601).

refugee regime, coupled with the expanding scope of the UNHCR has caused refoulement to occur.

## **Discussion**

By looking at the way that policy and bureaucracy can alter an unchanged definition, we see that though the 1951 Convention's definition of the refugee is undeniably important, it is also not one that can be taken only at face value. This definition of refugees has set a clear and tremendously useful way to identify those migrants who need asylum. When national-level policy starts to taper the number of people who qualify for asylum in their country based on national interest, the "non-discrimination, non-penalization" section of the definition is rendered profoundly less meaningful. When looking at this third idea of "non-refoulement," the UNHCR is changing the legitimacy of the protections in place to help refugees. If these populations can truly be "involuntarily repatriated," then it is almost contradictory to the original mission of the organization. My research does not suggest that altering the 1951 Convention definition would be useful or even effective. I would suggest that safeguards to be put in place to protect refugees from discrimination or penalization. I would also suggest that the landscape of the refugee regime be re-examined for the modern age. The country of origin, claims and needs of refugees are changing and the population has grown, so it is time for "burden-sharing" between nation-states and the UNHCR to modernize as well. The way in which these two entities can adapt to accommodate the contemporary refugee remains to be seen, but without calculated efforts to not let vulnerable migrants slip through the cracks, it will be impossible for the world to adapt to the changing needs of migrant populations.

## **Conclusion and Next Steps**

In a time of high flows of refugees and asylum seekers, it is more important now than ever before to protect vulnerable migrant groups from persecution. This protection needs to occur at all levels of government and needs to be comprehensive in its protection. However, both national and international actors have made calculated alterations to the 1951 Convention definition of the refugee in order to be able to keep up with the large numbers of refugees and asylum seekers. Refugee status was laid out as a way to protect vulnerable populations, but when those populations are tapered to fit the needs of countries and organizations, these populations feel the consequences. In order to protect these migrants, it is imperative to re-evaluate the definition of refugee for the modern age and ensure that protection is guaranteed for migrants, regardless of state or international interests.



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**THE NARROWING ROAD TO ASYLUM: How Limitation and Exclusion Have Shaped  
the 1951 Convention Refugee in the Modern Age**

IN PARTIAL FUFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF  
**MASTERS IN MIGRATION STUDIES**

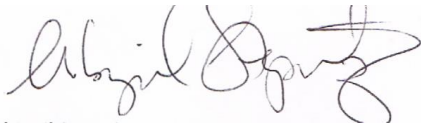
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**May 18, 2019**

**University of San Francisco**

**Under the guidance and approval of the committee, and approval  
by all the members, this thesis project has been accepted in  
partial fulfillment of the requirements for the degree.**

**APPROVED:**



29 May 2019

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**Advisor Date**

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**Academic Director Date**

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**Dean of Arts and Sciences Date**