

NOTES

PLIGHT OF THE BOAT PEOPLE: HOW TO DETERMINE STATE OBLIGATIONS TO ASYLUM SEEKERS

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INTRODUCTION

Scared, shivering, and disheveled, thousands of people float across the Indian Ocean from Asia to reach Australia¹ in search of freedom from the persecution that they face in their homes.² After these “boat people” land on Australian shores, they are housed in camps, waiting for a better life. However, the same hopeful sentiment

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1 This Note uses the Australian example to illustrate the problems faced by both states and asylum seekers in determining states’ obligations to asylum seekers. Although South Africa, the United States, the United Kingdom, and states in the European Union have had similar problems, the Australian example has been splashed across the pages of international newspapers for some years. The Note, however, is not restricted to addressing only the Australian situation. In fact, the analysis of the issues in this Note can be extrapolated and applied to all states that are having problems with an influx of refugees.

2 See Cindy Wockner & Gita Anggun Athika, *Asylum Seekers Tell of Their Journey of Death*, THE DAILY TELEGRAPH (Oct. 20, 2010, 10:36 PM), <http://www.dailytelegraph.com.au/news/national/asylum-seekers-journey-of-death/story-e6freuzr-1225941425056>. Refugees hailing from Afghanistan to Indonesia try to seek refuge in Australia. Known as “boat people,” these people face persecution from generalized violence, internal strife, economic inadequacies, and repressive governments. Although some of these “boat people” will fall within the original scope of the 1951 Convention Relating to the Status of Refugees, others will not. This Note focuses on those peoples that are not “Convention refugees” but still need protection and refuge.

is not reflected by the receiving country. For example, between 2009 and 2010 there was a thirty-one percent increase in asylum seekers in Australia.³ As a result, Australian politics have been in turmoil, trying to create a comprehensive policy to address the thousands of asylum seekers that land on its shores.⁴

At the end of 2009, there were 43.3 million forcibly displaced people worldwide.⁵ Of these, 15.2 million were refugees and, of that number, 983,000 were asylum seekers.⁶ More than 922,000 individual claims for asylum or refugee status were registered in 2009, with South Africa receiving the world's largest number of individual applications, followed by the United States and France.⁷ These refugees have escaped political and cultural persecution for their political views, sexual preference, or gender. However, when they arrive at their destination country, they face confusion and uncertainty.

Asylum seekers encounter several challenges in the current refugee system. They endure protracted refugee situations,⁸ secondary refugee flows,⁹ the extra-territorialization of migration controls,¹⁰ new

3 See DIVISION OF PROGRAMME SUPPORT AND MANAGEMENT, UNHCR, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2010 6 (2011) [hereinafter ASYLUM LEVELS].

4 See Kate Gauthier, *Asylum Seeker Chatter has Become a Debate About a Debate*, NATIONAL TIMES, (July 14, 2011), <http://www.smh.com.au/opinion/politics/asylum-seeker-chatter-has-become-a-debate-about-a-debate-20110713-1hdxy.html> (last visited Dec. 15, 2011).

5 See DIVISION OF PROGRAMME SUPPORT AND MANAGEMENT, UNHCR, 2009 GLOBAL TRENDS 1-2 (2010) [hereinafter 2009 GLOBAL TRENDS].

6 See *id.* For an understanding of the differences in status of displaced people, see *infra* Part I.A & B.

7 See *id.* Some refugees fall within the purview of the United Nations High Commissioner for Refugees [UNHCR] directly, such as Palestinian refugees, and are not counted within the asylum seeker category. See UNHCR, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 6 (2007) [hereinafter CONVENTION AND PROTOCOL], available at <http://www.unhcr.org/3b66c2aa10.html>

8 A protracted refugee situation is a situation in which asylum seekers are trapped between the inability to return to their homes, the lack of determination of the displaced person's status, and of the unknown actions and obligations of the state to help these persons. Oftentimes, during a period of protracted refugee status, these displaced persons reside in makeshift camps in border regions while waiting for their homes to become safe or for decisions from a government body on their protection status. See Ron Redmond, *Protracted Refugee Situations: Millions Caught in Limbo, with No Solutions in Sight*, UNITED NATIONS: 10 STORIES THE WORLD SHOULD HEAR MORE ABOUT, <http://www.un.org/events/tenstories/06/story.asp?storyID=2600> (last visited Nov. 11, 2011).

9 Secondary refugee flows are movements of refugees from the state of first entry (also known as "safe third countries") to other states in order to receive better treatment. For example, in Europe, Southern European countries such as Italy, Spain,

forms of displacement and asylum,¹¹ wide discrepancies in the recognition of asylum status, contraction of asylum policies and practices by states,¹² and inconsistencies in refugee status determination (RSD) mechanisms.¹³

The main issue underlying all of these challenges is the problem of, and confusion surrounding, the determination of state obligations to asylum seekers. Human rights are indivisible and inalienable,¹⁴ but states have discretion in granting and providing some of these rights to asylum seekers because no international covenant obligates them to do so. There is no uniform system to determine the obligations that states have to asylum seekers other than the base requirements outlined in the 1951 Convention Relating to the Status of Refugees, the main international document on refugees. In fact, states, interna-

and Greece are the states of first entry for a large number of refugees, but these refugees often migrate north to the Scandinavian countries that have more accommodating social programs and health care options. See Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, UNHRC NO. 2, GLOBAL CONSULTATIONS 2 (2003). But see *infra* Part I.D (discussing burden-sharing problems in the European Union).

10 A state's obligation to refugees begins upon their entry into their territory. Therefore, in order to prevent refugees from arriving onto their territory, states expand their policing efforts to ensure that these refugees do not enter their territory. See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 289–300 (2005). Australia has such a program with Indonesia, Malaysia, Thailand, Pakistan, East Timor, and Sri Lanka supplying patrol boats and other resources in return for policing boats before they leave on their journey. See Paul Maley & Stephen Fitzpatrick, *Julia Gillard's Gunboat Diplomacy*, *THE AUSTRALIAN*, (July 8, 2010, 12:00 AM) <http://www.theaustralian.com.au/julia-gillards-gunboat-diplomacy/story-fn5vfgwx-1225889173419>.

11 Examples include climate change or environmental refugees.

12 See Erika Feller, *Statement by the Director, UNHCR Department of International Protection, to the 18th Meeting of the UNHCR Standing Committee (July 5, 2000)* 12 INT'L J. REFUGEE L. 401, 403–06 (2000) (discussing the three trends of asylum policies: (1) very restrictive application of the 1951 Convention and 1967 Protocol, (2) alternative protection regimes (e.g., temporary resident status), and (3) "growing impatience in asylum countries" which leads to discrimination, nonacceptance, and increased levels of detention).

13 See James C. Simeon, *A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration*, 22 INT'L J. REFUGEE L. 72, 73 (2010) (footnotes not in original); see also Ninette Kelley & Jean-Francois Durieux, *UNHCR and Current Challenges in International Refugee Protection*, in 22 REFUGEE 6 (2004) (reviewing the current challenges in the international refugee protection regime).

14 See *Human Rights for All*, U.N. RESOURCES FOR SPEAKERS ON GLOBAL ISSUES, <http://www.un.org/en/globalissues/briefingpapers/humanrights/index.shtml> (last visited Nov. 11, 2011).

tional organizations, and publicists¹⁵ differ on the methodology that should be used to determine these obligations.

A consensus-based approach is the appropriate method of determining and expanding state obligations within the 1951 Convention. But recent attempts to expand the rights of asylum seekers through the new method of evolutionary interpretation of treaties could result in an unpredictable and unwanted application of the 1951 Convention, leaving asylum seekers unsure of their rights and options. The application of the classical tenets of customary international law to these obligations offers a better chance of creating stability in the asylum system for both asylum seekers and states. While such an approach appears to provide less immediate relief to asylum seekers, the consistency and stability that results from customary international law yields benefits that outweigh the loss in immediate relief.

This Note examines how states and asylum advocates should determine state obligations to asylum seekers, asserting that states should expand their obligations to asylum seekers based on new norms of customary international law. In doing so, Part I introduces some basic refugee law concepts and discusses in detail the aforementioned challenges for states and asylum seekers. Part II outlines three different modalities that the international community may use to determine these obligations and asserts that applying the theory of evolutionary interpretation of treaties to the 1951 Convention Relating to Refugees is an unpredictable method of expanding state obligations to asylum seekers that fails to adequately address the problem. Part III posits that expansion of state obligations should occur, but under the classical international legal principle of customary international law rather than through evolutionary interpretation of the 1951 Convention.¹⁶ This Note concludes with the assertion that evolution-

15 Publicists are international law scholars whose analysis of and recommendations on issues are given much weight in understanding general principles of international law and establishing custom. See Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 3 Bevens 1179 [hereinafter ICJ Statute].

16 In asserting that a state's asylum obligations should be expanded, this Note inherently asserts that asylum obligations should not be constricted. The full argument of this assertion is beyond the scope of this Note. However, in brief, the argument is that there is a baseline of state obligations to asylum seekers as provided by the 1951 Convention. Any expansion by a state of its obligations beyond the baseline is enacted either due to domestic will or through international agreement. See *infra* note 29 and accompanying text. Any contraction of state obligations is not only considered illegal, but will be devastating to current and future asylum seekers who depend almost entirely on host states for protection and who would not be able to seek refuge in a state that had originally provided it if contraction of these obligations is permitted.

ary interpretation is not an appropriate solution to the asylum seeker problem and is undeserving of the support some scholars have given it. The application of customary international law, on the other hand, is a more stable method through which expansion of these obligations *should* occur. The stability and consistency provided by customary international law is the current chaotic asylum system requires rather than the cosmetic changes evolutionary interpretation might provide.

I. BASIC REFUGEE LAW CONCEPTS

Refugee law consists of international, multilateral, and regional treaties that are reflected in, and incorporated into, domestic policy and law. Article 14 of the 1949 Universal Declaration of Human Rights (UDHR) declares that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”¹⁷ The International Convention on Civil and Political Rights (ICCPR)¹⁸ as well as the International Convention on Economic, Social, and Cultural Rights (ICESCR)¹⁹ provide the overarching principles of refugee protection. The 1951 UN Convention Relating to the Status of Refugees and the 1967 UN Protocol Relating to the Status of Refugees channeled these principles and created a framework for states to determine refugee status and implement asylum laws and procedures.²⁰

17 Universal Declaration on Human Rights, art. 14, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

18 See International Covenant on Civil and Political Rights, art. 2, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Mar. 23, 1976) [hereinafter ICCPR] (“Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant” (emphasis added)).

19 See International Covenant on Economic, Social, and Cultural Rights, art. 2, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966) [hereinafter ICESCR]. The ICESCR obligates

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the *full realization* of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Id. at art. 2(1) (emphasis added). The indication that this obligation also extends to noncitizens comes from Article 2(3) which provides a special exception for developing countries: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-citizens.” *Id.* at art. 2(3).

20 See United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention]; United

A. *Who Is a Refugee?*

Before World War II and the creation of the modern international system of states, a refugee was a person who was outside her country of origin and without the protection of that state's government.²¹ Post-1945, after the persecution of racial and religious minorities in Europe, this protection expanded to "all persons, wherever they may be, who, as a result of events in Europe, [. . .] had to leave . . . because of the danger to their lives or liberties on account of their race, religion, or political beliefs."²² The *travaux préparatoires*²³ placed geographical and temporal limitations on those classified as "refugees."²⁴

The 1951 UN Convention Relating to the Status of Refugees defines a "refugee" as any person who,

owing to [the] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁵

At the time, however, there was no universal agreement on this definition. For example, the Soviet Bloc wanted to extend the protection to people facing economic persecution. In the 1950s, individual states began granting some protection to people fleeing from the "economic South" (a term used to describe the poorest nations of the world), which required material and financial assistance.²⁶ Since the 1970s, there has been a movement to help and protect Internal and External Displaced Persons (IDPs and EDPs) who are displaced due to

Nations Protocol Relating to the Status of Refugees, Jan. 30, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 268 [hereinafter 1967 Protocol].

21 See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 4 (2d ed. 1996).

22 See *id.* at 5.

23 The *travaux préparatoires* or "preparatory works" are the written record of a negotiation. The travaux are consulted in order to understand the intentions of a treaty. See Vienna Convention on the Law of Treaties, art. 32 May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

24 See GOODWIN-GILL, *supra* note 21, at 19.

25 1951 Convention, *supra* note 20, at art. 1(A)(2).

26 See GUY S. GOODWIN-GILL, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, ASYLUM 100-01 (1995).

internal political violence and man-made disasters.²⁷ Currently, some states grant protection to victims of gender-based persecution, such as victims of homophobic persecution, female genital mutilation (FGM), and domestic violence.²⁸

Multilateral and regional organizations have adopted their own treaties, some of which expand the scope of “refugees” beyond the 1951 Convention.²⁹ The Cartagena Declaration, for example, extended the definition of refugee to include “persons who have fled their country, because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances seriously disturbing public order.”³⁰

Individual states also expand and restrict their definitions of refugees.³¹ When they restrict the definition of refugee to less than that prescribed by the 1951 Convention, they violate their international legal obligations.³² Although the United Nations Human Rights Committee (UNHRC) offers help in interpreting Article 1 of the Convention, the “refugee definition has been extensively interpreted by domestic courts.”³³ Due to the 1951 Convention’s open-ended nature, states vary widely in the scope of protection they offer. This Note asserts that this problem can be addressed by adopting the method of customary international law to determine both who will receive protection and what kinds of protection these asylum seekers will receive.

27 See GOODWIN-GILL, *supra* note 21, at 264–68.

28 See *infra* notes 161–74 and accompanying text.

29 See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter Treaty of Amsterdam]; Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights art. 3, Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1 [hereinafter Cartagena Declaration]; 1969 OAU Convention on Refugee Problems in Africa art. 1(2), June 20, 1974, U.N.T.S. 14, 691 [hereinafter OAU Convention].

30 See Cartagena Declaration, *supra* note 29. There are also “non-Convention refugees”—people who have fled war, crimes against humanity, repression, or other human rights abuses—but are considered not to have a well-founded fear of persecution under Article 1 of the 1951 Convention. The extent of the State obligations to these peoples is undetermined. See KAREN MUSALO ET AL., REFUGEE LAW AND POLICY 1117 (3d ed. 2007).

31 See Sonia Boutillon, *The Interpretation of Article 1 of the 1951 Convention Relating to the Status of Refugees by the European Union: Toward Harmonization*, 18 GEO. IMMIGR. L.J. 111, 115 (2003).

32 See *id.* at 113.

33 See *id.*

B. *Who Is an Asylum Seeker and How Does One Become a Refugee?*

The United Nations High Commissioner on Refugees (UNHCR) defines an asylum seeker as a person who claims that he or she is a refugee but whose status has not yet been determined by the national refugee determination system (RDS).³⁴ Each state creates its own RDS to process asylum claims.³⁵ Regional organizations, such as the European Union, are trying to create a uniform RDS.³⁶ Generally, an asylum seeker who migrates illegally is first detained. Then he must

34 See *What is a Refugee?* USA FOR UNHCR: THE UN REFUGEE AGENCY, http://www.unrefugees.org/site/c.lfiQKSOWFqG/b.4950731/k.A894/What_is_a_refugee.htm (last visited Nov. 11, 2011). For the purposes of this Note, this will be the definition used for asylum seeker, so as to determine what obligations a state has to people that seek asylum and do not yet have refugee status. However, there is disagreement as to the classification of asylum seekers and refugees in this manner. Professor Hathaway writes:

[Some states and agreements treat] ‘asylum seekers’ (or ‘applicants’) as a category of persons not entitled to invoke rights under the Refugee Convention. While it is true that an individual seeking recognition of refugee status is not necessarily a refugee, it is also true that an individual is necessarily a refugee—and hence entitled to claim the rights of refugees—prior to the formal verification of his or her status: A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but *declares* him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

James C. Hathaway, *What's in a Label?* 5 EUR. J. MIGRATION & L. 1, 9–10 (2003) (internal citations and formatting omitted) (emphasis added); see also UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATION TO THE STATUS OF REFUGEES, ¶ 28, HCR/IP/4/Eng/Rev.1 (1992) [hereinafter UNHCR HANDBOOK].

35 In the United States there are two fora for initial determinations of refugee status: asylum offices (for those asylum seekers who are not facing removal proceedings and are filing affirmative applications for refuge) and immigration courts (for asylum seekers facing removal and are raising their asylum claim as a defense). See *Procedures for Asylum and Withholding of Removal*, 62 Fed. Reg. 10,337 (Mar. 6, 1997) (to be codified at 8 C.F.R. pt. 1208); 8 U.S.C. § 1229a (2010) (outlining the statutory scheme of these processes). Australia has a similar procedure: refugees may apply for refugee status with the Department of Immigration and Citizenship (DIAC), whose decision may be reviewed by a Refugee Review Tribunal (RRT). In certain cases, these decisions can be reviewed by the federal court system or be challenged with the DIAC in order to receive a permanent resident status on the basis of humanitarian need. See *Australia's Refugee System: Facts + Stats*, REFUGEE COUNCIL OF AUSTRALIA, <http://www.refugeecouncil.org.au/arp/facts-03.html> (last visited July 31, 2011).

36 See Elizabeth Keyes, Note, *Expansion and Restriction: Competing Pressures on the United Kingdom Asylum Policy*, 18 GEO. IMMIGR. L.J. 395, 422–25 (2004).

establish that he falls within the recognized refugee categories of the 1951 Convention—a person that may claim refugee status and can “demonstrate that his [. . .] fear of persecution in his [. . .] home country is well-founded.”³⁷ If the asylum seeker satisfies the national RDS requirements, he will be granted asylum and become a refugee. The rights granted to the refugee, such as “legal protection and material assistance,”³⁸ depend on domestic law.³⁹ The 1951 Convention grants states the discretion to determine refugee status. However, the RDS must comport with “the principle[s] of effectiveness of obligations” as “judged by the international standard of reasonable efficacy and efficient implementation.”⁴⁰ Additionally, the UNHCR Executive Committee strongly recommends that asylum seekers receive due process, including guidance to applicants, provision of competent interpreters, a reasonable timeline for appeals, fair and expedited judicial processes, and independent appellate review of their cases.⁴¹ Whether asylum seekers are actually granted due process, however, is entirely dependent on the national RDS.

The RDS contains different categories of “refugee.” The first three categories—those persecuted on the basis of “race, religion, [and] nationality”—are relatively easy to determine. The last category, however, “membership of a particular social group or political opinion,” poses problems of interpretation and categorization. “Membership of a particular social group or political opinion” is considered the catch-all group within Article 1 of the 1951 Convention.⁴² It offers people who did not fall within the enumerated categories

37 See *What is a Refugee?*, *supra* note 34.

38 See *id.*

39 In addition to the label of “refugee,” states have also created several other criteria for displaced people: temporary protected status, persons granted humanitarian assistance, and persons granted a special leave to remain in the host state. These other criteria allow states to have different levels of obligations to different peoples. See *What’s in a Label?*, *supra* note 34, at 1.

40 See GOODWIN-GILL, *supra* note 21, at 324.

41 See *id.*; see also Stephen H. Legomsky, *An Asylum Seeker’s Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619 (2000) (discussing fair access to the refugee determination process and the fairness of the process with the main goals of the adjudicative process being accuracy, efficiency, and acceptability of the process to the public and asylum seekers). Legomsky discusses other due process provisions that he thinks must be met at a minimum, such as pre-hearing access to counsel and evidence, assistance of counsel, and cultural awareness by the adjudicators. See *id.* at 634–41. Due process, although defined internationally in the ICCPR Article 9, has different tangible applications depending on the state. See ICCPR, *supra* note 18, art. 9. In the United States, due process reaches any “person” within the United States and it reaches all aliens within its jurisdiction. See U.S. CONST. amend. V.

42 See MUSALO ET AL., *supra* note 30, at 620.

another way to claim refugee status.⁴³ Publicists argue that the three enumerated characteristics of recognition under the 1951 Convention are just defined social groups, and more social groups could be theoretically allowed. The UNHCR Handbook expansively defines “membership in a particular social group” as “persons of similar background, habits or social status.”⁴⁴ There is no definite, closed list of what groups may fall within a “particular social group,”⁴⁵ but the UNCHR asserts that it should be interpreted in an evolutionary manner in accordance with the object and purpose of the 1951 Convention.⁴⁶

43 It is argued by asylum advocates that a “wide variety of cognizable groupings, including those defined by gender, sexual identity, economic class, [or] occupation” could fall within this category and may be granted refugee status. *See id.* But this category has been subject to arbitrary interpretation. Jurisprudence is unclear about what indicia are used to determine “membership in a particular social group,” whether internal characteristics or external perceptions are important and the weight of each. *See* Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 505 (1993). In *Karouni v. Gonzales*, the Ninth Circuit granted asylum to a gay man from Lebanon. *See* 399 F.3d 1163, 1178–79 (9th Cir. 2005). In *Matter of Acosta*, the Board of Immigration Appeals denied asylum to a Salvadoran man claiming asylum because of his membership in a group of taxi leaders who refused to cooperate with the local guerrilla insurgency; they cited that international law did not allow the grant of refugee status to people in order to protect their ability to choose their profession (which is not considered a human right). *See* 19 I. & N. Dec. 211, 233–34 (BIA 1985) *available at* <http://www.justice.gov/eoir/vll/intdec/vol19/2986.pdf>. The difference seems to be that some groups are immutable or fundamental (such as sexual orientation and “femaleness”) but others reflect a choice that is not fundamental and is not protected (such as choice of employment). The Second Circuit in *Gomez* gave importance to external perceptions when it stated that a woman claiming membership in a social group of women who were raped by guerillas was not likely to be persecuted any more than any other women in the country, and therefore her claim was rejected as she had presented it. *See Gomez v. I.N.S.*, 947 F.2d 660, 664 (1991). *Gomez* did not prove that her “social group” had shared common interests, lifestyle, or background. However, how does one categorize people that are affected by environmental disasters due to their residence in a particular village? Is specific residence considered immutable and fundamental or a choice? For different publicists that argue that these people should fall within the Convention’s definition of “refugee” via evolutionary interpretation theory, see *infra* notes 118–23 and accompanying text.

44 *See* UNHCR HANDBOOK, *supra* note 34, ¶ 77. The Handbook relates potential social groups to the other four categories of refugees and also discusses the internal and external factors affecting the formation and persecution of a social group. *See id.* ¶¶ 77–78. It further stipulates, however, that mere membership is generally insufficient for claiming refugee status, and therefore persecution must also be proven. *See id.* ¶ 79.

45 *See id.* ¶ 77.

46 *See* UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBER OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVEN-

In refugee law, “persecution” is another term without concrete definition. “There is no universally accepted definition of ‘persecution,’ and various attempts to formulate such a definition have met with little success.”⁴⁷ Articles 31 and 33 of the 1951 Convention describe persecution in terms of a person whose “life or freedom was threatened.”⁴⁸ States, however, have a wide margin of appreciation⁴⁹ to interpret this fundamental term. The UNHCR Handbook provisions reflect the well-established rule that prosecution and punishment do not fall within the confines of “persecution,” meaning that criminals fleeing legal prosecution cannot attain refugee status.⁵⁰ Additionally, according to caselaw, the term “persecution” must be interpreted in good faith. “[T]he ordinary meaning of the words of the treaty [is] presumed to be the authentic representation of the parties’ intentions,” and the words of the treaty must be determined within the “context of the treaty” and its object and purpose.⁵¹ Another issue in defining “persecution” is the source of the persecution: state versus nonstate actors (individuals, private organizations, and corporations).⁵² Although the 1951 Convention does not specifically address this issue, the UNHCR Handbook states that both state and private actors can be the source of “persecution” within the definition of the 1951 Convention.⁵³

TION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/02/02, at 2 (2002); *infra* Part II.C (discussing the theory of evolutionary interpretation of treaties).

47 See MUSALO ET AL., *supra* note 30, at 230 (citing UNHCR HANDBOOK, *supra* note 34, ¶ 15).

48 See 1951 Convention, *supra* note 20, arts. 31, 33.

49 Margin of appreciation is a general concept in international law allowing a range of discretion to states regarding the interpretation of a treaty and application of it in accordance with domestic law. See, e.g., *Layla Sahin v. Turkey*, App. No. 44774/98, 41 Eur. H.R. Rep. 8, ¶ 110 (discussing the margin of appreciation granted to France in derogating the right to manifest one’s religion).

50 See MUSALO ET AL., *supra* note 30, at 275–76 (discussing UNHCR HANDBOOK, *supra* note 34, ¶¶ 56–60).

51 See Refugee Appeal No. 71427/99 (2000) N.Z.L.R. 545 (N.Z.), *reprinted in* MUSALO ET AL., *supra* note 30, at 230.

52 This discussion of the “source of persecution” is important in the later sections of this Note that discuss how different groups of asylum seekers, who do not generally fall within the 1951 Convention’s categories of refugees, could claim refugee status. It is particularly important for asylum seekers claiming refuge from female genital mutilation, domestic violence, and certain kinds of environmental persecution.

53 See UNHCR HANDBOOK, *supra* note 34, ¶ 65 (“Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.”).

The boat people of Australia who await determination by the national RDS fall within these gaps of 1951 Convention. For example, they might be fleeing generalized violence from Afghanistan, environmental disasters from Bangladesh, or economic misfortune from Indonesia. As this Note later addresses, two modalities—evolutionary interpretation and customary international law—can be used to understand and expand the definitions of “membership in a particular social group” and “persecution” and the resulting state obligations to these asylum seekers. The Note concludes that evolutionary interpretation would not properly resolve the uncertainties surrounding which asylum seekers will receive protection. Instead, customary international law offers a more stable method of expansion that, while admittedly sacrificing some measure of short-term relief, best serves the needs of all future asylum seekers.

C. *Basic Obligations to Asylum Seekers*⁵⁴

As a general principle of international law, states have certain basic obligations to asylum seekers: Non-rejection, *non-refoulement*,⁵⁵ temporary refuge, nondiscrimination, access to courts, opportunity to find a lasting solution to their plight, and provisional admission into the country.⁵⁶ The 1976 Nansen Symposium held that “an obligation to grant asylum, subject to certain exceptions; [required] confirmation of the notion of non-rejection at the frontier within the principle of *non-refoulement*; and general recognition of the principle of provisional admission as a *minimum requirement*.”⁵⁷

Australia is one state that satisfies these minimum requirements. Australia tries to prevent asylum seekers from landing on its shores, but once they have arrived, Australia does not reject them, it does not try to return them to their home countries, and it does allow them provisional admission until the asylum seekers have undergone the national RDS. In addition to *non-refoulement* and provisional admis-

54 For clarification purposes, this Note analyzes the obligations that states have to asylum seekers, not people that have gone through the RDS and have been determined to be, or not be, refugees.

55 The principle of *non-refoulement* is the obligation by the host state to not expel or return (“refouler”) “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” 1951 Convention, *supra* note 20, art. 33; *see also* I.N.S. v. Stevic, 467 U.S. 407, 430 (1984) (holding that the *non-refoulement* principle was only guaranteed to those asylum seekers who could demonstrate a “clear probability of persecution”).

56 *See* 1951 Convention, *supra* note 20, arts. 3, 16, 32, 33.

57 GOODWIN-GILL, *supra* note 21, at 181 (second emphasis added).

sion, Australia provides some minimal monetary, medical, and legal aid for the asylum seekers within its borders.⁵⁸ However, tents of asylum seekers wait in an asylum limbo of detention⁵⁹ until the state's RDS determines the appropriate action for persons that do not fall within the traditional Convention definition of "refugee." Some of the asylum seekers in Australia have been waiting for adjudication and determination of their refugee status from anywhere between three and eleven years.⁶⁰

58 See *Fact Sheet 62: Assistance for Asylum Seekers in Australia*, AUSTL. GOV'T, DEP'T OF IMMIGRATION & CITIZENSHIP, <http://www.immi.gov.au/media/fact-sheets/62assistance.htm> (last visited Nov. 7, 2011); *Fact Sheet 63: Immigration Advice and Application Assistance Scheme*, AUSTL. GOV'T, DEP'T OF IMMIGRATION & CITIZENSHIP, <http://www.immi.gov.au/media/fact-sheets/63advice.htm> (last visited Nov. 7, 2011) (discussing specific requirements that are needed in order to be entitled to these benefits).

59 The method of seeking asylum discussed here, which includes detention, is for asylum seekers that enter states without proper travel documentation. Asylum seekers can gain asylum and refugee status through other channels, such as applying from the asylum seeker's home state or by first traveling to the host state with proper travel documentation on other terms (e.g., through the regular travel or work visa process) and requesting permanent or semi-permanent refugee status after entry. An interesting examination of Article 31 of the 1951 Convention provides that asylum seekers should not be penalized for illegal immigration-like situations because they were fleeing from persecution. But the current asylum scene shows that they are in fact treated like illegal persons and kept in detention facilities. See Guy S. Goodwin-Gill, *International Law and the Detention of Refugees and Asylum-Seekers*, 20 INT'L MIGRATION REV. 193, 208 (1986). "In 1999 [the] UNHCR issued guidance on the detention of asylum-seekers, recommending that detention should be the exception, rather than the rule, and that it should be used only in specified and limited circumstances." MUSALO ET AL., *supra* note 30, at 959 (citing UNHCR, DIVISION OF INTERNATIONAL PROTECTION SERVICES, ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES, POLAS/2006/03 (April 2006)). The UN High Commissioner for Refugees outlines that (1) detention is highly undesirable, (2) it must only be resorted to in cases of necessity, and (3) should not be automatically applied to people that come "directly" in an irregular manner. See UNHCR, UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS, Introduction ¶¶ 1-3 (1999) [hereinafter UNHCR REVISED GUIDELINES]. This document also offers alternatives to detention, such as monitoring protocols, residence requirements, guarantors, bail systems, or specially designed residence centers. See *id.* at Guideline 4. The term "necessary" is defined as it pertains to reasons why states may be able to detain certain asylum seekers. See UNHCR, DETENTION OF REFUGEES AND ASYLUM SEEKERS, CONCLUSION NO. 44 (XXXVII) (Oct. 13, 1986).

60 See *End to Refugee Detention*, 16 AUSTL. NURSING J. 13 (2008). Just like all other aspects of asylum law practice, detention practices are quite varied. Australia and the United States detain asylum seekers during the entire RDS process whereas European states have much more limited detention periods (between one to three months). See MUSALO ET AL., *supra* note 30, at 959.

While these asylum seekers are in a state of limbo, they deserve their basic, non-derogable human rights⁶¹—namely, the right to life, the right to be free from slavery, the right to be free from torture, and the rights to be free from retroactive application of penal laws.⁶² Other human rights also apply to these asylum seekers: the right to be free from arbitrary detention,⁶³ “recognition as a person before the law, equality before and equal protection of the law, [and the] freedom of conscience, thought, and religion.”⁶⁴ Going further, domestic and international human rights advocates argue that these detainees should be allocated even more rights and freedoms, such as employment rights and full access to state-sponsored social services.⁶⁵ Even if asylum seekers receive these “extra” rights, they continue to live in limbo, not understanding or realizing the full breadth of their rights in the host state. There are few options available for such asylum seekers. They must either wait until the current host state has the political will to expand its understanding of “refugee” and grant protection to more asylum seekers, or they must seek refuge elsewhere.⁶⁶

61 Non-derogable rights are ones that cannot be limited under any circumstances. There are also derogable rights, such as the right to religious manifestation and the freedom of movement which may be limited by states for purposes of public order, safety, health, or the protection of the freedoms and rights of others. See ICCPR, *supra* note 18, at art. 4. Many states have actually entered reservations to Article 26 of the 1951 Convention, which concerns the freedom of movement, in order to ensure that these states may restrict places of residence of asylum seekers “on the grounds of national security, public order, or the public interest.” Goodwin-Gill, *supra* note 59, at 206.

62 See Goodwin-Gill, *supra* note 59, at 205.

63 Although the UNHCR urges states to refrain from detaining asylum seekers at all, it is generally accepted that states can detain asylum seekers for the purposes of initial determination or later for purposes of national security. See UNHCR REVISED GUIDELINES, *supra* note 59, at Guideline 10. Protracted or *arbitrary* detention, however, is prohibited. See *id.*

64 Goodwin-Gill, *supra* note 59, at 205.

65 See, e.g., *End to Refugee Detention*, *supra* note 60. The UNHCR provides conditions for detention, such as the opportunity to receive medical treatment, education, vocational training in addition to basic necessities, and basic human rights (such as exercise of religion and due process). This guideline does not include the right to work or access to state-sponsored social services. See UNHCR, REVISED GUIDELINES, *supra* note 59, at Guideline 10.

66 In some regions, such as the European Union, where the first-entry policy is in effect as well as relatively uniform definitions of “refugee,” if an asylum seeker fails to pass through the first-entry state’s RDS, they might not have the ability to find another, nearby state where they can try again. As mentioned earlier, although the first-entry policy allows states to avoid forum shopping and promote burden sharing, it really negatively affects asylum seekers.

Several factors restrict the protection states provide to asylum seekers, including xenophobia; strict interpretation of domestic refugee laws; high burdens of proof for granting refugee status; considerable difficulties for asylum seekers to establish “well-founded fear” due to lack of documentation or problems in understanding the asylum process; and the lack of efficient, stream-lined procedures in the RDS.⁶⁷ Additionally, states face incredible pressures from domestic groups that argue that national resources should go towards domestic problems and the citizenry rather than to foreigners and asylum seekers. Understandably, states have to balance the needs of their domestic population with those of asylum seekers. Especially in difficult economic times, countries focus on providing for their own citizenry. Countries such as Italy, Greece, and Spain receive large numbers of asylum seekers from the African continent and the Middle East. These countries are also experiencing terrible economic turmoil, as reflected by the recent Greek debt crisis.⁶⁸ Spain, in order to handle their domestic asylum seeker and migrant problem,⁶⁹ initiated two programs: a *regularización* program and a “Plan de Retorno Voluntario,” which provided amnesty and voluntary return to illegal immigrants, including asylum seekers.⁷⁰ The Spanish voluntary return program and the Australian policy of immigration controls are attempts to systematically turn away asylum seekers.

As the story of the boat people reflects, asylum seekers are inherently marginalized populations that have been abandoned by their countries and need the protection of other states. States are the sole entities in the international community that are capable of providing this protection. All individuals, including asylum seekers, inherently possess indivisible human rights. So states should not treat asylum

67 See Goodwin-Gill, *supra* note 59, at 194. There are also discrepancies within a host state’s system of civic detention of asylum seekers, for example giving preferential treatment to asylum seekers from one country. See *id.* at 203.

68 See *Greek Debt Crisis Still Unresolved*, VOICE OF AMERICA NEWS, (Sept. 26, 2011), <http://www.voanews.com/english/news/europe/Greek-Debt-Crisis-Still-Unresolved-130560808.html> (last visited Nov. 7, 2011).

69 In 2005, Spain hosted 1,714,256 undocumented persons out of a total population of 43 million. See Francisco Torres, *La Regularización Extraordinaria: Luces y Sombras* [Extraordinary Regulation: Lights and Shadows], PENSAMIENTO CRÍTICO, (June 2005) <http://www.pensamientocritico.org/frantor0605.htm> (last visited Nov. 7, 2011).

70 See María Pabón López, *What Nations Are Doing About Immigrant Workers In Downturn Economies: Examining and Comparing the Recent Treatment of Immigrant Workers in the United States and Spain*, 1 NOTRE DAME J. INT’L, COMP. & HUM. RTS. L. 80, 87–92 (2011), available at <http://www.nd.edu/~intlaw/Lopez%20Article.pdf> (discussing the Spanish regularization program).

seekers as second-class, “illegal” persons for unlawfully crossing the border, but afford them basic rights to allow them to live a dignified life, such as the right to a family life, a form of employment, and basic health and safety rights. States should consider programs similar to the Spanish amnesty program, which provided some relief to desperate asylum seekers. Human rights, such as those requested by asylum seekers, are basic rights, which do not diminish when the economy contracts or domestic politics change. This Note suggests that by expanding state obligations to asylum seekers through customary international law, asylum seekers’ basic human rights will not be susceptible to the ebbs and flows of internal state concerns.

D. *Problems in Refugee Law*

The various definitions of “refugee” and interpretations of state obligations to asylum seekers lead to several challenges for states, asylum seekers, and the international community. First, there is a lack of concrete, statutory definitions of “refugee,” either in international documents or domestic law. The history of refugee law “illustrate[s] both the development in the refugee definition and the problems that arise in applying it consistently to large numbers of asylum seekers.”⁷¹ “States have translated their concern for the international problem of refugees into action on the municipal level.”⁷² These municipal actions, however, are too disjointed to provide a sufficiently consistent practice that benefits asylum seekers.

Second, states have differing obligations asylum seekers. “[T]here is a clear gap between what may be called *functional* responsibilities and expectations, on the one hand, and the legal obligations of States, on the other hand.”⁷³ These differing obligations either go beyond those outlined in the 1951 Convention and 1967 Protocol or fall short due to states’ reservations⁷⁴ to these documents.

Lastly, existing obligations are not truly enforced. The UNHCR has been tasked this responsibility, but its ability to tangibly affect state obligations and practices is limited.⁷⁵ Furthermore, “the majority of States clearly want the United Nations to assume responsibilities for a

71 GOODWIN-GILL, *supra* note 21, at 13.

72 *Id.* at 25. By “municipal” it is meant that domestic and local courts, panels, and tribunals are the final arbiters of asylum determinations.

73 *Id.* at 26.

74 A reservation is a caveat to a state’s acceptance of a treaty. It allows a state to be a party to the treat, but excludes the legal obligation of a specific part of the treaty to which the state has objected. See VCLT, *supra* note 23, art. 2(1)(d).

75 See Guy S. Goodwin-Gill, *The Margin of Interpretation: Different or Disparate?*, 11 INT’L J. REFUGEE L. 730, 730 (1999). For a view on who should oversee the 1951

broad category of persons obliged to flee their countries for a variety of reasons.”⁷⁶ But the international community lacks the social cohesion and political will to expand asylum obligations and to enforce them.

These three challenges are problematic to states, asylum seekers, and the international asylum mechanism. Due to different state policies, refugees are confused about where they might actually receive protection. States are afraid that refugees will “engage in forum-shopping between different jurisdictions,”⁷⁷ meaning that refugees will go to states with favorable refugee and asylum laws in order to reap benefits and perhaps later move to the country in which they actually want to live.⁷⁸ In response to forum shopping and to control refugee movement, European Union states have enacted laws that restrict where refugees need to file their claims, rather than establishing consistent regional refugee policies. Refugees must claim refugee status in the state of first entry.⁷⁹ States argue that the first-entry policy is a good way to ensure burden sharing⁸⁰ of asylum seekers and eliminate the refugees’ abuse of the system. There is no proof, however, that this type of procedural restraint actually alleviates burden-sharing problems, especially because states have little control over how asylum seekers choose their destination.⁸¹ For example, due to the geographic and historical contours of Europe, states such as Spain, Italy, and Greece receive more refugees than other European countries. Due to the state of first entry policy, these states have to accommodate larger refugee populations than their northern neighbors. Consequently, there is no real burden sharing or alleviation of the burden for these border states. At the same time, the policy of first entry makes it more difficult for the asylum seekers at the outset to determine their preferred location and pressures them to take considera-

Refugee Convention, see James C. Hathaway, *Who Should Watch Over Refugee Law?* 14 FORCED MIGRATION REV. 393, 398–99 (2002).

76 GOODWIN-GILL, *supra* note 21, at 25.

77 Boutillon, *supra* note 30, at 117.

78 *See id.*

79 *See id.* The state of first entry is literally the state that the refugee first enters after fleeing his home country. The European Union had enacted such policies where asylum seekers had to file claims for refugee status in the state of first entry via the Dublin Convention. *See id.*

80 Burden sharing is a concept that one country should not host more refugees than its fair share in comparison to other countries. *See id.* at 117 n.23.

81 *See id.* at 117. In addition to choosing a state for their refugee laws and social services, asylum seekers must also compare the risks that they must take in order to reach a destination with the chances that they will actually arrive there and be granted the protection that they need and require.

ble risks to arrive in their preferred country if it is one that is not easily accessible.⁸²

After these (illegal immigrant) asylum seekers finally arrive at a host state, they still face problems in obtaining refugee status and realizing the rights associated with that status. Receiving tangible results from the national RDS requires the political will of the host state, but that can be quite elusive. Moreover, states have different national RDS and varied obligations that constitute the current haphazard asylum system.

II. DIFFERENT MODALITIES OF DETERMINING STATE OBLIGATIONS UNDER REFUGEE LAW

In order to achieve a stable and liberal regime of rights for asylum seekers, there must be an established method to determine states' obligations. Legal scholars have posited three methods to determine state obligations to asylum seekers: (1) a strict, positivist view of state obligations, (2) a liberal view that allows a variety of state obligations depending on states' political will, and (3) a view that espouses international expansion of new state obligations based on the application of the theory of evolutionary interpretation to the 1951 Convention. None of the modalities presented here are viable for appropriately expanding states' obligations to asylum seekers. Instead, customary international law provides an alternative, more stable method for expanding obligations.

A. *The Positivist View*

Theorists espousing the positivist, or the strict, narrow view on state obligations encourage the limitation of obligations to the Convention's text. "[T]hose universal rights of particular value to refugees, even as it explains why the rights of refugees are, for the most part, best defended not by reference to universal custom or general principles of law, but by reliance on clear duties codified in treaty law."⁸³ Some publicists argue that the 1951 Convention, the 1967 Protocol, and the surrounding Guidelines should be the sole source of state obligations to asylum seekers.⁸⁴

The Convention and Protocol definitions, however, are neither clear nor comprehensive enough for international human rights and humanitarian needs. The "boat people" in Australia are illegal immi-

82 See *id.* at 118.

83 See HATHAWAY, *supra* note 10, at 10.

84 See *id.* at 74. Hathaway asserts that the existing refugee rights regime is sufficient for addressing the crises in refugee law today. See *id.* at 1002.

grant asylum seekers that have been detained for long periods with no relief. They are fleeing generalized violence, internal conflicts, gross violations of human rights, or severe economic hardship. Those “persecutions” are generally not classified under the 1951 Convention, so these asylum seekers are considered “non-Convention refugees.” Although they do not have a legally recognized refugee status under the 1951 Convention, these people have dire needs that must be met by the asylum system tasked to protect them. The asylum system places a heavy burden on states. They must employ immigration officers, finance overhead costs, and maintain detention centers. However, states are the only viable entities that can provide the protection sought by asylum seekers, and they must be obligated to do so. In fact, if states expand asylum obligations through customary international law, it will result in a unified system that will inherently alleviate burden-sharing problems. For example, if all states are providing the same obligations, it would reduce forum shopping by asylum seekers and states would not have to spend as many resources trying to control asylum seekers’ entry and movement.⁸⁵

B. *States’ Self-Appointed Obligations*

The second modality allows states to determine their own obligations beyond the Convention and Protocol, giving great weight to the principle of margin of appreciation.⁸⁶ Liberal allowance to states over certain “legislative” asylum issues, such as RDS procedures and what kinds of asylum seekers are granted refugee status, can result in experimentation and perhaps liberalization and expansion of asylum laws and obligations as per the needs of the international community.⁸⁷ States with resource capabilities and political willingness have historically expanded their obligations. For example, the United States expanded its understanding of “refugee” to include refugees from the Eastern Bloc and Cuba during the Cold War, labeling them victims of “economic persecution.”⁸⁸

Under this modality, “[t]he acceptance of other foreigners for humanitarian reasons would be based, not on any Convention obligation, but on considerations of humanitarian law or international soli-

85 See *supra* notes 79–80 and accompanying text.

86 See *supra* note 49 and accompanying text.

87 In the United States as well as other common law countries judges are another factor in determining what peoples are granted refugee status.

88 See *infra* note 134 and accompanying text (discussing *Kovac v. I.N.S.*). Preferential treatment has also been given to Cuban refugees since the 1960s. They arrive for mostly economic reasons, but it is characterized as *per se* political persecution by the Communist Castro government.

parity; that is ‘on a free decision by the State concerned.’”⁸⁹ Moore, offering a state-centric point of view of international legal theory, argues that the right to grant asylum “is to be exercised by the government in the light of its own interests, and of its obligations as a representative of social order.”⁹⁰ Even the UN Group of Experts agrees: “[E]ach Contracting State, *acting in the exercise of its sovereign rights, shall use its best endeavours* in a humanitarian spirit to grant asylum in its territory.”⁹¹ This modality asserts that the 1951 Convention acts as a baseline for state obligations from which individual states may deviate due to domestic political will and resource capabilities.

Determining state obligations in this way leaves refugees susceptible to the pendulum swings of domestic popularity of policies, composition of legislatures, availability of resources, and compilation of the judiciary or administration system that decides such issues.⁹² For example, the nontraditional areas into which asylum coverage is expanding in individual countries, such as gender- and sex-based refugees and environmental refugees, are ones that are more difficult to decide objectively on a case-by-case basis. It is difficult to determine whether these persons actually fit within the category of “membership of a particular social group or political opinion” or if there is a “well-founded fear of persecution.”⁹³

This difficulty in determination and execution leads to problems for states as well. For example, it could lead to excessive fraudulent claims, which clutter the already overworked national RDS.⁹⁴ Additionally, drastic changes, specifically *restrictions*, in the asylum laws of individual countries can have serious effects on other states. It can result in overwhelming the administrative systems of neighboring states and mass influxes of asylum seekers traveling to more favorable host states.⁹⁵ In Europe, for example, the Scandinavian countries provide more social benefits to asylum seekers than their Southern European counterparts, so asylum seekers try to arrive in these favorable states. It is exactly for this reason (forum shopping) that the Euro-

89 GOODWIN-GILL, *supra* note 21, at 27 (emphasis added).

90 *See id.* at 172–73.

91 *See id.* at 180.

92 *See, e.g.,* Keyes, *supra* note 36, at 401–04 (discussing the aforementioned issues as well as external pressures from the European Union in the determination of asylum policy in the United Kingdom).

93 *See supra* notes 42–53 and accompanying text.

94 Actually assessing whether a woman is a domestic violence victim or if a person comes from a village that has been destroyed by manmade environmental disasters is quite difficult. Evidence gathering and witness production is very difficult to provide for the victims and to authenticate by local judges.

95 *See* GOODWIN-GILL, *supra* note 21, at 194–95.

pean community enacted the first-entry policy, but that rule has resulting practical problems, as well.⁹⁶ States, such as Australia, are understandably confused, overwhelmed, and frustrated by the asylum system and by the large numbers of asylum seekers that arrive at their borders.

This modality of interpretation relies heavily on the consent of states to determine their own obligations, similar to customary international law. However, unlike customary international law, these obligations are not determined uniformly with the consensus of several states. By using this modality to determine obligations, the asylum system will remain susceptible to the ebb and flow of domestic policies. Therefore, creating a stable mechanism for expanding state obligations to asylum seekers via custom would benefit both states and asylum seekers.

C. *Evolutionary Interpretation of the 1951 Convention*

1. Synopsis of the Modality

The third modality asserts that expansions of asylum law and state obligations to asylum seekers should be based on an evolutionary interpretation of the 1951 Convention. Before discussing evolutionary interpretation, this Note briefly discusses customary international law (CIL) in order to contrast it with evolutionary interpretation as an alternative to CIL. Part III addresses CIL more fully.⁹⁷

The UNHCR Programme stated that “refugee problems are the concern of the international community and their resolution is dependent on the will and capacity of states to respond *in concert* and wholeheartedly, in a spirit of true humanitarianism and international solidarity.”⁹⁸ The international community has created a system for refugees, and as such, expansions in state obligations to these people that have been granted special status must also be derived from the international community. “‘Community rules should lead to a *com-*

96 See *supra* notes 77–83 and accompanying text.

97 See *infra* Part III.

98 GOODWIN-GILL, *supra* note 26, at 29 (emphasis added); see also IOM & UNHCR, *Towards a Comprehensive Regional Policy Approach: The Case for Closer Inter-Agency Co-operation*, 5 INT'L. J. REFUGEE L. 347, 382–86 (1993) (proposing a regional policy based approach to the problems that states face in controlling population movements); Guy S. Goodwin-Gill, *Refugees and Responsibility in the Twenty-first Century: More Lessons Learned from the South Pacific*, 12 PAC. RIM L. & POL'Y J. 23, 35 (2003) (discussing the MV/*Tampa* incident and using it as a case study to assess the obligations that states should have towards refugees).

mon asylum procedure and a *uniform status . . .*”⁹⁹ Therefore, creating a comprehensive and liberal scheme of state obligations should result from a community of states. This comprehensive scheme is known as a new custom in international law.

In order to assert a new norm of customary international law, there must be general practice of states and *opinio juris*.¹⁰⁰ *Opinio juris* (an “opinion of law”) is the belief that an action or a law or a judgment was enacted because it was a legal obligation. It is the subjective element of custom as a source of international and domestic law.¹⁰¹ The objective element is the general practice of states. According to Kay Hailbronner, there is neither extensive and uniform state practice nor *opinio juris* sufficient to warrant an assertion of international rights for refugees outside the scope of the Convention.¹⁰² These two requirements are quite difficult to find in practice due to the current state of affairs in refugee law. Because of the *ad hoc*, state-driven asylum system, there is no uniform practice of states’ obligations towards asylum seekers. Additionally, the determination of *opinio juris*, which is normally difficult, is even more difficult because drafting domestic immigration policies is highly *political*.¹⁰³ Publicists argue that in order to arrive at an international consensus of state obligations regarding asylum seekers while avoiding lengthy negotiations for another refugee treaty,¹⁰⁴ one must interpret the treaty in an evolu-

99 Goodwin-Gill, *supra* note 75, at 735 (emphasis added) (quoting Tampere European Council, *Presidency Conclusions*, 11 INT’L J. REFUGEE L. 738 (1999)). Although in this case the author was specifically discussing the European Union and its community of rules towards asylum seekers, the communitarian sentiment is still valid.

100 See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6–12 (7th ed. 2008).

101 See, e.g., S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 28 (Sept. 7); North Sea Continental Shelf Cases (Ger./Den., Ger./Neth.), 1969 I.C.J. 3, ¶ 78 (Feb. 20); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 68 (July 8), available at <http://www.icj-cij.org/docket/files/95/7495.pdf> (applying the concept of *opinio juris* in three different cases to discern whether a new custom of international law had been formed).

102 See James C. Hathaway, *The Law of Refugee Status* 25 (1991) (citing Kay Hailbronner, *Non-refoulement and ‘Humanitarian’ Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT’L L. 857, 887 (1986)).

103 See *supra* notes 86–91 and accompanying text. This assertion simply highlights that *opinio juris* is based on the *legal* obligations of states. The crux of domestic immigration policies is highly dependent on politics rather than on law. The reasoning of the political branches of governments only can be used to show *opinio juris* if it is reflective of *legal* obligations.

104 Regional harmonization and expansion of asylum obligations has been sought by the European Union, the Organization of American States (OAS), and the Organization for African Unity (OAU). The OAS and the OAU have regional treaties that

tionary manner to fulfill the object and purpose of the 1951 Convention. Evolutionary interpretation is the judicial reading-in of the diverse obligations that have, arguably, come within the Convention over time.

The Vienna Convention on the Law of Treaties (VCLT) governs the interpretation of international conventions.¹⁰⁵ Articles 31 and 32 of the VCLT offer general and supplementary rules of interpretation, respectively. Article 31(3)(c)¹⁰⁶ allows for a “scope of evolutionary interpretation by reference to developments in the law outside the immediate confines of a particular treaty.”¹⁰⁷ Examples of evolutionary treaty interpretation can be seen in the “expansion of international law into regulation of new areas, particularly by treaties not only *creating specific obligations* but also *establishing general principles*.”¹⁰⁸

The evolutionary interpretation theory is built upon the premise that “changed circumstances affect [the] interpretation of a treaty.”¹⁰⁹ Tribunals use evolutionary interpretation to read something into a treaty due to changes over time. Tribunals have found that using evolutionary interpretation “ensure[s] an application of the treaty that would be effective in terms of its object and purpose” and that such an application would be preferred to a strict application of the treaty without considering temporal changes.¹¹⁰ The Permanent Court of

expand upon the 1951 Convention. *See supra* notes 29–30. The EU’s Tampere Conclusion and the Hague Program go further by seeking to create a harmonized system of RSD and asylum laws under the Common European Asylum System (CEAS). *See Protection in Europe*, EUROPEAN COUNCIL ON REFUGEES AND EXILES, <http://www.ecre.org/topics/areas-of-work/protection-in-europe.html> (last visited Nov. 14, 2011).

105 *See* VCLT, *supra* note 23, art. 31.

106 Article 31(3)(c) of the VCLT states that “there shall be taken into account, together with the context: . . . any relevant rules of international law applicable in the relations between the parties.” *Id.* art. 31(3)(c).

107 RICHARD K. GARDINER, *TREATY INTERPRETATION* 252 (2008).

108 *Id.* (emphasis added).

109 *Id.*; *see also* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), July 13, 2009, 48 I.L.M. 1180, ¶ 64 (“On the one hand, the subsequent practice of the parties, within the meaning of Article 31(3)(b) of the Vienna Convention, can result in a *departure from the original intent on the basis of a tacit agreement between the parties*. On the other hand, there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used or some of them a *meaning or content capable of evolving*, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question *upon each occasion on which the treaty is to be applied*.” (emphasis added)).

110 GARDINER, *supra* note 107, at 255.

Arbitration (PCA) used evolutionary treaty interpretation in *Iron Rhine Railway*.¹¹¹ This case extended the term “new road” or “new canal” in Article XII of the 1839 treaty in issue to refer to a railway.¹¹² The PCA stated that an evolutionary interpretation is superior to a strict application in order to address new technological railway developments. It also considered the object and purpose of the treaty, which addressed the cost and expenses of the modernization and extension of other methods of transport.¹¹³ Similarly, environmental treaties have also been subjected to evolutionary interpretation in order to accommodate new threats and new technologies, as exemplified by the *Shrimp-Turtle* case.¹¹⁴ Regional trade treaties, such as the treaty in dispute in *Costa Rica v. Nicaragua*, have also been subject to evolutionary interpretation.¹¹⁵

The 1951 Convention is a special kind of treaty-document, a human rights treaty, that provides safe haven to the peoples of the

111 Arbitration Regarding the Iron Rhine (“Ijzeren Rijn”) Railway (Belgium v. Netherlands), May 24, 2005, 27 R.I.A.A. 35 (2005), available at http://untreaty.un.org/cod/riaa/cases/vol_XXVII/35-125.pdf.

112 See *id.* ¶ 79.

113 See *id.* at 57, 71.

114 In the *Shrimp-Turtle* case, the World Trade Organization (WTO) Appellate Body interpreted Article XX of the General Agreement on Trade and Tariffs (GATT) (1994) under the principles of Article 31(3)(c) of the VCLT and, by considering the object and purpose of the *chapeaux* (rather than the object and purpose of the whole treaty), allowed the United States to deviate from the GATT to ensure the protection of shrimp species. The protection of this species had not been considered at the treaty’s inception, but the *chapeaux* provided for such future considerations. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158 n.157, WT/DS58/AB/R, (Oct. 12, 1998). A *chapeaux* is the head paragraph of a separate section of a treaty. It sets the tone, object, and purpose of that particular section, which may vary slightly from the overall object and purpose of the treaty.

115 See Dispute Regarding Navigational and Related Rights, July 13, 2009, 48 I.L.M. 1180. The parties challenged the meaning of the phrase “con objetos de comercio” (literally translated as “with objects of commerce”) in Article VI of the 1858 Treaty of Limits. See *id.* ¶ 37. Costa Rica asserted a broad interpretation—taking the phrase to mean “for the purpose of commerce”—which would include not only the transportation of goods, but also people. *Id.* ¶ 45. Nicaragua, on the other hand, interpreted the phrase strictly to mean “with articles of trade.” *Id.* The ICJ found that Costa Rica has the right of free navigation on the San Juan River for purposes of commerce, including the transport of peoples. It based its decision on an evolutive understanding of the treaty to include temporal changes in the definition of “commerce.” “[T]he term ‘comercio,’ must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning . . . it is the present meaning which must be accepted for purposes of applying the Treaty.” *Id.* ¶ 70.

international community from violence and discrimination. Publicists posit that the Asylum Convention needs a more natural evolution of the interpretation of the object and purpose of Article 1 to develop a more comprehensive definition of the term “refugee.”¹¹⁶

In general, the 1951 Convention’s meaning has evolved. For example, Article 1 still asserts a limited scope of application to those people who became refugees as a result of events occurring prior to January 1, 1951.¹¹⁷ The Convention’s definition of “refugee,” however, has expanded to apply even to people who became refugees after that date¹¹⁸ because states failed to adhere to that temporal requirement.¹¹⁹ Similarly, the terms “membership in a particular social group” and “persecution” have expanded over time to include more groups that would not have originally received protection under the 1951 Convention.¹²⁰ For example, gender-based asylum seekers or those fleeing generalized violence have been recognized as refugees by asylum-receiving countries.¹²¹

Further application of evolutionary treaty interpretation would allow for an expansion of the categories of “refugee” in the 1951 Convention to encompass more kinds of asylum seekers, liberalizing the regime to include asylum seekers such as some of the Australian boat people. Arguably, evolutionary interpretation should be applied to the two contested clauses in the 1951 Convention: “[A] member of a social group”¹²² and “persecution.”¹²³ Publicists contend that evolutionary interpretation should be applied to the 1951 Convention definition of “refugee” to expand its protection of “non-Convention” asylum seekers.¹²⁴ One publicist proposes that victims of private, man-

116 See *infra* note 124 and accompanying text.

117 See 1951 Convention, *supra* note 20, art. 1

118 See UNHCR CONVENTION AND PROTOCOL, *supra* note 7, at 6.

119 Failure to adhere to a custom or a treaty in turn becomes a custom on its own merits. In this case, the custom of failing to adhere to the temporal requirement of the 1951 Convention became its own custom and was later codified in the 1967 Protocol.

120 See *infra* notes 160–74 and accompanying text.

121 See *id.*

122 See *supra* notes 32–36 and accompanying text.

123 See *supra* notes 37–43 and accompanying text.

124 See, e.g., Larry Katzman, *UNHCR’s Asylum-Related Guidelines* 81 No. 17 INTERPRETER RELEASES 545, 547–48 (2004) (suggesting that the UNHCR’s Executive Committee (ExCom) Conclusions, which seeks to interpret the 1951 Convention in “evolutionary” terms, should act as formally binding interpretations for the asylum regime); Justice A.M. North & Nehal Bhuta, *The Future of Protection: The Role of the Judge*, 15 GEO. IMMIGR. L.J. 479, 491 (2001) (discussing the inability of a “state-centric” interpretation to adequately protect refugees).

made environmental harm—such as indigenous peoples in Bolivia and El Salvador victimized by environmental degradation as a result of unsafe mining and extraction practices—should be considered part of the 1951 Convention through the theory of evolutionary interpretation.¹²⁵ Marcs argues that these peoples belong to a particular “social group” of indigenous peoples who own land that is particularly attractive to mining companies. Therefore, they face a “well-founded fear of persecution” from a nonstate actor because of continued environmental calamities caused by pollutants and destruction of their land, which is their sole livelihood.¹²⁶

2. An Assessment of the Theory of Evolutionary Interpretation

This third modality seeks to reach a compromise between the other two. It allows for the expansion of state obligations from the limited allocations of the 1951 Convention while providing some semblance of harmony in the incorporation of new obligations within the scope of the Convention. This consensus-based expansion benefits refugees by designating a baseline for state obligations that is higher than the status quo, meaning that it could allow for a liberalized asylum system to accommodate asylum seekers such as the Australian boat people. It benefits states by reducing the burden-sharing problems, and it benefits the domestic courts by reducing the confusion when applying international and comparative legal standards.

However, evolutionary interpretation poses two main problems: international recognition and legal validity. Generally, the Asylum Convention, as with all other treaties, is interpreted with two main policies in mind: (1) to ensure states’ consent and (2) to enable the widest participation possible. For this reason, the 1951 Convention grants states the ability to fluctuate their obligations based on domestic policy and political will.¹²⁷ This is the concept of “margin of appreciation” expounded earlier. Although it is of vital and moral importance that states grant protection to asylum seekers, the Asylum Convention is a treaty that imposes hefty obligations upon a state and its domestic policies—arguably more obligations than any other human rights treaty.¹²⁸

125 See Carly Marcs, *Spoiling Movi’s River: Towards Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention*, 24 AM. U. INT’L L. REV. 31, 34–35 (2008).

126 See *id.* at 35, 43, 63.

127 See 1951 Convention, *supra* note 20, pmbl., cl. 5.

128 See *id.* pmbl., cl. 4; see also *supra* notes 74–77, 89–90 and accompanying text (discussing the burdens on states).

Due to the high level of obligations already imposed by this treaty, it is a legitimate concern that states should have the freedom to create the mechanisms and execute the enforcement of their asylum obligations. It is the very freedom and discretion granted to states by the 1951 Convention that makes it a widely accepted treaty. As of April 1, 2011, there were 142 states party to both the 1951 Convention and the 1967 Protocol.¹²⁹ The proliferation of the Asylum Convention is paramount, and more comprehensive acceptance of the remaining states requires a state-minded understanding and interpretation of the 1951 Convention. Evolutionary interpretation incorporates new obligations as a result of judicial interpretation, inherently invalidating states' ability to choose their asylum obligations.

Another problem with the evolutionary interpretation of the Asylum Convention is the degradation of the treaty. The treaty is one of the most important vehicles of international law.¹³⁰ It constitutes a legal, binding obligation based on consent and enforceable by international institutions.¹³¹ Scholars stipulate that the use of evolutionary interpretation is just for that purpose, "to further the process of interpretation, not to displace the treaty."¹³² If the theory of evolutionary interpretation may be used to create a new definition of refugee, it results in a *de facto* amendment of the treaty, thereby deteriorating the structures of the treaty regime. The VCLT outlines the methodology for amendments and changes to a treaty.¹³³ Article 31(3)(c) was not contemplated as a venue for amendments, but rather as a method of interpretation that ensures the continuation of the treaty's object and purpose over time.

Additionally, the use of evolutionary interpretation to change the definition of refugee in the 1951 Convention would result in a completely new interpretation of the treaty that was perhaps not contem-

129 See UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, *available at* <http://www.unhcr.org/protection/PROTECTION/3b73b0d63.pdf> (last visited Nov. 14, 2011). There are three states that are only party to the Convention and three states that are only party to the Protocol, the United States being one of them. See *id.* There are 193 countries recognized by the United Nations today. See *What are Member States?*, UNITED NATIONS, <http://www.un.org/depts/dhl/unms/whatisms.shtml> (last visited Nov. 14, 2011).

130 See VCLT, *supra* note 23, pmbl, cl. 2 ("Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems.").

131 The ICJ has the ability to hear cases on treaties, referring to treaties, and applying treaties in order to adjudicate international disputes. See ICJ Statute, *supra* note 15, arts. 36–38.

132 GARDINER, *supra* note 107, at 252.

133 See VCLT, *supra* note 23, arts. 39–41.

plated or, more importantly, contemplated and rejected. For example, during the early 1990s, due to the fall of the Soviet bloc, there was an influx of people from Eastern Europe into Western Europe and the United States. These Cold War asylum seekers claimed refugee status under the 1951 Convention's "membership in a social group." The United States, in the midst of Cold War political maneuvering, further changed the definition of "persecution" via interpretation in *Djordje Kovac v. I.N.S.* to include nonphysical persecution such as the deprivation of economic opportunities so that these Eastern European asylum seekers would not be deported.¹³⁴ However, economic oppression is not enumerated in the U.S. Refugee Act of 1980 as a basis for refugee status.¹³⁵ States have generally ignored the status of economic refugees, who still have not been recognized by the international community.¹³⁶

Today, economic refugees, such as some of the Australian boat people, are not part of the definition of "membership in a social group" nor part of "persecuted" persons according to the 1951 Convention.¹³⁷ Through evolutionary interpretation, "economic refugees" could be incorporated into the 1951 Convention in the future. In the opposite vein, a group of people that is now considered to be part of the Convention could, over time, be excluded through evolutionary interpretation.¹³⁸ There is not necessarily a one-way ratchet with evolutionary interpretation. This *temporal* uncertainty about which groups could fall within the 1951 Convention only perpetuates the uncertainty that asylum seekers face today. Currently, asylum seekers are uncertain whether they will be granted protection. Under an evolutionary interpretation scheme they will be uncertain whether they will be protected in the future even if they are protected at present. For example, if evolutionary interpretation grants the Australian boat people protection today, it could take it away in the future, leav-

134 See 407 F.2d 102, 107 (9th Cir. 1969) (holding that in specific circumstances, deprivation of economic opportunity may constitute "persecution" because it would satisfy the looser interpretation of the word to mean "infliction of suffering or harm upon those who differ," sufficient to withhold deportation under INA § 243(h) in order to reflect the sentiment of the 1965 amended version of INA § 243(h)).

135 See Franci S. Gabor & John B. Rosenquest IV, *The Unsettled Status of Economic Refugees from the American and International Legal Perspectives—A Proposal for Recognition Under Existing International Law*, 41 TEX. INT'L L.J. 275, 279 (2006).

136 See *id.* at 281.

137 See *id.* Gabor and Rosenquest outline a proposal through which there could be protection of economic refugees.

138 Remember, evolutionary interpretation is used by the judges of tribunals in resolving disputes of interpretation. So, a judge could theoretically read something out of a treaty just as easily as he had read something into it.

ing successive generations of asylum seekers perpetually unsure of their status.

Evolutionary interpretation does not require the two prongs of customary international law (general state practice and *opinio juris*) because it allows for a new interpretation of a treaty, expansive or otherwise.¹³⁹ The theory of evolutionary interpretation is relatively new and rarely applied.¹⁴⁰ In its limited use, we see that the interpretation is utilized by a panel of judges to determine the meaning and application of a treaty in question.¹⁴¹ A treaty such as the 1951 Convention, which profoundly affects state sovereignty, should not be subject to the changing and disjointed use of evolutionary interpretation by domestic and international judges.

The three proposed modalities offer three distinct ways to apply the 1951 Convention, each with their own merits and disadvantages. Although evolutionary interpretation provides a compromise, its conciliatory approach should not cloud the serious consequences that may result from its application. A liberal asylum system should not be the result of a volatile methodology such as evolutionary interpretation, whose inherent impermanence renders any temporary improvement unreliable in the future, thus failing to provide the stability most notably absent from the asylum system.

III. THE CLASSICAL PRINCIPLE: CUSTOMARY INTERNATIONAL LAW

Customary international law, in comparison to evolutionary interpretation, parallels an existing treaty, and if sufficient state practice and *opinio juris* are found, may lead to a new treaty on the issue or even displace a treaty or lack thereof. CIL does not require a long

139 The theory of evolutionary interpretation of treaties has seen limited use. As such, there are no examples of evolutionary interpretation leading to the contraction of a treaty. On a theoretical level, however, it is posited that if a concept can be evolved *into* a treaty (and not codified by treaty or law) then it can be evolved *out* as well. There is no indication that it is a one-way ratchet.

140 There are very rare instances in which evolutionary interpretation has been used by courts in the past: the *Iron Rhine* case, the *Shrimp-Turtle* Case, and *Costa Rica v. Nicaragua*. In those cases, the respective treaties were interpreted in order to limitedly incorporate new technology, new environmental considerations, and new trends in commerce, respectively. Those applications seem intrinsically different from the application advocated by some publicists of evolutionary interpretation to the 1951 Convention, both in terms of theoretical and actual repercussions. The current examples of evolutionary interpretation have been in bilateral disputes. The use of evolutionary interpretation in the asylum context affects the sanctity of state sovereignty and the entire asylum system because of a decision from a court or tribunal.

141 See *supra* notes 111–15 and accompanying text.

practice by states, but only that an established practice exists.¹⁴² Additionally, there is no requirement for complete uniformity; only substantial uniformity is required.¹⁴³ An application of customary international legal principles is a much stricter and more stable methodology for expanding asylum obligations. Establishing a sufficient state practice requires the following: (1) the common, “consistent and concordant” action of numerous states¹⁴⁴ with a sufficient degree of participation, especially of those states whose interests are affected by such action,¹⁴⁵ and (2) a failure of other states to challenge or dissent from an action.¹⁴⁶ Although uniform state practice and *opinio juris* are difficult to establish in the asylum context,¹⁴⁷ perhaps the constraints of CIL are appropriate and necessary. CIL is a modality that is accepted as the classical method for crystallizing new customs as international law.

The case of *The Paquete Habana*¹⁴⁸ is the leading case on CIL. There, Justice Gray of the U.S. Supreme Court held that fishing vessels were exempt from prize capture in times of war.¹⁴⁹ In arriving at this decision, he cited historical “tradition” since Henry IV as a basis of customary international law that satisfied the three requirements of CIL.¹⁵⁰ States—including the United States, France, Great Britain, Spain, Austria, Germany, and Japan—had been practicing this custom of exempting fishing vessels because they felt they had a legal obligation to do so, either by explicit treaty or by action.¹⁵¹ These states were the major naval powers in the early 1900s, and they had all acquiesced to this custom.¹⁵² There was no dissention from this practice, and any deviation from it resulted in vehement indignation and condemnation from other states.¹⁵³

There are customary international norms that can develop within the asylum context. For example, modern asylum law resulted from maturing and crystallizing Arab-Islamic and Judeo-Christian tradi-

142 See *supra* note 100 and accompanying text.

143 See *id.*

144 Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, ¶ 63 (June 27).

145 See North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 I.C.J. 4, ¶ 73 (Feb. 20).

146 See *Nicaragua*, 1986 I.C.J. 14, ¶ 186.

147 See HATHAWAY, *supra* note 10.

148 175 U.S. 677 (1900).

149 See *id.* at 714.

150 See *id.* at 686–712.

151 See *id.*

152 See *id.*

153 See *id.* at 692.

tions.¹⁵⁴ Additionally, the way in which states ignored the temporal restriction of the definition of “refugee” in the 1951 Convention even before the 1967 Protocol shows that states are willing to create new practices and norms within the asylum system.¹⁵⁵ In a similar vein, countries that are not party to the 1951 Convention or the 1967 Protocol, such as India and Indonesia, grant and recognize refugee rights based on the UDHR, the ICCPR, and the ICESCR.¹⁵⁶ These states, although not party to the asylum documents, are held to the standards of the 1951 Convention and 1967 Protocol, such as the guarantee of *non-refoulement*¹⁵⁷ and the provision of temporary and/or permanent protection.¹⁵⁸

Additionally, the international community is currently expanding state obligations to asylum seekers via CIL by changing the scope of the definition of “refugee.” Asylum seekers fleeing generalized violence are another generally accepted kind of “refugee,” although that category is not enumerated in the 1951 Convention. This custom has arisen due to regional treaties, such as the OAS and the OAU treaties, which grant refugee status to this category of asylum seekers outside the realm of the 1951 Convention and the 1967 Protocol. Although this definition of “refugee” (which includes those fleeing generalized violence) is not universally recognized and adopted, a substantial number of states (those that are members of these documents) implement asylum law under this acceptance of the term “refugee.” The membership of the OAS and the OAU combined constitutes approximately seventy to eighty countries in the world that have adopted this definition of “refugee.” Arguably, this rises to a level of regional custom that has been recognized by the International Court of Justice.¹⁵⁹

154 See MUSALO ET AL., *supra* note 30, at 5. The word “tradition” was used by Justice Gray in *The Paquete Habana* to describe customary international law.

155 See GOODWIN-GILL, *supra* note 21, at 100–01.

156 See Anil Shrivastav, *Need for Domestic: Refugee Law*, HALSBURY’S L. MONTHLY, Dec. 2008, available at <http://www.halsburys.in/need-for-domestic.html>.

157 The principle of *non-refoulement* has risen to the level of a *jus cogens* norm. See MUSALO ET AL., *supra* note 30, at 101 (citing UNHCR, *Report of U.N. High Commissioner for Refugees*, 40 U.N.G.A.O.R. Supp. (No. 12), U.N. Doc. A/40/12 at 6 (1985) (“[N]on-refoulement has now come to be characterized as a peremptory norm of international law.”)); Cartagena Declaration, *supra* note 29, art. III (“[*Non-refoulement*] is imperative in regard to refugees . . . as a rule of *jus cogens*.”).

158 See Shrivastav, *supra* note 156.

159 The ICJ recognized a regional (Latin American) custom in the *Asylum Case* of a state unilaterally characterizing an offense for the purpose of “asylum” if it could prove it was binding on the states that were parties to the dispute. See *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20), available at <http://www.icj-cij.org/docket/files/13/1933.pdf>.

If one also includes the European Union member states that have accepted that people fleeing high levels of generalized violence require protection, then that number increases.¹⁶⁰

Asylum cases brought by victims of female genital mutilation (FGM) also show the willingness of states to expand the refugee definition. The UNHCR *Guidelines on Gender Related Persecutions*¹⁶¹ stated that “[t]here is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, [and] female genital mutilation . . . are acts which inflict severe pain and suffering—both mental and physical—and which have been used as forms of persecution, whether perpetrated by state or private actors.”¹⁶² The UNHCR’s Executive Committee Conclusion No. 73 (XLIV) on Refugee Protection and Sexual Violence supported the classification of sexual violence as a “well-founded fear of persecution.”¹⁶³ South Africa, the world’s most popular destination country for asylum seekers, especially for African asylum seekers, has codified gender-related violence, including FGM, within its Refugees Act.¹⁶⁴ Federal courts in the United States have recognized victims of FGM and their eligibility for asylum.¹⁶⁵ In *Mohammed v. Gonzales*,¹⁶⁶ the Ninth Circuit held that a

160 See Council Directive 2004/83/EC, arts. 9(1)–(2), 2004 O.J. (L. 304/12) 12, 15 available at <http://www.unhcr.org/refworld/docid/4157e75e4.html>.

161 See UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A (2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR GUIDELINES ON INTERNATIONAL PROTECTION].

162 *Id.* ¶ 9 (internal citation omitted).

163 See UNHCR, CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES 102 (2009), available at <http://www.unhcr.org/refworld/docid/4b28b1f2.html> (“Supports the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion.”).

164 See Refugees Act 130 of 1998 § 1 (S. Afr.) (“‘[S]ocial group’ includes, among others, a group of persons of particular *gender*, sexual orientation, disability, class or caste.” (emphasis added)); see also MIGRANT RIGHTS MONITORING PROJECT, GENDER BASED PERSECUTION IN THE SOUTH AFRICAN ASYLUM SYSTEM (Special Report No. 3) 41–43 (2008) (asserting that FGM is generally considered a legitimate ground for asylum).

165 See *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) available at <http://www.justice.gov/eoir/vll/intdec/vol21/3278.pdf> (holding that applicants could seek asylum on the basis of gender-based persecution, such as female genital mutilation). *In re Kasinga* set a precedent in United States immigration law on this issue. Before this decision, applicants had to use religious or political grounds to show refugee status.

166 400 F.3d 785 (9th Cir. 2005); see also *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006) (stating in dictum that a showing of a prior infliction of FGM constitutes a

showing of FGM was sufficient to establish a “well-founded fear of persecution,” due to both past violence as well as the risk of future violence and gender persecution, either to the woman requesting asylum or to her female children.¹⁶⁷ In Canada, asylum cases granting refugee status on the basis of FGM have been decided similarly.¹⁶⁸ The United Kingdom,¹⁶⁹ Belgium,¹⁷⁰ France,¹⁷¹ Sweden,¹⁷² and Germany¹⁷³ have also granted asylum on the basis of FGM.¹⁷⁴

In the development of custom in international law, much weight is given to the substantial actors in the context of the custom. For example, in the case of *Paquete Habana*, the Court only considered the practice of powerful naval states of the day in determining new custom. Similarly, in *Texaco v. Libya*,¹⁷⁵ the sole arbitrator, Dupuy, rejected an assertion of custom because the states that had a substan-

prima facie case of persecution for an asylum claim); *Niang v. Gonzales*, 422 F.3d 1187, 1197–98 (10th Cir. 2005) (agreeing that a prior infliction of FGM is a viable basis for an asylum claim).

167 See *Abebe v. Gonzales*, 432 F.3d 1037, 1042–43 (9th Cir. 2005) (noting that applicants were required only to show that they belonged to an ethnic [social] group in which girls are mutilated and that their fear of mutilation is well founded). They are not required to prove that the child was *likely* to be mutilated, stating that *Cardozo-Foncesca* established that a ten percent chance of future persecution was sufficient for an asylum claim to prevail. See *Mohammad*, 400 F.3d at 800. The Board of Immigration Appeals rejected this theory in 2008 by asserting that because the “persecution” (the mutilation) had already occurred and is not likely to happen twice. *But see Bah v. Mukasey*, 529 F.3d 99, 114 (2d Cir. 2008) (holding that the BIA had erred in *In re A-T* because it had assumed that a woman could undergo FGM only once).

168 See *In re Khadra Hassan Farah*, Immigration Review Board (Refugee Division), May 10, 1994, (Can.) available at <http://www.unhcr.org/refworld/docid/3ae6b70618.html> (holding that an applicant is in the social group of “females” that have a “well-founded fear of persecution” in the form of female genital mutilation in Somalia).

169 See *Secretary of State for the Home Department v. K* [2006] UKHL 46 (appeal taken from Eng.), available at <http://www.bailii.org/uk/cases/UKHL/2006/46.html>.

170 See AMNESTY INT’L, ENDING FEMALE GENITAL MUTILATION: A STRATEGY FOR THE EUROPEAN UNION INSTITUTIONS 33 (2010) (citing CCE, No. 29110, June 25, 2009), available at http://www.endfgm.eu/content/assets/END_FGM_FINAL_strategy.pdf.

171 See *id.* (citing *Mlle Kinda*, CRR, No. 366892, Mar. 19, 2001).

172 See *Act on Prohibition of Female Circumcision*, 1982:316 (1982) (Swed.).

173 See AMNESTY INT’L, *supra* note 170 (citing *VG Wiesbaden*, 5 E 31472/98.A (2), Jan. 27, 2000; *VG Regensburg*, RO 5 K 00.30162, Mar. 23, 2000).

174 Some E.U. countries have had shifts in domestic policy recently and are only granting subsidiary protection to victims of FGM.

175 See *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic*, Dupuy, Sole Arbitrator, Award on the Merits, 1977, 53 INT’L L. REP. 389, 486 (1979).

tial interest in the context of the custom (capital *exporting* states) had rejected the principles asserted by Libya, a capital *importing* state.¹⁷⁶

As such, although granting refugee status on the basis of FGM is not wide spread, it should be noted that countries such as South Africa, the United States, France, Canada, the United Kingdom, Sweden, and Germany, the main destination countries for asylum seekers,¹⁷⁷ have granted refugee status to FGM victims. Therefore this practice rises to a level of custom *de lege ferenda*, even though it is not a custom *de lege lata* (*de lege lata* is the law as it exists currently;¹⁷⁸ *de lege ferenda* is Latin for “with a view to the future law”). It is used to describe developing customary law, such as the acceptance of FGM victims within the Asylum Convention.

These examples show the willingness of individual states and regional organizations to expand their obligations within the CIL framework, which could lead to more widespread acceptance of these obligations. The practice of granting refugee status and asylum to those fleeing generalized violence and to women persecuted via genital mutilation has not risen to the consistency of the fishing vessels custom in *Paquete Habana*. Still, the practice of those states that *do* grant these groups of people “refugee” status can influence other states to expand their “refugee” definitions as well. The development of CIL arises from the influence of states upon others over time. The tradition in question in *Paquete Habana* was 500 years in the making, but the crystallization of customary international law of the Law of the Sea or of International Environmental Law occurred in less than a decade. The expansion of the definition of “refugee” to include those reflected in the OAS and OAU treaties or victims of FGM can currently be classified as *de lege ferenda*. Although the expansion of asylum obligations based on CIL would not be immediate and would not provide a swift solution for the Australian boat people, CIL provides a more stable and accepted method through which expansion can occur.

Referring back to the three modalities supplied earlier, the two main concerns posed were (1) that states should be afforded a margin

176 The capital importing states asserted that the principles reflected in the Charter of Economic Rights and Duties of States was the custom regarding compensation for expropriation of foreign property; however this assertion of custom was rejected because all of the capital exporting states had rejected the Charter. See *id.* ¶ 87.

177 See 2009 GLOBAL TRENDS, *supra* note 5, at 17. These countries are also most likely the main destination countries for asylum seekers requesting refugee status on the basis of FGM.

178 See BLACK'S LAW DICTIONARY 438 (7th ed. 1999); North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶ 62 (Feb. 20).

of appreciation in how they implement their asylum obligations, and (2) that any changes in asylum obligations should be the result of consensus. The CIL framework allows expansion of asylum obligations in a manner that addresses both of those concerns. General practice of states does not impose requirements on states, but simply notes how states actually implement and practice their asylum obligations. Once this general practice of states based on legal obligations (*opinio juris*) becomes prevalent, a new custom is formed. As such, CIL provides a fourth modality for the expansion of asylum obligations that not only gives states discretion, but also recognizes and imposes new obligations that arise as a result of substantial consensus in state practice. Therefore, through the use of CIL, the liberalization of the asylum system will be both comprehensive and stable, best addressing the problems of the current asylum system.

CONCLUSION

The majority of the “boat people” that are housed in detention camps in Australia are economic refugees or those fleeing generalized violence from Asia. Although economic refugees will most likely lack recourse to protest the denial of refugee status, they may claim asylum on another basis or receive a lesser status, such as temporary protection.¹⁷⁹ Those fleeing generalized violence have the potential of coming within the scope of “membership in a particular social group or political opinion” through the principles of custom that continues to develop. The OAS, AU, and EU member-states already recognize that these refugees (fleeing generalized violence) need protection.¹⁸⁰ CIL addresses the two main concerns in expanding asylum obligations: (1) allowing states discretion in implementing domestic immigration legislation and (2) requiring a consensus of states before expanding the asylum system. Evolutionary interpretation, on the other hand, is not an appropriate solution because it fails in both respects. As a tool of the international judiciary, evolutionary interpretation imposes obligations on states without their consent and without the consent of the international community. As such, the theory of evolutionary interpretation of treaties should not be expanded to or used in the asylum context. Instead, the classical international legal principle of CIL pro-

179 See, e.g., Immigration Act of 1990 (“IMMACT”), Pub. L. No. 101-649, (1990) (establishing a procedure that provides temporary protection to immigrants that (1) have arrived in the United States, (2) do not qualify for asylum status, and (3) are temporarily unable to safely return to their home country because of ongoing armed conflict, environmental disaster, or other reason).

180 See *supra* notes 160–61 and accompanying text.

vides a sufficient and appropriate venue for expansion of asylum obligations. Although the CIL methodology will, most likely, not develop in a sufficiently timely fashion to save the current Australian boat people, CIL offers a long-term solution for *consistent* expansion and liberalization of state obligations to asylum seekers.