

## THE REFUGEE CRISIS AS CIVIL LIBERTIES CRISIS

*Eric A. Ormsby\**

*The number of refugees worldwide has expanded dramatically in the first decades of the twenty-first century, with tens of millions of people forced to seek shelter outside their countries of origin. Currently, the most critical form of protection that people in this vulnerable position are guaranteed is the duty of non-refoulement. This duty ensures that countries to which refugees flee cannot return them to places where their lives may be endangered. However, in recent decades, a growing number of states have experimented with policies designed to prevent refugees from accessing their territory and thereby triggering the duty of non-refoulement. As refugee populations have continued to grow, these policies have become increasingly draconian and punitive. This Note identifies and describes a worrying new trend in this area: restrictions on the civil liberties of states' own citizens as a mechanism for deterring refugee arrivals. In particular, the Note examines policies in the United States, Hungary, and Australia to conclude that this trend represents a natural outgrowth of existing refugee deterrence policies and requires an immediate and sustained response from the international community in order to protect the rights of citizens as well as the rights of refugees.*

### INTRODUCTION

In 2015, the world's population of displaced persons grew to its largest number in human history: At slightly more than sixty-five million, this group now constitutes approximately one out of every 113 people alive today.<sup>1</sup> Since 2011 alone, the number of displaced persons worldwide has increased by more than fifty percent.<sup>2</sup> For many in the international community, the scale of the problem can be adequately conveyed only by comparison to the enormous human displacement following the aftermath of World War II.<sup>3</sup>

---

\* J.D. Candidate 2017, Columbia Law School.

1. See U.N. High Comm'r for Refugees, Global Trends: Forced Displacement in 2015, at 2 (June 20, 2016), <http://www.unhcr.org/576408cd7> (on file with the *Columbia Law Review*) (presenting general statistics regarding displacement internationally).

2. *Id.* at 5.

3. See, e.g., Dimitria Groutsis, The Biggest Refugee Crisis Since World War II Needs a Similar Response, *Sydney Morning Herald* (Dec. 30, 2015), <http://www.smh.com.au/comment/the-biggest-refugee-crisis-since-world-war-2-needs-a-similar-response-20151229-glw655.html> [<http://perma.cc/Y2R2-D3DQ>]; Euan McKirdy, UNHCR Report: More Displaced Now than After WWII, CNN,

At that time, the sheer number of displaced persons and the overwhelming humanitarian needs they faced caused the world community to come together to create an international legal regime to provide protection for these vulnerable groups. In 1951, the U.N. formally enacted the Convention on the Status of Refugees in an attempt to find a lasting solution to the ongoing humanitarian crisis.<sup>4</sup> It remains, to this day, the most critical component of the world community's response to the problems of the displaced.<sup>5</sup> However, the Convention's core elements were shaped in reference to the particular circumstances in which it was made, and this has at times created unintended consequences for the quite different circumstances in which many modern refugee-producing situations arise.

Because the core of the Convention's definition of "refugee" depends on the concept of persecution,<sup>6</sup> the most critical obligation it imposes on state signatories is the duty of *non-refoulement*: the requirement that states not return refugees to a place where they potentially face persecution.<sup>7</sup> This often means that persons who fit the Convention's definition of refugee cannot simply or quickly be removed from a state in which they seek asylum.<sup>8</sup> On the other hand, the Convention does not obligate contracting states to examine asylum claims, meaning that state signatories are not obligated to affirmatively take in asylum seekers.<sup>9</sup> As a result, states have a perverse incentive to prevent the initial entry into their territory of potential asylum seekers in order to avoid having to face legal obligations toward refugees.<sup>10</sup>

---

<http://www.cnn.com/2016/06/20/world/unhcr-displaced-peoples-report/> [http://perma.cc/QCC5-UGZM] (last updated June 20, 2016, 9:29 AM).

4. See Marilyn Achiron, A 'Timeless' Treaty Under Attack, 2 Refugees, no. 123, 2001, at 4, 6 ("In a spirit of empathy and humanitarianism, and with a hope that such widespread suffering might be averted in the future, nations came together in the stately Swiss city of Geneva and codified binding, international standards for the treatment of refugees and the obligations of countries towards them.").

5. See, e.g., Shalini Bhargava Ray, Optimal Asylum, 46 Vand. J. Transnat'l L. 1215, 1243-44 (2013) ("The Refugee Convention is widely regarded as the 'centerpiece' of international refugee law . . ." (citation omitted)); Paul Weis, The Development of Refugee Law, 3 Mich. Y.B. Int'l Legal Stud. 27, 29 (1982) ("The Convention can be regarded as the most important international instrument relating to refugees.").

6. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

7. Id. art. 33.

8. See Thomas Gammeltoft-Hansen & James C. Hathaway, Non-Refoulement in a World of Cooperative Deterrence, 53 Colum. J. Transnat'l L. 235, 239 (2015) (noting "the non-citizen who either claims asylum or who is recognizable as coming from a refugee-producing situation must in practice be allowed to remain for the duration of the assessment of her status," a process that "is not straightforward").

9. Pierre-Michel Fontaine, The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: Evolution and Relevance for Today, 2 Intercultural Hum. Rts. L. Rev. 149, 156 (2007) (noting the lack of an "unambiguous obligation for contracting states to examine asylum claims" as an important component of the Refugee Convention).

10. Cf. Atle Grahl-Madsen, Commentary on the Refugee Convention 1951, at 229 (1997) ("Article 33 produces the strange result . . . that, 'if a refugee has succeeded in

In spite of this incentive, states have found that preventing this initial entry is often quite challenging. In response, many states have adopted increasingly complicated and severe deterrence policies to keep asylum seekers out.<sup>11</sup> In the push to make these policies effective, however, some states have begun to take steps that impede the civil liberties of their own citizens. While some of these policies have been relatively harmless,<sup>12</sup> others implicate core civil liberties for citizens in these states.<sup>13</sup> With the world's refugee population at its highest level in history and expectations that it will continue to grow, this trend therefore poses important challenges to the rights of both refugees and citizens of the countries in which they seek shelter.

This Note seeks to identify and describe the growing trend of domestic civil liberties restrictions resulting from refugee deterrence policies and place that trend within the context of broader trends in international refugee law. In particular, it will argue that in light of the projections for future refugee displacements in the coming decades, as well as the steady advance of increasingly severe deterrence policies, a response from the international community is necessary in order to protect domestic civil liberties as well as the existing refugee framework.

Part I will provide background on the historical development and current operation of the international framework for refugee law. Part II will examine the growth of refugee deterrence policies internationally and then examine how in at least three countries these policies have led to the imposition of significant limitations on domestic civil liberties. Part III will provide the criteria that any response to this issue should follow and argue that the most effective means of combating this trend, balancing substantive effect against viability, is a multipronged strategy of legal and political measures from the international community.

---

eluding the frontier guards, he is safe; if he has not, it is his hard luck.” (quoting Nehemiah Robinson, *Convention Relating to the Status of Refugees: The History, Contents and Interpretation* 163 (1953)).

11. See, e.g., Gammeltoft-Hansen & Hathaway, *supra* note 8, at 244–57 (describing “traditional” and “next generation” refugee deterrence policies).

12. For example, following the enormous strain placed on its immigration system in the wake of the Syrian refugee crisis, Germany temporarily reinstated border controls requiring all entrants to present appropriate documentation. Ian Traynor, *Germany Border Crackdown Deals Blow to Schengen System*, *Guardian* (Sept. 13, 2015, 2:17 PM), <http://www.theguardian.com/world/2015/sep/13/germany-border-crackdown-deals-blow-to-schengen-system> [<http://perma.cc/E8Q5-AZ2T>]. In effect, this limited the right of free movement of German citizens, a civil liberty they would otherwise be entitled to exercise under the law. However, the civil liberties implications of such a move are exceedingly modest and arguably unavoidable in such a context, rendering them relatively unobjectionable.

13. See *infra* section II.C (discussing the American policy denying lawyers access to clients, the Hungarian law permitting warrantless searches of homes suspected to contain refugees, and the Australian law criminalizing refugee workers discussing conditions witnessed in detention centers).

## I. THE INTERNATIONAL FRAMEWORK FOR REFUGEE RIGHTS

The development of refugee rights internationally, like the development of international humanitarian law more generally, is a relatively recent phenomenon.<sup>14</sup> This Part focuses on the development and operation of this international framework. Section I.A will focus on the historical background of refugee rights in the first decades of the twentieth century, the events leading to the creation of the 1951 Convention, and subsequent developments in international refugee law. Section I.B will examine how the international refugee framework currently operates.

### A. *The Development of International Refugee Rights*

Before discussing the modern international framework for refugee rights, a brief background on how those rights developed can help clarify why the system operates as it does today. This section will evaluate that historical context. Section I.A.1 explores refugee rights prior to World War II. Section I.A.2 discusses the events that culminated in the adoption of the 1951 Convention. Section I.A.3 explores how refugee law evolved in the following decades.

1. *Refugee Rights Prior to World War II.* — While refugees are in no sense a new phenomenon, the scale of human displacement in the twentieth century was without precedent.<sup>15</sup> Consequently, an international response to the refugee problem can be traced to this period.

The aftermath of World War I marked the first stage of the process of creating a unified regime for the protection of refugees.<sup>16</sup> The problem of displacement was particularly acute in the case of the 1.5 million Russian citizens who, having fled the new Bolshevik regime, saw their citizenship formally revoked, placing them in the legally anomalous position of lacking a home country but also being unable to establish eligibility for entry and residence in new countries because of a lack of adequate documentation.<sup>17</sup> In response, the League of Nations established

---

14. See, e.g., Fontaine, *supra* note 9, at 153–54 (tracing the creation of the international refugee regime to “1914 and the outbreak of World War I”); Göran Melander, *The Protection of Refugees*, 18 *Scandinavian Stud. L.* 151, 153 n.2 (1974) [hereinafter Melander, *Protection of Refugees*] (describing the history of international bodies dealing with refugees as having begun in 1921).

15. Melander, *Protection of Refugees*, *supra* note 14, at 153.

16. See James C. Hathaway, *The Rights of Refugees Under International Law* 83 (2005) [hereinafter Hathaway, *The Rights of Refugees*] (“The early efforts of the international community to protect refugees stemmed from a series of exoduses in the years following the end of the First World War . . .”).

17. *Id.* at 84.

the first international agency for refugees, the Office of the High Commissioner for Russian Refugees.<sup>18</sup>

In the early stages of the international refugee regime, refugees were referred to on the basis of relatively objective, identifiable characteristics.<sup>19</sup> As Professor Pierre-Michel Fontaine argues, “[t]his focus reflected . . . the eventually persistent hope that the refugee problem would not be a lasting one and therefore that a generic refugee definition was not called for.”<sup>20</sup> By the early 1930s, however, it was clear that this hope was unfounded and that a more stable arrangement for the legal status of refugees would require a formal agreement among those states housing large numbers of refugees.<sup>21</sup> The result was the 1933 Convention Relating to the International Status of Refugees, which retained the limited understanding of refugees as citizens from specific countries but added an explicit obligation of states not to expel authorized refugees, the duty known as *non-refoulement*.<sup>22</sup> The Convention, unfortunately, was not widely adopted,<sup>23</sup> and with the onset of global economic depression, expansion of refugee rights stalled or even contracted.<sup>24</sup>

Nevertheless, at least one notable change in the understanding of refugee rights occurred in the period stretching from the late 1930s to 1950: The international refugee definition began to shift away from “concern with group disenfranchisement . . . toward a consideration of the relationship between a particular individual and his State.”<sup>25</sup> This more individualist approach was a reflection of the practical reality that most refugees during that period had become refugees not because of citizenship but rather because of the likelihood of persecution they faced in their countries of origin (particularly, though by no means exclusively, Germany).<sup>26</sup> This change in emphasis would have important consequences for the definition of refugee that would ultimately be adopted in the 1951 Convention.

---

18. Fontaine, *supra* note 9, at 154.

19. See James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 *Int’l & Comp. L.Q.* 348, 353 (1984) [hereinafter Hathaway, *Evolution of Refugee Status*] (describing early definitions as referring specifically to “Russian” and “Armenian” refugees who were “deprived of the ‘protection’ of [their] nation of origin”).

20. Fontaine, *supra* note 9, at 154.

21. Hathaway, *The Rights of Refugees*, *supra* note 16, at 87.

22. See David A. Martin et al., *Forced Migration Law and Policy* 50 (2d. ed. 2013).

23. See *id.* (noting “only eight states adhered to the treaty, and many of these entered reservations to key provisions”).

24. See Hathaway, *The Rights of Refugees*, *supra* note 16, at 88–91 (noting the challenges faced by the League of Nations in encouraging states to join successive agreements and restraining states from abandoning commitments).

25. Hathaway, *Evolution of Refugee Status*, *supra* note 19, at 370.

26. *Id.* at 371.

2. *The 1951 Convention on the Status of Refugees*. — At the end of World War II, more than six million individuals were left displaced, many of them refugees unable or unwilling to return to their home countries.<sup>27</sup> In order to help manage this situation, the U.N. established the International Refugee Organization (IRO) as a temporary measure to resolve the problem.<sup>28</sup> However, as the date for termination of its mandate approached, the IRO still had not been able to resettle or repatriate all refugees under its supervision.<sup>29</sup> Moreover, a new wave of refugees had begun to emerge from the newly Communist states in Central and Eastern Europe.<sup>30</sup>

This deepening crisis set the stage for the adoption of the 1951 Convention. In 1949, the U.N. established an ad hoc committee to draft the text of a convention formalizing the legal status of refugees.<sup>31</sup> An international convention was deemed desirable, in part, because such a formal agreement would resolve the collective-action problem presented by each individual government's fears of being the first to act without a guarantee of similar action from other governments.<sup>32</sup> While the committee was developing its draft text, the General Assembly established the United Nations High Commissioner for Refugees (UNHCR) to begin operations in 1951.<sup>33</sup> The momentum from these developments eventually led to a meeting of delegates from twenty-six countries in Geneva in June 1951 that after three weeks of diplomatic wrangling, produced the final text of the 1951 Convention Relating to the Status of Refugees.<sup>34</sup>

The definition of refugee embodied in the Convention's text reflected both a culmination of the emerging trends in refugee rights to that point as well as the limitations that continued to shape international conceptions of refugee protection. On the positive end, the focus on individual protection was enshrined in the Convention's refugee definition,

---

27. Melander, *Protection of Refugees*, supra note 14, at 154.

28. *Id.*

29. Hathaway, *The Rights of Refugees*, supra note 16, at 91.

30. *Id.*

31. Melander, *Protection of Refugees*, supra note 14, at 155.

32. Guy S. Goodwin-Gill, *The Continuing Relevance of International Refugee Law in a Globalized World*, 10 *Intercultural Hum. Rts. L. Rev.* 25, 26 (2015); cf. *Colloquium on the Development in the Law of Refugees with Particular Reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner for Refugees Held at Villa Serbelloni Bellagio (Italy) from 21–28 April 1965*, at para. 44, U.N. High Comm'r for Refugees (Apr. 28, 1965), <http://www.unhcr.org/en-us/protection/colloquia/3ae68be77/colloquium-development-law-refugees-particular-reference-1951-convention.html> [<http://perma.cc/A9H9-MZEA>] [hereinafter *Colloquium on Development of Refugee Law*] (arguing governments would not have been “willing to take the first step” in extending refugee protections “for fear of being the only one to improve the status of stateless persons”).

33. Melander, *Protection of Refugees*, supra note 14, at 154.

34. See Achiron, supra note 4, at 6.

which applied to “any person” who met the definition’s criteria.<sup>35</sup> It also preserved the persecution framework and, importantly, allowed those who were “unwilling” to return to their home countries for fear of persecution to obtain refugee status.<sup>36</sup>

However, the Convention also reflected the temporal limitations of previous refugee-protection agreements: Only those who were refugees as a result of events occurring before January 1, 1951, would fall under its protection.<sup>37</sup> Thus, from a practical standpoint, the Convention would protect only those who had been affected by the Second World War and the Soviet takeover of Central and Eastern Europe in its aftermath.

3. *The 1967 Protocol and Subsequent Developments.* — The temporal limitation of the 1951 Convention quickly rendered it ill-suited to managing emergent refugee problems. In particular, the unstable political conditions in many newly independent African states led to a new wave of refugees whose needs could not be met by the 1951 Convention.<sup>38</sup>

In recognition of the need to create a more lasting framework for refugee protection in an increasingly globalized context, the 1967 Protocol Relating to the Status of Refugees was advanced at the U.N.<sup>39</sup> Importantly, the Protocol is not an amendment to the 1951 Convention; instead, it operates as a separate treaty that incorporates the Refugee Convention’s obligations, and extends the protections guaranteed by the Convention to all refugees, regardless of temporal or geographical limitations.<sup>40</sup> Only four parties to the 1951 Convention have not adopted the 1967 Protocol.<sup>41</sup>

This Protocol remains the last major international agreement to have effected a substantial change in refugee policy. In the interim, there have been developments on the regional and national level,<sup>42</sup> but the 1967 Protocol and the underlying 1951 Convention remain the most important elements of international refugee law. However, many have questioned their current efficacy and relevance. From one perspective,

---

35. Refugee Convention, *supra* note 6, art. 1.

36. *Id.*

37. *Id.*

38. See, e.g., Melander, *Protection of Refugees*, *supra* note 14, at 153, 156 (noting the “new states in Africa had to deal with refugee problems of enormous proportions,” but that “it was impossible to consider [these] refugees . . . to be within the 1951 Convention”); Weis, *supra* note 5, at 31 (“The dateline of January 1, 1951 excluded from the application of the Convention . . . large numbers of refugees in Africa.”).

39. See Martin et al., *supra* note 22, at 58 (describing the background to and enactment of 1967 Protocol).

40. Hathaway, *The Rights of Refugees*, *supra* note 16, at 111.

41. *Id.* at 97.

42. See Martin et al., *supra* note 22, at 59–63 (describing regional refugee rights regimes); Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 Wash. U. J.L. & Pol’y 129, 132–33 (2001) (discussing “regional instruments” such as the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa and the Comprehensive Plan of Action for Indo-Chinese Refugees following the Vietnam War).

many human rights advocates argue that the Convention is not sufficiently broad in scope to offer effective protection to all those who need it, as will be discussed in more detail in section I.B. At the same time, many government officials contend that the Convention places too many burdens on receiving countries.<sup>43</sup> In many developed countries, those sympathetic to the latter proposition have implemented policies to limit governmental obligations under the Convention, as will be discussed in section II.A.

## B. *Operation of International Refugee Law*

To understand the nature of the problem identified in this Note, an understanding of the content and operation of international refugee law will be necessary. This section explains the basic elements of the international refugee framework. Section I.B.1 details the obligations that states parties to the Convention and Protocol must satisfy. Section I.B.2 explains the gaps in this framework, specifically analyzing the ways in which elements that were left out of the Convention impact the extent of rights that refugees may claim (and, in turn, how these absent elements create space for refugee policies that affect the rights of domestic citizens).

1. *Obligations of Receiving States.* —Under the 1951 Convention, the obligations receiving states have toward refugees expand as the attachment of the refugee to the state deepens.<sup>44</sup> Obligations are at their most basic when “refugees are simply subject to a state’s jurisdiction,” while those “refugees who can demonstrate durable residence in the asylum state” are guaranteed a much broader range of rights.<sup>45</sup> This expanding-rights framework emerged in response to the experience of European states following the Second World War, in which the predominant refugee flows were characterized by unplanned and unauthorized arrivals at state borders;<sup>46</sup> in this way, states could ensure that unlawful arrivals would not automatically attain the same level of rights as those who had arrived with prior authorization.<sup>47</sup>

Nevertheless, even those refugees who are simply subject to a state’s jurisdiction are able to enjoy the guarantee of *non-refoulement*, arguably the Convention’s most important right.<sup>48</sup> A state’s duty of *non-refoulement*

---

43. See Achiron, *supra* note 4, at 20–21 (describing complaints from British and Australian authorities).

44. Hathaway, *The Rights of Refugees*, *supra* note 16, at 156.

45. *Id.*

46. *Id.* at 157.

47. *Id.*

48. See *id.* at 163 (identifying *non-refoulement* as one of “two core refugee rights” attaching when a refugee is within a state’s jurisdiction); see also Gammeltoft-Hansen & Hathaway, *supra* note 8, at 238 (noting refugees are “legally entitled to the provisional benefit of the robust duty of *non-refoulement* as soon as they come under [a] state’s jurisdiction”); Ray, *supra* note 5, at 1245 (“At its core, the Refugee Convention offers a limited guarantee against refoulement . . .”); cf. Joan Fitzpatrick, *Revitalizing the 1951*

is defined in Article 33 as the requirement that states avoid returning a refugee “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.”<sup>49</sup> This conception of the nature of the duty reflects the unique historical moment in which the Convention’s drafters found themselves,<sup>50</sup> but its effects on the ongoing relevance of the international refugee regime have been profound.

At a practical level, the duty of *non-refoulement* strongly increases the likelihood that states will be required to take on additional obligations toward refugees within their jurisdiction. For instance, in a few situations, the duty of *non-refoulement* may require the state to affirmatively admit refugees into their territory.<sup>51</sup> Moreover, if a refugee has reached a state’s border, it is generally recognized that the principle of *non-refoulement* prohibits blanket non-admittance.<sup>52</sup> If a refugee has entered state territory and submits an application for asylum, the duty of *non-refoulement* generally requires states to permit the individual to remain in the country while the application is considered,<sup>53</sup> a process that is both costly and time consuming.<sup>54</sup>

---

Refugee Convention, 9 Harv. Hum. Rts. J. 229, 235 (1996) [hereinafter Fitzpatrick, Revitalizing the Convention] (referring to the duty of *non-refoulement* as “the central normative and operational core of the Convention regime”).

49. Refugee Convention, supra note 6, art. 33.

50. See supra section I.A.2 (discussing the historical background to the passage of the Refugee Convention).

51. See, e.g., Hathaway, *The Rights of Refugees*, supra note 16, at 301 (arguing “where there is a real risk that rejection will expose the refugee ‘in any manner whatsoever’ to the risk of being persecuted . . . [the duty of *non-refoulement*] amounts to a de facto duty to admit the refugee” (quoting Refugee Convention, supra note 6, art. 33)); Vladislava Stoyanova, *The Principle of Non-Refoulement and the Right of Asylum Seekers to Enter State Territory*, 3 *Interdisc. J. Hum. Rts. L.* 1, 5 (2008–2009) (“[T]he prohibition in Article 33(I) could in certain situations amount to a de facto obligation to accept asylum-seekers in a state’s territory if the denial of acceptance ‘in any manner whatsoever’ results in exposure to risk.” (quoting Refugee Convention, supra note 6, art. 33)).

52. Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 208 (3d ed. 2007) (arguing even if *non-refoulement* was not originally conceived as prohibiting rejection at the frontier, “States in their practice and in their recorded views [] have recognized that *non-refoulement* applies to the moment at which asylum seekers present themselves for entry, either within a State or at its border”). But see Grahl-Madsen, supra note 10, at 229 (“Article 33 forbids return and not ‘non-admittance’ . . .”).

53. See U.N. High Comm’r for Refugees, *Note on International Protection*, ¶ 11, UN Doc. A/AC.96/815 (1993) (“Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees . . .”); cf. Hathaway, *The Rights of Refugees*, supra note 16, at 304 (“The duty [of *non-refoulement*] therefore applies whether or not refugee status has been formally recognized.”).

54. See James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 *Harv. Hum. Rts. J.* 115, 142, 153 (1997) (referring to the “often lengthy time required to process . . . refugee claim[s]” and noting that “[i]ndustrialized states spend billions of dollars

As the degree of attachment between a refugee and the receiving state increases, so too do the number and quality of rights that the refugee may enjoy. For instance, refugees who are lawfully within the territory of a receiving state are guaranteed the right of self-employment.<sup>55</sup> Refugees who are lawfully residing or staying in a receiving state are guaranteed, among other things, many of the same rights that nationals of that state enjoy, such as artistic and intellectual property rights, access to the courts, and elementary education.<sup>56</sup>

Enforcement of the obligations imposed on Convention signatories may occur in a number of different ways. In principle, the Convention envisions a role for “the community of state parties” in enforcing its terms, with Article 38 granting states a right to have disputes resolved by the International Court of Justice.<sup>57</sup> In practice, however, few states have exercised meaningful oversight roles.<sup>58</sup> Therefore, in most cases, enforcement of the Convention’s provisions is largely a matter of the internal judicial systems of states parties.<sup>59</sup>

2. *Gaps in the Framework.* — As important as the principles developed under the Convention are, many in the international community rightly acknowledge its weaknesses.<sup>60</sup> In particular, the Convention fails to impose obligations on states parties that would otherwise be necessary to ensure a truly comprehensive refugee protection regime. Chief among these is the absence of any requirement that states grant asylum to refugees.<sup>61</sup> This was a conscious choice on the part of the Convention’s drafters: During discussions about the Convention’s text, the British delegation intervened in order to ensure that the Convention could not be read as entitling asylum seekers to admission into any country of their

---

annually to process . . . [asylum] claims”); Charles B. Keely & Sharon Stanton Russell, Responses of Industrial Countries to Asylum Seekers, 47 J. Int’l Aff. 399, 402 (1994) (estimating the cost of the application process to industrialized countries to be “\$8 to \$10 billion” in the 1990s).

55. Refugee Convention, *supra* note 6, art. 18.

56. *Id.* arts. 14, 16, 22.

57. Hathaway, *The Rights of Refugees*, *supra* note 16, at 994.

58. See *id.* (arguing such lack of oversight may be due to “indifference or fear of bilateral disadvantage”).

59. See James C. Hathaway, Anthony M. North & Jason Pobjoy, Supervising the Refugee Convention: Introduction, 26 J. Refugee Stud. 323, 323 (2013) (describing refugee law as “an extraordinary example of international law in action, with treaty-based norms enforced domestically in ways that lead to real rights”).

60. See, e.g., Fitzpatrick, *Revitalizing the Convention*, *supra* note 48, at 229–32 (discussing four main categories of criticism of the Convention in the human rights community).

61. See, e.g., Hathaway, *The Rights of Refugees*, *supra* note 16, at 300 (“The duty of *non-refoulement* is not . . . the same as a right to asylum . . .”); Ray, *supra* note 5, at 1239 (“International refugee law does not recognize an individual’s right to be granted asylum in a foreign country.”).

choosing.<sup>62</sup> Indeed, the word “asylum” itself is not used in any of the Convention’s operative parts.<sup>63</sup>

A second, related issue is the fact that the Convention does not directly address the responsibility of countries to examine a refugee’s asylum application.<sup>64</sup> While the duty of *non-refoulement* can, to some degree, mitigate this challenge,<sup>65</sup> this does not prevent countries that refuse to examine asylum claims from removing refugees to safe third countries, which may in turn perpetuate the cycle by removing the refugee yet again to another “safe” country.<sup>66</sup>

There are other significant issues the Convention fails to adequately provide for or address.<sup>67</sup> However, the impact of these other gaps on the rights of refugees is largely outside the scope of the problem this Note seeks to address. The principal issue, instead, is the lack of an obligation to provide asylum or even necessarily to consider asylum claims that in conjunction with the obligation of *non-refoulement*, creates an incentive for states to pursue deterrence policies designed to prevent the entrance of refugees into their territory or jurisdiction to begin with (thereby avoiding, as well, any additional responsibilities that might be incurred). These deterrence policies have gone through several stages of development, each iteration tending to require greater and more direct interference in the private lives of individuals.<sup>68</sup> While those most directly affected by these policies are refugees and migrants themselves, a growing number of states have adopted refugee deterrence policies that also infringe upon the civil liberties of their own citizens. These policies and their implications will be the subject of Part II.

## II. REFUGEE DETERRENCE POLICIES AND CIVIL LIBERTIES IMPLICATIONS

Recent decades have seen an increasing trend toward state policies aimed at preventing or deterring refugees from seeking protection in the

---

62. See Ray, *supra* note 5, at 1239–40.

63. Fontaine, *supra* note 9, at 157.

64. See *id.* (noting the 1951 Convention’s “absence of a clearly stated obligation to examine an asylum claim”).

65. See Hathaway, *The Rights of Refugees*, *supra* note 16, at 319 (explaining the “refusal to consider a claim to refugee status” violates *non-refoulement* if the state knows that “refusal leaves the refugee exposed to removal” to countries where they are likely to face persecution).

66. See, e.g., Goran Melander, *Responsibility for Examining an Asylum Request*, 20 *Int’l Migration Rev.* 220, 220–22 (1986) (describing problem of “orbiting” refugees).

67. For instance, those who are not the victims of personal persecution on the basis of the factors designated in the refugee definition are unable to enjoy protection under the Convention, which leaves out an increasing number of the world’s total refugee population. See Fontaine, *supra* note 9, at 150–51 (noting critics of the 1951 Convention often focus on its refugee definition as “too narrow . . . and not in tune with the plight of the overwhelming majority of contemporary refugees”).

68. See *infra* section II.A.

state's territory.<sup>69</sup> As these policies have evolved, they have begun to demonstrate potentially significant consequences for the civil liberties of citizens of those states. This Part explores the nature of these policies and their civil-liberty implications. Section II.A provides a background to refugee deterrence policies. Section II.B offers a framework for understanding how different types of deterrence policies may impact domestic civil liberties. Section II.C examines three different policies with civil-liberties implications for domestic citizens. Finally, section II.D explains the relevance of this trend for the future of both the refugee regime and the rights of domestic citizens.

### A. *Refugee Deterrence Policies*

The world community's stance toward refugee protection, which as recently as 1967 had been accommodating enough to adopt a new international treaty expanding protection, saw a dramatic reversal beginning in the 1980s as refugee populations swelled.<sup>70</sup> Both the number of refugees internationally<sup>71</sup> and the types of countries from which they tended to come changed significantly during this period.<sup>72</sup> Both of these trends helped to push states from relatively welcoming policies for refugees towards policies aimed at deterring their arrival.<sup>73</sup>

One of the principle refugee deterrence policies these states have pursued is imposing visa requirements for entry, which can effectively

---

69. See Fitzpatrick, *Revitalizing the Convention*, supra note 48, at 237 (noting "the growing popularity of evasive strategies by States seeking to avoid their obligations without committing direct breaches" of the duty of *non-refoulement*).

70. See Joan Fitzpatrick, *Flight From Asylum: Trends Towards Temporary "Refugee" and Local Responses to Forced Migrations*, 35 Va. J. Int'l L. 13, 27 (1994) (noting asylum "[a]pplication rates escalated rapidly in the 1980s and accelerated at exponential rates in the early years of" the 1990s, leading to "almost hysterical perceptions of asylum systems out of control").

71. Between 1983 and 1991, the number of refugees worldwide more than doubled. See Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Regimes*, 71 Wash. U. L.Q. 833, 833 n.1 (1993) ("The number of refugees world-wide grew from 7.8 million in 1983 to nearly 17 million in 1991.").

72. See B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. Refugee Stud. 350, 351 (1998) (discussing the growth of refugees arriving in developed countries from developing countries); Thomas Gammeltoft-Hansen & Nikolas Feith Tan, *Beyond the Deterrence Paradigm in Global Refugee Policy*, 39 Suffolk Transnat'l L. Rev. 637, 640 (2016) ("The proxy wars of the 1980s further created large-scale displacement across several regions in the Global South. At the same time, globalization has made both knowledge of faraway destinations and transcontinental transportation more readily available.").

73. See Guy S. Goodwin-Gill, *The Refugee in International Law* 191-93 (2d ed. 1996) [hereinafter Goodwin-Gill, *Refugee in International Law*] (summarizing responses among developed countries to this trend in the 1980s and 1990s); Gammeltoft-Hansen & Hathaway, supra note 8, at 241 ("Over the last three decades, even as powerful states routinely affirmed their commitment to refugee law, they have worked assiduously to design and implement *non-entrée* policies that seek to keep most refugees from accessing their jurisdiction . . .").

screen out many potential refugees by restricting entry access via common carriers such as ships and airlines.<sup>74</sup> While these requirements are often couched in terms of broader immigration controls, the practical effect is frequently to ensure that many refugees are prevented from ever reaching developed countries.<sup>75</sup>

While these types of measures have achieved some degree of “success,” in the sense of preventing mass refugee arrivals in many states, enough refugees and asylum-seekers have found ways to circumvent their operation that some states have chosen to pursue stronger deterrence policies.<sup>76</sup> One potential policy involves the interdiction and repulsion or return of refugees in extraterritorial areas, particularly the high seas.<sup>77</sup> This type of measure, however, raises serious concerns about violating the duty of *non-refoulement*, and most states have not pursued interdiction as a key element of their refugee deterrence policies.<sup>78</sup> A second potential option is the implementation of “safe third country” or “first country of arrival” assumptions in order to expel refugees attempting to reach a country’s territory.<sup>79</sup> This poses a number of practical problems, including the possibility that refugees will face repeated removals to different states,<sup>80</sup> but perhaps the greatest concern is that those states most likely to be the “first country of arrival” or considered a “safe third state” will be incentivized to prevent refugee arrivals at the outset to avoid taking on the responsibility of providing refugee protection or assistance later on.<sup>81</sup>

---

74. See, e.g., Hathaway, *The Rights of Refugees*, supra note 16, at 291–93 (“The classic mechanism of *non-entrée* is to impose a visa requirement on the nationals of genuine refugee-producing countries, enforced by sanctions against any carrier that agrees to transport a person without a visa.”); cf. Ray, supra note 5, at 1237 (“Visa controls serve to control the type of migrants who enter so that they are temporary, self-sufficient visitors, some of whom possess exceptional skills or educational potential.”).

75. See, e.g., Frances Nicholson, *Implementation of the Immigration (Carriers’ Liability) Act of 1987: Privatising Immigration Functions at the Expense of International Obligations?*, 46 *Int’l & Comp. L.Q.* 586, 597–601 (1997) (discussing the impact of the U.K.’s common-carrier liability law on refugees and asylum seekers).

76. See Goodwin-Gill, *Refugee in International Law*, supra note 73, at 193–95 (describing the refugee deterrence measures of the 1980s as insufficient to significantly reduce refugee flows); Gammeltoft-Hansen & Hathaway, supra note 8, at 246 (describing sophisticated smuggling operations to circumvent traditional refugee deterrence policies).

77. See Hathaway, *The Rights of Refugees*, supra note 16, at 290–91 (describing such policies in the United States, Australia, and the United Kingdom.).

78. *Id.* at 247–48. For an exception to this general trend, see *infra* section II.C.1 (discussing U.S. policy relating to Haitian asylum-seekers and the Supreme Court’s approval of the policy).

79. See Goodwin-Gill & McAdam, supra note 52, at 390–441 (discussing “safe country” and “effective protection” concepts).

80. See supra note 66 and accompanying text.

81. See *infra* section II.C.2 (discussing Hungary’s response to the Syrian refugee crisis as a common first country of arrival).

One of the newest methods that has emerged as a potential method for refugee deterrence is what some have referred to as “cooperation-based *non-entrée*.”<sup>82</sup> This can take a number of different forms, but at its most basic level, it involves coordination between states, “with deterrence occurring in the territory, or under the jurisdiction, of the home state or a transit country.”<sup>83</sup> The United States, for instance, has partnered with Mexican authorities to institute programs in Mexico aimed at preventing Central American asylum seekers from ever reaching the U.S. border.<sup>84</sup> These countries may be incentivized to take on added responsibilities vis-à-vis refugee deterrence through promises of improved diplomatic relations or even direct financial assistance.<sup>85</sup>

The proliferation of different refugee deterrence policies over the past three decades, as well as the increasing sophistication of these policies, reflects an increasing sense among many countries that the duties they bear toward refugees are a significant burden. What is far from clear, however, is whether the policies have achieved their desired effects;<sup>86</sup> indeed, the very fact that many states have felt compelled to pursue ever-more restrictive and elaborate policies can be seen as persuasive evidence that they have not done so. The response, in at least a few states, has been to test the outer limits of acceptability under the international legal framework for refugee protection. A consequence of these efforts, unintended or otherwise, has been the rollback of important domestic civil liberties, explored in greater detail in section II.C. First, however, it is necessary to establish a framework for analyzing the different types of refugee deterrence policies in order to clarify the precise nature of the problem identified.

#### B. *A Framework for Categorizing Refugee Deterrence Policies*

Refugee deterrence policies have been categorized in a number of useful ways.<sup>87</sup> However, for the issue this Note seeks to address, a new framework is necessary in order to differentiate between policies with different degrees of consequence for domestic civil liberties. This section, therefore, offers such a framework.

---

82. Gammeltoft-Hansen & Hathaway, *supra* note 8, at 248.

83. *Id.*; see also Gammeltoft-Hansen & Tan, *supra* note 72, at 638 (“To this end, developed states have enlisted the help of both private companies and authorities in origin and transit countries.”).

84. See generally Sonia Nazario, Opinion, *The Refugees at Our Door*, N.Y. Times (Oct. 10, 2015), [http://www.nytimes.com/2015/10/11/opinion/sunday/the-refugees-at-our-door.html?\\_r=0](http://www.nytimes.com/2015/10/11/opinion/sunday/the-refugees-at-our-door.html?_r=0) (on file with the *Columbia Law Review*).

85. Gammeltoft-Hansen & Hathaway, *supra* note 8, at 251–55.

86. See *id.* at 248 (“In sum, the classic tools of *non-entrée* no longer provide developed states with an effective and legal means to avoid their obligations under refugee law.”).

87. See, e.g., *id.* at 246–57 (classifying different varieties of traditional and cooperation-based *non-entrée*).

One reality must be noted at the outset: In principle, almost any refugee deterrence policy has the potential to impact the civil liberties of domestic citizens in at least some applications.<sup>88</sup> This does not mean, however, that these policies cannot be meaningfully differentiated.

Acknowledging this fact helps to illuminate one possible framework through which the issue can be analyzed: a framework of territorial application. Much like the expanding-rights framework embodied in the Convention,<sup>89</sup> this territorial framework would look to the relevant connection between the deterrence policy and the locus of application in order to differentiate between those policies least and most likely to implicate domestic civil liberties. Such a framework would suggest that the further a policy's aim is from the territory of the state itself, the less likely domestic civil liberties concerns are to be implicated.

In practice, this framework seems to track well with the observed application of refugee deterrence policies. Those policies that are most outwardly-focused, such as visa requirements for common carriers and cooperation-based *non-entrée*, are the least likely to have any impact on the civil liberties of a state's citizens.<sup>90</sup> This can be thought of as the "extra-territorial" category of refugee deterrence policies—those that are exclusively extra-territorial in application.

The second category of refugee deterrence policies can be described as those carried out at a state's borders, the furthest limit of actual territorial application. This "nominally territorial" category of policies is more likely to restrict the civil liberties of domestic citizens than purely extra-territorial policies, but the effects of these policies in practice are still relatively limited.<sup>91</sup>

The final category under which refugee deterrence policies may fall can be described as "intra-territorial." These policies are characterized by a predominant focus on individuals or activities within the state's territory: While they may implicate issues of extra-territorial concern, such as extra-territorial areas in which refugees may be housed while

---

88. Even a policy designed in principle not to operate on domestic citizens can, either through interpretation or administrative error, have civil liberties impacts in application. See, e.g., Caitlin Cruz, *Trump Camp Contradicts Itself on Whether Muslim Ban Covers US Citizens*, Talking Points Memo (Dec. 8, 2015, 12:27 PM), <http://talkingpointsmemo.com/dc/does-trumps-muslim-ban-include-citizens> [<http://perma.cc/Z4HL-W3R9>].

89. See *supra* notes 44–45 and accompanying text.

90. In both cases, the only likely impact on civil liberties of citizens would be as a result of error on the part of those officials tasked with carrying out the deterrence policy.

91. Germany's decision to temporarily reinstate border patrols, for instance, arguably violated the right of free movement that Germans, as EU citizens, are typically able to enjoy. Unlike purely extra-territorial policies, the nominally territorial policies' impact on civil liberties in such a case can be clearly foreseen; indeed, the policy necessitates it. This limitation of rights, however, can be viewed as relatively innocuous insofar as it merely required Germans wishing to reenter their country of residence to maintain travel documents on their person. See *supra* note 12 and accompanying text.

awaiting processing,<sup>92</sup> the effects of the policies fall predominantly on citizens of the state itself or restrict behavior within the state's territory. This category of refugee deterrence policies is often a component of a larger deterrence policy<sup>93</sup> and is the most likely to have significant impacts on domestic civil liberties.

To date, most refugee deterrence policies have fallen into the first or second category. However, as previously noted,<sup>94</sup> a growing number of states have begun to pursue "intra-territorial" deterrence policies, in line with the growth in reach and sophistication of refugee deterrence policies generally. These policies will be examined in more detail in the next section.

### C. *Intra-Territorial Deterrence Policies Examined*

This section will examine several manifestations of intra-territorial deterrence policies in order to clarify both differences and commonalities in how these policies operate. Section II.C.1 will explore intra-territorial deterrence in America's response to Haitian political upheaval in the 1990s. Section II.C.2 will discuss Hungary's response to the Syrian refugee crisis. Finally, section II.C.3 will examine Australia's Border Force legislation and intra-territorial impacts.

1. *American Policy Toward Haitian Refugees.* — The United States has long had a complicated relationship with international human rights law, and the issue of international refugee protection is no exception.<sup>95</sup> Indeed, while the United States played a significant role in the drafting of the 1951 Convention, it ultimately did not become a signatory and only acceded to the Protocol in 1968.<sup>96</sup> It would be another twelve years

---

92. See, e.g., *infra* section II.C.3 (discussing Australia's offshore interdiction and detention policy).

93. For instance, Australia's intra-territorial policy, discussed *infra* section II.C.3, is part of a much larger reorganization of the country's immigration forces. For an explanation of this reorganization, see generally Explanatory Memorandum, Australian Border Force Bill 2015 (Cth), [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F5408\\_ems\\_b699cc7e-7aeb-451b-8725-c9ce0e065f12%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F5408_ems_b699cc7e-7aeb-451b-8725-c9ce0e065f12%22) (on file with the *Columbia Law Review*)

94. See *supra* section II.A.

95. See, e.g., James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 *Geo. Immigr. L.J.* 481, 481–84 (2000) (noting "America's troubled relationship with international law, in particular human rights law, is well documented" and "the American asylum system is one of the most parochial in the world"); see also Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 *Berkeley J. Int'l L.* 38 (examining legislative, judicial, and executive actions placing the U.S. refugee regime outside international norms).

96. See Naomi S. Stern, *Evian's Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States's*, 19 *Geo. Immigr. L.J.* 313, 320–26 (2004) (discussing the United States's relationship to the 1951 Convention and 1967 Protocol).

before the United States would adopt implementing legislation to conform its immigration policies to the Protocol.<sup>97</sup>

The commitment of U.S. policymakers to the letter and the spirit of the Convention would be tested early, and the results would suggest the commitment was limited. Beginning in the late 1970s, the increasing brutality of Haiti's Duvalier government led significant numbers of Haitians to flee their country and seek asylum in the United States.<sup>98</sup> At first, the United States responded by interdicting Haitians attempting to make this voyage on the high seas and screening for refugee status, but it later switched to a policy of interdiction and off-shore detention at Guantanamo Bay in Cuba and, eventually, one of direct return of all interdicted Haitians to the country they had just fled.<sup>99</sup> The last policy quite clearly implicated concerns about violating the duty of *non-refoulement* but was eventually upheld by the Supreme Court, which ruled that both the applicable U.S. law as well as the Convention itself did not apply the duty extraterritorially.<sup>100</sup>

As this brief history makes clear, U.S. refugee policy made the shift to deterrence at a very early stage and cycled through a range of increasingly strict measures intended to effect this goal.<sup>101</sup> It should not come as a significant surprise, then, that U.S. policy was also very early in implicating concerns about the civil liberties of domestic citizens in connection with its refugee-deterrence goals. In this case, the civil liberty at issue involved the First Amendment rights of attorneys. Attorneys from a variety of organizations sought to gain access to Haitian refugees who had been interdicted and were held in offshore detention facilities at Guantanamo Bay.<sup>102</sup> They argued, in part, that the government's refusal to grant them access to refugees at Guantanamo violated their right to associate with and advise persons of their legal rights, as guaranteed by the First Amendment.<sup>103</sup> In this, they were initially successful—District

---

97. See *id.* at 326–28 (describing events leading to the passage and enactment of the Refugee Act of 1980).

98. Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. Rich. L. Rev. 139, 141 (1995) [hereinafter Koh, *Offshore Refugee Camps*].

99. See *id.* at 141–48 (discussing the evolution of U.S. policy).

100. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 171–77, 179–88 (1993) (discussing obligations imposed by the Refugee Act of 1980 and the 1951 Convention, respectively).

101. Indeed, the decision in *Sale* is notable for being one of the few interpretations of the Convention finding that extraterritorial interdiction and return to the country of origin is not a violation of *non-refoulement*. See Gammeltoft-Hansen & Hathaway, *supra* note 8, at 247–48 (noting there is “little support for the view that a state can deter refugees in the international space of the high seas without violating its duties of protection” and that the *Sale* decision “has not found favor elsewhere”).

102. See Koh, *Offshore Refugee Camps*, *supra* note 98, at 144–45 (noting involvement of Yale Law School's International Human Rights Clinic and “hastily recruit[ed] co-counsel”).

103. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1040 (E.D.N.Y. 1993).

Judge Sterling Johnson Jr. ruled that because other organizations had been granted full access to the refugees and the attorneys sought to do so at their own expense, the government's restriction on speech and association in this non-public forum was not based on a "legitimate interest" but rather was an exercise in viewpoint discrimination.<sup>104</sup> However, in later litigation arising out of the same factual issues but for different claimants, the Eleventh Circuit expressly repudiated this holding, finding that Guantanamo is not subject to U.S. law (despite being under its exclusive control and jurisdiction), and that as a result, the First Amendment did not apply to either the refugees or the attorneys in that space.<sup>105</sup>

The extent to which this case represents an infringement on domestic citizens' civil liberties, then, is certainly contested. Nevertheless, at least two federal judges unequivocally found the government's refusal to grant attorneys access to their clients in this situation to be a violation of the attorneys' rights.<sup>106</sup> The nature of the civil liberties infringement in this case is also relatively limited: The attorneys were not threatened with punishment, civil or otherwise; the right they were arguably denied was a positive, rather than a negative, one, insofar as they were denied only access rather than potentially facing government intrusion into their own affairs; and the infringement was limited to a narrow class of legal activists.

Nevertheless, the real consequences of these decisions should not be dismissed. For attorneys in this position, the denial of access to their clients, a right that attorneys are typically guaranteed under First Amendment doctrine,<sup>107</sup> must certainly have registered as a significant limitation of their own rights. Moreover, when viewed in light of the developments discussed in the following sections, these decisions can be seen as part of a larger trend with troubling implications for all citizens of countries with restrictive refugee policies.

---

104. *Id.* at 1040–41.

105. See *Cuban Am. Bar Ass'n, v. Christopher*, 43 F.3d 1412, 1428–30 (11th Cir. 1995) (explaining speech and association rights depend on an underlying cognizable legal claim and holding Guantanamo Bay to be an extraterritorial area in which no such claim could be asserted); see also Koh, *Offshore Refugee Camps*, *supra* note 98, at 157 (“[T]he Eleventh Circuit expressly disagreed with Judge Johnson[] . . . that Guantanamo is subject to U.S. law . . . . The court further held that . . . American citizens have no First Amendment rights to communicate with or associate with their clients on Guantanamo, because the clients themselves have no underlying rights.”).

106. See Thomas David Jones, *Aliens — Interdiction of Cubans and Haitians on High Seas — Rights of Cubans and Haitians in Safe Haven Outside United States*, in *International Decisions*, 90 *Am. J. Int'l L.* 477, 477 (Judith Hipler Bello ed., 1996) (noting the District Court decision in *Cuban American Bar Ass'n* finding attorneys had a First Amendment right to access their clients).

107. See, e.g., *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513 (11th Cir. 1992) (finding that Supreme Court precedent “recognize[s] a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression”).

2. *Hungary's "Emergency" Legislation.* — The Syrian refugee crisis, which had been ongoing for several years as a result of the protracted civil war in that country,<sup>108</sup> first affected Europe in a significant way during the summer and early fall months of 2015.<sup>109</sup> Hungary, with its strategic position on the eastern frontier of Europe, was one of the countries most heavily affected by the dramatic influx of new arrivals in the early stages of the crisis.<sup>110</sup> Unique among European countries, however, Hungary pursued extraordinarily aggressive emergency measures to prevent new arrivals practically at the outset of the crisis.

The first stage of Hungary's response involved the construction of a fence around portions of its border.<sup>111</sup> The Hungarian Parliament enacted legislative measures aimed at further deterring refugee arrivals as the second stage of its response.<sup>112</sup> These measures included a raft of different provisions aimed at arriving refugees, including draconian punishments for damaging the newly erected border fence and for entering the country at nondesignated areas.<sup>113</sup> The law also allowed for

---

108. See Adrian Edwards, Needs Soar as Number of Syrian Refugees Tops 3 Million, United Nations High Commissioner for Refugees (Aug. 29, 2014), <http://www.unhcr.org/53ff76c99.html> [<http://perma.cc/JJ6L-254K>] (noting high numbers of Syrian refugees in Lebanon, Turkey, and Jordan since the civil war's outbreak).

109. See, e.g., Mathis Wagner, As Syrian Refugee Crisis Spreads to Europe, Lessons from Turkey, Conversation (Oct. 9, 2015, 6:18 AM), <http://theconversation.com/as-syrian-refugee-crisis-spreads-to-europe-lessons-from-turkey-48428> [<http://perma.cc/C3NM-7T2D>] ("In the first week of September, the Syrian refugee crisis finally came to Western Europe."); see also Somini Sengupta, Refugee Crisis in Europe Prompts Western Engagement in Syria, N.Y. Times (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/world/middleeast/europe-refugee-crisis-syria-civil-war.html> (on file with the *Columbia Law Review*) (quoting the U.N. High Commissioner for Refugees as saying the attention of world leaders had turned to the refugee crisis because refugees had begun arriving in rich countries).

110. Indeed, it has been suggested that Hungary's government hastened the visibility of the crisis by its premature decision in mid-June to build a fence on its Serbian border, before the number of refugee arrivals had grown to significant proportions. See Jan-Werner Müller, Hungary: "Sorry About Our Prime Minister," N.Y. Rev. Books: NYR Daily (Oct. 14, 2015, 3:39 PM), <http://www.nybooks.com/blogs/nyrblog/2015/oct/14/orban-hungary-sorry-about-prime-minister/> [<http://perma.cc/6PTF-36GG>] ("[T]he decision . . . to build the fence along the border with Serbia was beginning to have an effect: it increased the number of refugees rushing to Hungary, as complete closure of the Balkans route now appeared to be only a matter of time.").

111. See Kim Lane Scheppele, The Hungary Games, Politico (Aug. 24, 2015, 5:30 AM), <http://www.politico.eu/article/hungary-games-migration-refugees-asylum-crisis/> [<http://perma.cc/R6DR-C27X>] (last updated Aug. 26, 2015, 7:52 AM) (explaining the decision to begin construction of a fence at the Serbian border).

112. Bradley McAllister, Hungary Lawmakers Approve Emergency Laws to Address Migration Crisis, Jurist: Paper Chase (Sept. 5, 2015, 12:03 PM), <http://jurist.org/paperchase/2015/09/hungary-lawmakers-approve-emergency-laws-to-address-migration-crisis.php> [<http://perma.cc/T8D2-Z8VK>].

113. See Hungary Declares State of Emergency Over Refugee Crisis, Al Jazeera Am. (Sept. 15, 2015, 8:15 AM), <http://america.aljazeera.com/articles/2015/9/15/hungary->

declaration of a state of emergency in perpetuity under certain conditions.<sup>114</sup>

The legislative measures were not aimed solely at foreign arrivals: An element of the law would also focus on domestic citizens. Specifically, the law gave police the power to search the homes of Hungarian citizens suspected of harboring refugees without a warrant. As initially drafted, the law granted this power explicitly, but this provision was eventually removed after it threatened legislative support for the measure as a whole.<sup>115</sup> However, as pointed out during floor debate, this did not in fact change the nature of the powers police would be granted: Because the law criminalized unauthorized refugee entries and presence, police who suspected a household of harboring refugees could still enter without a warrant.<sup>116</sup>

This development can be understood in a couple of different ways. On the one hand, many external critics have noted that Hungary has increasingly moved towards autocracy and illiberalism in recent years, and thus see the warrantless-search issue as merely part of a larger ongoing trend.<sup>117</sup> Others argue that the measures are a not-entirely-irrational response to an almost unprecedented emergency situation.<sup>118</sup>

---

declares-emergency-over-refugee-crisis.html [http://perma.cc/VP55-2FKR] (last updated Sept. 15, 2015, 12:00 PM).

114. See, e.g., Kim Lane Scheppele, Opinion, Orbán's Police State, *Politico* (Sept. 14, 2015, 3:45 PM), <http://www.politico.eu/article/orbans-police-state-hungary-serbia-border-migration-refugees/> [http://perma.cc/6TA5-RJRY] [hereinafter Scheppele, Police State] (last updated Sept. 15, 2015, 4:27 PM).

115. See Mark Snowiss, Hungary Could Use Migrant Crisis for Internal Crackdown, *Voice Am.* (Sept. 18, 2015, 2:46 PM), <http://www.voanews.com/content/hungary-could-use-migrant-crisis-for-internal-crackdown/2969548.html> [http://perma.cc/4CG2-DTGF] (“A controversial provision that would have allowed police to search private homes suspected of harboring migrants was dropped at the last minute.”).

116. See, e.g., Scheppele, Police State, *supra* note 114 (explaining parliamentary discussions concerning the warrantless search issue); see also Eva S. Balogh, Toward a Police State?, *Hungarian Spectrum* (Sept. 5, 2015), <http://hungarianspectrum.org/2015/09/05/toward-a-police-state/> [http://perma.cc/5TAY-BTYC] (“[A] policeman would be able to enter private property without a warrant. An order from a superior officer would suffice to search for immigrants suspected of being lodged on the premises.”); András B. Göllner, Hungary Facing a Slow Slide into Despotism, *Nat'l Post* (Sept. 14, 2015), <http://news.nationalpost.com/full-comment/andras-b-gollner-hungary-facing-a-slow-slide-into-despotism> [http://perma.cc/HC82-8FCN] (last updated Sept. 15, 2015, 8:26 AM) (“Hungary’s security forces have been given the power to enter anyone’s home in search of aliens — no warrants are necessary.”).

117. See Snowiss, *supra* note 115 (“[I]deas like searching houses without a warrant come up — once you allow democracy to slide, you don’t know when it will stop.” (quoting Andras Simonyi, Managing Dir. of the Ctr. for Transatlantic Relations at the Johns Hopkins Sch. of Advanced Int’l Studies)).

118. See, e.g., Christopher Caldwell, Europe Gets Borders, *Wkly. Standard* (Sept. 28, 2015), [http://www.weeklystandard.com/articles/europe-gets-borders\\_1032567.html](http://www.weeklystandard.com/articles/europe-gets-borders_1032567.html) [http://perma.cc/TBL2-C566] (defending Hungarian refugee policies).

Regardless of the merits of either position, one thing is clear: The Hungarian legislation is a stark demonstration of the extent to which states may be willing to go in an attempt to deter the arrival of refugees. After all, the protection against warrantless searches is a core right in the liberal democratic order. That Hungary has nevertheless embarked on a path that renders this right irrelevant if citizens are so much as suspected of housing refugees suggests the extent to which civil liberties may be vulnerable in the face of intra-territorial deterrence policies.

Some might counter that, as a country whose government has avowedly pursued an “illiberal” course,<sup>119</sup> Hungary’s policy in this regard should be considered an aberration from the prevailing liberal democratic order. Even granting that Hungary’s government is outside the mainstream of democratic thought, however, two issues remain: (1) The position of the Orbán government toward refugees is clearly not without sympathy in other parts of Europe;<sup>120</sup> and (2) Orbán’s government is not alone in imposing restrictions on domestic civil liberties in the pursuit of refugee deterrence policies. As already discussed, the United States has been a pioneer in this area,<sup>121</sup> and as will be shown in the next section, Australia has also taken worrisome steps in this direction. Thus, this development in Hungarian law should not simply be shrugged off as an aberration, but rather must be understood as a warning for what the future of refugee deterrence may look like.<sup>122</sup>

---

119. See Jeffrey Stevenson Murer, *The Rise of Jobbik, Populism, and the Symbolic Politics of Illiberalism in Contemporary Hungary*, 24 *Polish Q. Int’l Aff.*, no. 2, 2015, at 79, 100 (“In a speech last July . . . , Orbán made clear that his goal is to create an ‘illiberal democracy.’”).

120. See, e.g., Jacob Poushter, *European Opinions of the Refugee Crisis in 5 Charts*, Pew Res. Ctr. (Sept. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/09/16/european-opinions-of-the-refugee-crisis-in-5-charts/> [<http://perma.cc/JQ6R-BZAE>] (discussing survey results showing Europeans believe refugees increase terrorism and crime while taking jobs and social benefits, and noting EU citizens overwhelmingly disapprove of the EU’s response to the refugee crisis); Alison Smale, *Anti-Immigrant Violence in Germany Spurs New Debate on Hate Speech*, *N.Y. Times* (Oct. 21, 2015), <http://www.nytimes.com/2015/10/22/world/europe/anti-immigrant-refugees-violence-in-germany.html> (on file with the *Columbia Law Review*) (“The stabbing of a politician overseeing refugee affairs in Cologne and a veiled call to reopen concentration camps at an anti-immigration rally of 20,000 people have set off new fears that anti-immigrant sentiment is taking a sharper turn in Germany . . . .”); Griff Witte, *Behind Sweden’s Warm Welcome for Refugees, a Backlash Is Brewing*, *Wash. Post* (Oct. 19, 2015), [https://www.washingtonpost.com/world/europe/behind-swedens-warm-welcome-for-refugees-a-backlash-is-brewing/2015/10/17/b5f4110c-661d-11e5-bdb6-6861f4521205\\_story.html?utm\\_term=.cac9246832c9](https://www.washingtonpost.com/world/europe/behind-swedens-warm-welcome-for-refugees-a-backlash-is-brewing/2015/10/17/b5f4110c-661d-11e5-bdb6-6861f4521205_story.html?utm_term=.cac9246832c9) [<http://perma.cc/6EJF-FCPQ>] (“In this Scandinavian country famous for its progressive politics and unfailingly polite citizenry, a party with roots in the neo-fascist fringe has surged toward the top of recent opinion polls with a defiantly hostile message to refugees . . . .”).

121. See *supra* section II.C.1 (describing U.S. treatment of Haitian refugees).

122. This is particularly true in light of developments in two other Central and Eastern European countries, Poland and Slovenia. Slovenia, following the Hungarian example, began construction on its own border fence to keep out refugee arrivals. See Marja Novak,

3. *Australia's Border Force Act: Criminalizing Dissent.* — Perhaps the most serious concern for domestic civil liberties arising from intra-territorial refugee deterrence policies relates to Australia's Border Force Act of 2015.<sup>123</sup> The Act is part of a broader reorganization of Australia's customs and immigration services and largely reflects trends that have been developing in Australia for some time.

Australia's refugee policy shifted toward deterrence in the early 1990s.<sup>124</sup> The Tampa incident in 2001, however, truly pushed Australian policy toward its present incarnation.<sup>125</sup> After a boat of Afghan refugees capsized near Christmas Island, a Norwegian ship rescued them and brought them into Australian territory, prompting a rash of litigation and ultimately leading the Australian government to adopt the "Pacific Solution."<sup>126</sup> Described briefly, this policy involved ramped-up interdiction efforts and the use of third countries, particularly the island nation Nauru,<sup>127</sup> for detention and screening purposes, preventing refugee access to Australia's asylum system and imposition of the duty of *non-refoulement*.<sup>128</sup> The policy proved initially unpopular, and by 2007 it had

---

Slovenia Putting Up Fence Along Border with Croatia to Control Migrant Flow, Reuters (Nov. 11, 2015, 12:15 PM), <http://www.reuters.com/article/2015/11/11/us-europe-migrants-slovenia-idUSKCN0T00I120151111#3HxTkmOUssUEiipU.97>

[<http://perma.cc/TBN9-8KGV>] ("Slovenia began erecting a razor wire fence along parts of its border wall with Croatia on Wednesday, saying it wanted better control over a tide of migrants flowing through the tiny country en route to other areas of Europe."). Meanwhile, Poland's recent elections saw the Law and Justice Party take power, whose leader is an outspoken supporter of Prime Minister Viktor Orbán and his policies. See Poland Turns Right: A Conservative Enigma, *Economist* (Oct. 29, 2015), <http://www.economist.com/news/europe/21677216-right-saviours-victory-people-wonder-how-far-it-will-go-conservative-enigma> [<http://perma.cc/MQA3-Z6SW>] (describing opponents' fears of the new regime's intention to curb political and civil rights). These and other developments stand as clear evidence that to view Hungary as aberrational is to mistake the current political climate in Europe.

123. Australian Border Force Act 2015 (Cth).

124. See, e.g., Mark Isaacs, Argument, The Intolerable Cruelty of Australia's Refugee Deterrence Strategy, *Foreign Pol'y* (May 2, 2016), <http://foreignpolicy.com/2016/05/02/australia-papua-new-guinea-refugee-manus-nauru/> [<http://perma.cc/4AVF-D4UM>] ("People have sought refuge in Australia via boat since the Vietnam War. But only since 1992 has the government — both the traditionally center-left Labor Party and the center-right Liberal Party — opted for a deterrence system.").

125. For an excellent explanation of the factual and legal issues at stake in the Tampa incident, see generally William Kirtley, Note, The Tampa Incident: The Legality of *Ruddock v. Vadarlis* Under International Law and the Implications of Australia's New Asylum Policy, 41 *Colum. J. Transnat'l L.* 251 (2002).

126. See Tara Magner, A Less than 'Pacific' Solution for Asylum Seekers in Australia, 16 *Int'l J. Refugee L.* 53, 53–57 (2004).

127. Australia was able to enlist Nauru's assistance by offering a substantial aid package. See Gammeltoft-Hansen & Hathaway, *supra* note 8, at 249 (noting Australia offers "free medical care, educational opportunities, and sports facilities in return for the warehousing in Nauru" of intercepted migrants).

128. See Magner, *supra* note 126, at 56–57 (describing operation of the Pacific Solution).

largely been abandoned.<sup>129</sup> However, by 2013, as refugee arrivals increased, Australia returned to a policy combining offshore detention with an enhanced focus on punitive deterrence at sea.<sup>130</sup> Today, controversy surrounding the conditions at the offshore facilities remains.<sup>131</sup>

Australia's Border Force Act needs to be understood in this context. While it contains a wide range of different provisions, one of the most contentious has been Section 42, which makes it a criminal offense for an "entrusted person" to "make[] a record of, or disclose[], . . . protected information."<sup>132</sup> Under the Bill's definitions, "entrusted persons" include all government workers as well as consultants and contractors,<sup>133</sup> and "protected information" is simply any information that a person comes across while working at the detention centers.<sup>134</sup> Put more directly, the law potentially makes it a criminal offense for those who work in the detention centers to discuss anything about what they witness inside. The law contains exceptions to this prohibition, but they are premised on the

---

129. See Anthony Pastore, Comment, Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention, 13 *Chi. J. Int'l L.* 615, 621 (2013) ("This policy became unpopular, and rioting broke out in the detention centers, where migrants could be held indefinitely." (citation omitted)).

130. See, e.g., Sharon Pickering & Leanne Weber, *New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers*, 39 *Law & Soc. Inquiry* 1006, 1010 (2014) (describing the policy reopening detention facilities at Nauru and Manus Islands as amounting to "the deliberate warehousing of individuals selected for offshore detention in circumstances that could only be described as punitive"); Luke Taylor, *Designated Inhospitability: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia*, 60 *McGill L.J.* 333, 351–53 (2015) (arguing a "key component of the policy is . . . forcibly turning back boats").

131. See, e.g., U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, *Nauru 2014 Human Rights Report* 6 (2014), <http://www.state.gov/documents/organization/236674.pdf> [<http://perma.cc/YE42-9HL6>] (describing riots at the Nauru facility and criticism of living conditions, including reports of suicide attempts and hunger strikes, by NGOs and former facility workers); Editorial, *Australia's Brutal Treatment of Migrants*, *N.Y. Times* (Sept. 3, 2015), [https://www.nytimes.com/2015/09/03/opinion/australias-brutal-treatment-of-migrants.html?\\_r=0](https://www.nytimes.com/2015/09/03/opinion/australias-brutal-treatment-of-migrants.html?_r=0) (on file with the *Columbia Law Review*) (mentioning a report that "portrayed the Nauru center as a "purgatory where children are sexually abused . . . and some asylum seekers are so desperate that they stich their lips shut in an act of protest"); see also Robyn Dixon, *Australia Doesn't Want Them. Trump Doesn't Either. Who Are These Refugees Trapped in Bleak Island Camps?*, *L.A. Times* (Feb. 2, 2017, 11:25 AM), <http://www.latimes.com/world/africa/la-fg-australia-refugees-20170202-story.html> [<http://perma.cc/9TJS-HX2N>] (describing the refugees as "collateral damage in Australia's widely criticized 'Stop the Boats' policy").

132. Australian Border Force Act 2015 (Cth) s 42.

133. *Id.* s 4 (defining "entrusted persons" to include "Immigration and Border Protection Worker[s]," including contractors and consultants, and defining "Immigration and Border Protection Worker" to include any government employee "whose services are made available to the Department").

134. See *id.* (defining protected information as "information that was obtained by a person in the person's capacity as an entrusted person").

discretion of the Secretary of the Department<sup>135</sup> and are so vaguely worded that their application to specific circumstances is impossible to determine.<sup>136</sup>

In effect, the Act's secrecy provisions help Australia's government avoid scrutiny of some of the most controversial elements of its refugee deterrence policies at the cost of limitations on the civil liberties of Australian citizens.<sup>137</sup> Indeed, in response to concerns about the Act's restrictions on the free speech of workers at detention facilities, the U.N. special rapporteur on the human rights of migrants cancelled a planned trip to Australia.<sup>138</sup> Notably, the Australian government refused to assure the rapporteur that those he spoke with would not be at risk of prosecution.<sup>139</sup>

This significant encroachment on domestic civil liberties in the refugee deterrence context is perhaps the most troubling of all those so far mentioned, for several reasons. First, unlike the U.S. and Hungarian legislation, it uses the threat of criminal penalties to enforce its goals.<sup>140</sup> Second, it is more legally durable than either the U.S. or Hungarian

---

135. See, e.g., *id.* s 45(1) ("An entrusted person . . . may disclose protected information . . . if: (a) the Secretary is satisfied that the information will be used in accordance with an agreement to which subsection (4) applies . . .").

136. See, e.g., Khanh Hoang, *Border Force Act Entrenches Secrecy Around Australia's Asylum Seeker Regime*, Conversation (July 1, 2015, 9:12 PM), <http://theconversation.com/border-force-act-entrenches-secrecy-around-australias-asylum-seeker-regime-44136> [<http://perma.cc/8T3B-VDNN>] (examining ambiguities in the Act's exemptions, including placing the burden of proof on whistleblowers and the potential for the government to claim "what goes on in detention centers . . . amounts to sensitive law enforcement information" not subject to exemptions).

137. See Greg Barns & George Newhouse, *Border Force Act: Detention Secrecy Just Got Worse*, Austl. Broadcasting Corp.: The Drum (May 27, 2015, 5:40 PM), <http://www.abc.net.au/news/2015-05-28/barns-newhouse-detention-centre-secrecy-just-got-even-worse/6501086> [<http://perma.cc/ZZ2J-Z7DB>] ("The Abbott Government is erecting an iron curtain of secrecy over what is happening and what has happened in Australia's immigration detention system. The Act not only criminalises whistleblowers but those such as medical professionals and teachers who believe they have an ethical duty to report . . . harm . . ."); Michael Bradley, *Border Force Act: Why Do We Need These Laws?*, Austl. Broadcasting Corp.: The Drum (July 15, 2015, 7:20 PM), <http://www.abc.net.au/news/2015-07-16/bradley-border-force-act-why-do-we-need-these-laws/6623376> [<http://perma.cc/XW4K-G8RL>] (arguing the Act's secrecy provisions serve no useful purpose except shielding detention center abuses from public scrutiny).

138. Matthew Doran, *United Nations Special Rapporteur for Asylum Seeker Human Rights Delays Australian Visit, Cites Border Force Act*, Austl. Broadcasting Corp. (Sept. 26, 2015, 10:07 AM), <http://www.abc.net.au/news/2015-09-26/un-human-rights-investigator-australia-visit-border-force-act/6807146> [<http://perma.cc/T55K-VHYD>].

139. *Id.*

140. Australian Border Force Act s 42(1) (providing a penalty of imprisonment for two years). In contrast, the U.S. policy merely involved refusing access to lawyers wishing to meet with their clients, see *supra* section II.C.1, and the Hungarian policy allowed police officers to conduct warrantless searches of homes suspected of containing refugees without making those who house refugees criminally liable, see *supra* section II.C.2.

policy.<sup>141</sup> Finally, the law's disregard for Australians' civil liberties may have helped to create a larger normative context in which refugee deterrence goals are considered to supersede basic rights.<sup>142</sup>

D. *The Contemporary and Future Relevance of Intra-Territorial Refugee Deterrence Policies*

The increasing number of states that have adopted intra-territorial refugee deterrence policies that undermine the civil liberties of their own citizens should be seen as a nascent trend in refugee policies internationally. The importance of this trend, particularly for what it may portend for the future, should not be understated.

One reason to view this development as worthy of serious concern is that it can be seen as a logical extension of larger trends in refugee deterrence policies.<sup>143</sup> As these policies have increased in terms of both volume and complexity, their impacts on human rights generally have grown.<sup>144</sup> There is little reason to assume that domestic civil liberties will necessarily escape unscathed. Moreover, these policies have to date been relatively ineffective,<sup>145</sup> which has only led governments to pursue increasingly severe measures.

---

141. The U.S. policy, as an executive-branch creation, see *supra* note 99 and accompanying text, may be more subject to cancellation due to changes in the political environment. Meanwhile, the Hungarian policy is explicitly designated as a temporary emergency law, see *supra* notes 113–116 and accompanying text, regardless of concerns about its potential durability.

142. See, e.g., Shalailah Medhora, Border Force Officials Apologize for Botched Visa Crackdown in Melbourne, *Guardian* (Oct. 18, 2015, 10:07 PM), <http://www.theguardian.com/australia-news/2015/oct/19/border-force-officials-apologise-botched-visa-crackdown-melbourne> [<http://perma.cc/TK9C-Y9VP>] (explaining the outcry concerning the Border Force press release suggesting any Australian citizen could be stopped and required to produce visas or other identifying documents on command).

143. For a discussion of the evolution of refugee deterrence policies internationally, see *supra* section II.A.

144. For instance, the imposition of carrier sanctions had the unintended effect of dramatically increasing the incidence of human smuggling worldwide, see Gammeltoft-Hansen & Hathaway, *supra* note 8, at 246 (“The vulnerability of the visa control and carrier sanction regime has thus given rise to an unending ‘cat and mouse game’ in which border control must be constantly reinvented to respond to the schemes hatched by imaginative smugglers motivated by extraordinary profits.”), while offshore detention policies such as those practiced by Australia and the United States have frequently led to periods of indefinite detention for asylum seekers, see Koh, *Offshore Refugee Camps*, *supra* note 98, at 140 (discussing effects of U.S. policy); Taylor, *supra* note 130, at 347 (discussing Australian policy). Conditions for refugees housed in such detention centers, meanwhile, are often staggeringly poor. See, e.g., Editorial, *supra* note 131.

145. See Gammeltoft-Hansen & Hathaway, *supra* note 8, at 248 (“In sum, the classic tools of *non-entrée* no longer provide developed states with an effective and legal means to avoid their obligations under refugee law.”); Taylor, *supra* note 130, at 354–56 (discussing research showing “asylum seekers generally have little understanding” of other states’ deterrence policies). Furthermore, to the extent that the policies *are* effective, it is typically the case that arriving refugees have simply been pushed to neighboring countries. See

Another reason to be concerned about this trend is that the current global wave of refugees is predicted to presage a much larger international refugee population in the near future.<sup>146</sup> The current crisis is already the worst in recorded history.<sup>147</sup> However, a number of factors, including the effects of climate change<sup>148</sup> and the growth of conflicts relating to resource limitations in developing countries,<sup>149</sup> are expected to push millions more people to seek asylum across the world in coming years. Considering that some states have already responded to current refugee pressures with policies limiting domestic civil liberties, little imagination is required to conclude that potentially many more may do so in this projected context. Indeed, this is precisely what makes the recognition of this trend so concerning: If, under current conditions, multiple states have concluded that restrictions on domestic civil liberties are necessary to combat refugee inflows, it is reasonable to assume that if future projections come to pass, many more states will follow suit, likely with policies more draconian than those currently in place.

A third cause for concern arises from the contemporary parallels that can easily be drawn between policies aimed at protecting against other types of perceived foreign threats. In particular, the response in many countries to concerns about international terrorism<sup>150</sup> provides a

---

Goodwin-Gill, *Refugee in International Law*, supra note 73, at 194–95 (arguing “restrictive measures almost always have a ‘sideways’ effect” by pointing to data showing a decrease in asylum seekers in some European countries following the imposition of deterrence policies had correlated with a similar increase in others).

146. See, e.g., Rod Nordland, *A Mass Migration Crisis, and It May Get Worse*, N.Y. Times (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/world/europe/a-mass-migration-crisis-and-it-may-yet-get-worse.html> (on file with the *Columbia Law Review*) (quoting the president of the European Council, a former German foreign minister, and a member of the International Center for Democratic Transition all expressing the belief that refugee flows will increase).

147. See *id.* (“There are more displaced people and refugees now than at any other time in recorded history—60 million in all—and they are on the march in numbers not seen since World War II.”).

148. See, e.g., Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 *Harv. Envtl. L. Rev.* 349, 351–52 (2009) (“Studies predict that, over the coming decades, environmental disruptions caused by climate change will lead . . . millions of people to leave their homes and in some cases their countries.”); John Vidal, *Global Warming Could Create 150 Million ‘Climate Refugees’ by 2050*, *Guardian* (Nov. 2, 2009, 7:05 PM), <http://www.theguardian.com/environment/2009/nov/03/global-warming-climate-refugees> [<http://perma.cc/4GPB-RD8Q>].

149. See Kimberly Flowers, *The Conflict, Displacement, and Food Security Nexus*, Ctr. for Strategic & Int’l Stud. (July 17, 2015), <http://www.csis.org/analysis/conflict-displacement-and-food-security-nexus> [<http://perma.cc/RNE3-5CR7>] (explaining “[t]he consequential competition over valuable resources has wide-reaching implications: food insecure populations are likely to express frustration with troubled regimes, perpetuating a cycle of political instability and further undermining long-term economic development,” leading to further displacement).

150. The consequences of anti-terrorism policies for domestic civil liberties have been widely discussed in both the academic and popular media. For a useful introduction to the discussion in the U.S. context, see generally Jules Lobel, *The War on Terrorism and*

worrisome glimpse at the domestic impact refugee policies might eventually have. To be sure, terrorism directly implicates national security in a way that refugee arrivals do not necessarily, and security issues have long been the context in which civil liberty sacrifices are considered most justified.<sup>151</sup> However, refugee inflows are not without potential security implications,<sup>152</sup> and many also perceive the issue as one threatening national identity.<sup>153</sup> As a result, civil liberty restrictions may come to be seen as justified. The response of many political figures to terrorist attacks in Paris and San Bernardino, California, provides a troubling indication of how easily these issues may become conflated.<sup>154</sup>

Taken together, these concerns highlight both the future as well as current relevance of refugee deterrence policies for domestic civil

---

Civil Liberties, 63 U. Pitt. L. Rev. 767 (2002) (discussing the history of challenges to civil liberty protections in the face of national security concerns in the United States). For a similar exploration of the issue in the U.K. context, see generally Jessie Blackbourn, Counter-Terrorism and Civil Liberties: The United Kingdom Experience, 1968–2008, 2008 J. Inst. Just. & Int'l Stud. 63 (discussing civil liberties impacts of U.K. counter-terrorism efforts in the conflict with Northern Ireland).

151. See, e.g., Nancy Murray & Sarah Wunsch, Civil Liberties in Times of Crisis: Lessons from History, 87 Mass. L. Rev. 72 (2002) (surveying U.S. historical reactions to security crises resulting in civil liberties restrictions).

152. The Refugee Convention itself explicitly acknowledges this fact in Article 9 (“Nothing in this Convention shall prevent a Contracting State . . . from taking provisionally measures which it considers to be essential to the national security in the case of a particular person . . .”) and Article 33(2) (holding *nonrefoulement* does not apply to “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is”). Refugee Convention, supra note 6, arts. 9, 33; see also Marisa Silenzi Cianciarulo, Terrorism and Asylum Seekers: Why the Real I.D. Act is a False Promise, 43 Harv. J. on Legis. 101, 101–06 (2006) (discussing legislation aimed at concerns “terrorists . . . [would] us[e] the U.S. asylum system to gain lawful immigration status in the United States”); Won Kidane, The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination, 41 U. Mich. J.L. Reform 669, 670–77 (2008) (describing the history of U.S. national security concerns relating to immigration and asylum).

153. See, e.g., Rick Noack, Muslims Threaten Europe’s Christian Identity, Hungary’s Leader Says, Wash. Post (Sept. 3, 2015), <http://www.washingtonpost.com/news/worldviews/wp/2015/09/03/muslims-threaten-europes-christian-identity-hungarys-leader-says/> [<http://perma.cc/8FWZ-RK76>] (describing Prime Minister Orbán’s statements reflecting sentiment against refugee acceptance as rooted in concerns for national identity).

154. For instance, then-Republican Nominee Donald Trump’s proposal during the 2016 presidential campaign to effectively halt the entrance into the United States of all Muslim individuals, including U.S. citizens, see Ben Kamisar, Trump Calls for ‘Shutdown’ of Muslims Entering US, Hill (Dec. 7, 2015, 4:30 PM), <http://thehill.com/blogs/ballot-box/presidential-races/262348-trump-calls-for-shutdown-of-muslims-entering-us> [<http://perma.cc/MM5B-WX2F>], needs to be seen as a conflation of these two issues: While President Trump’s proposal was made in the immediate aftermath of a terrorist attack in the United States, it cannot be divorced from his earlier criticism of plans to accept Syrian refugees into the country on security grounds, see Tal Kopan, Donald Trump: Syrian Refugees a ‘Trojan Horse’, CNN Pol. (Nov. 16, 2015, 12:39 PM), <http://www.cnn.com/2015/11/16/politics/donald-trump-syrian-refugees/> [<http://perma.cc/PL7Q-6EFA>].

liberties. The logic underlying the progressive complexity and severity of refugee deterrence policies amplifies the risk that domestic civil liberties will be impacted; the projections for future refugee flows suggest that states will respond, as they have in the past, with ever harsher measures aimed at keeping refugees out; and the degree to which states have been willing to sacrifice the civil liberties of their citizens in response to concerns about terrorism, concerns that can easily become linked to refugee issues, demonstrates how vulnerable domestic civil liberties may be in the face of future refugee crises.

In addition to these concerns, it is important to recognize the challenges that this trend poses to the international refugee regime and the protection of refugees themselves. After all, each of the policies identified in section II.C is fundamentally oriented toward limiting *refugee* rights, though the mechanism through which the policies achieve this goal is the infringement of the civil liberties of citizens.<sup>155</sup> These types of policies, moreover, can be used as an effective tool to evade responsibilities under the international refugee regime as it currently exists. The American example demonstrates how domestic attorneys, often the actors most directly responsible for enforcing the Refugee Convention's provisions,<sup>156</sup> may be prevented from exercising their critical role within the current system. Similarly, Australia's policy illustrates how countries can use criminal sanctions to discourage citizens from alerting the international community to possible abdications of responsibility under the Convention.<sup>157</sup> Thus, the trend identified in this Note should be cause for concern not only for citizens in countries that may adopt such policies but also for those who support the rights of refugees and the international system designed for their protection.

In order to combat this trend and prevent other states from adopting similar or more onerous policies in the future, an effective response likely requires action in the present. Otherwise, political and other pressures may simply render attempts to stem the growth of this trend unworkable.<sup>158</sup> The necessary character and potential outline of

---

155. The U.S. policy of denying American attorneys access to their refugee clients is ultimately a policy of preventing refugees from enjoying legal representation to challenge their conditions of confinement. See *supra* notes 101–105 and accompanying text. The Hungarian policy of permitting warrantless searches of Hungarian homes suspected of harboring refugees, likewise, is aimed primarily at preventing refugees from finding shelter in Hungary. See *supra* notes 115–116 and accompanying text. Finally, the Australian policy of criminalizing detention center employees' discussions of conditions inside the camps is, as many have argued, intended to prevent disclosure of information about refugee mistreatment. See *supra* notes 132–136 and accompanying text.

156. See *supra* note 59 and accompanying text (explaining the role of domestic attorneys in upholding the Convention).

157. This concern has already come to fruition. See *supra* notes 138–139 and accompanying text.

158. Hungary is a useful test-case for this proposition: Even as many observers have identified the country as moving toward a more illiberal posture, with the latest laws being

what such a response might look like are discussed in more detail in the next Part.

### III. STEMMING THE TIDE: A PROPOSAL FOR PROTECTING REFUGEE AND CITIZEN RIGHTS

The challenge posed by the trend identified in this Note could potentially be faced in a number of different ways. This Part, therefore, will both identify the issues that any solution should address and offer a proposal that satisfies those criteria. Section III.A presents the key issues that the solution must face. Section III.B then provides an overview of potential solutions as well as the challenges each option faces. Finally, section III.C argues for a multipronged approach combining elements of each solution as the approach most likely to succeed in the face of current political realities.

#### A. *Elements of a Solution*

While several different steps might be taken to prevent more countries from adopting the types of policies discussed in this Note, any solution must be able to grapple with a number of issues implicated by this trend.

To begin with, an effective solution should be international in scope. While solutions that focus on individual countries would help to ameliorate the problem, they would not change the incentive structure that pushes other countries to pursue such policies.<sup>159</sup> Indeed, a strategy focused purely on individual states would run up against the types of collective-action problems that tend to recur in refugee law and policy.<sup>160</sup> States that might otherwise be willing to limit their ability to pursue these types of refugee deterrence policies would be discouraged from doing so if they knew that other states would not be willing to do the same.<sup>161</sup>

---

simply part of the trend, the reality is that Orbán's governing party has seen a substantial rise in its support after taking a firm stance against refugees. See Matt Moffett & Margit Feher, *Criticized Abroad, Hungary's Prime Minister Orbán Gains Support at Home with Migrant Crackdown*, *Wall St. J.* (Sept. 17, 2015, 11:36 PM), <http://www.wsj.com/articles/criticized-abroad-hungarys-orban-gains-support-at-home-with-migrant-crackdown-1442517065> (on file with the *Columbia Law Review*).

159. See *supra* section I.B.2 (discussing the gaps in the Refugee Convention framework creating these incentives).

160. The Refugee Convention itself was, in many ways, a response to the collective-action problem that European states found themselves in after World War II. See Hathaway, *The Rights of Refugees*, *supra* note 16, at 92–93 (emphasizing that acceptance of the Refugee Convention and its attendant responsibilities was heavily aided by “concerns to promote burden-sharing” and “to consolidate the commitment of other states”); see also *supra* note 32 and accompanying text (emphasizing why individual states are unwilling to take the first step in granting rights to refugees).

161. See Eiko Thielemann & Nadine El-Enany, *Refugee Protection as a Collective Action Problem: Is the EU Shirking Its Responsibilities?*, 19 *Eur. Security* 209, 212 (2010) (arguing “uncoordinated action risks leading to a competitive ‘race to the bottom’ in

While there are other reasons that stopping the growth of this trend in refugee policy should be pursued at the international level,<sup>162</sup> the issue of state incentives and collective action remains the most essential.

A second issue that any solution must be able to deal with is the wide range of different rights that may be implicated by the new wave of refugee deterrence policies. The policies identified in this Note alone touch on such disparate civil rights issues as freedom of speech, freedom of association, and freedom from warrantless searches.<sup>163</sup> The likelihood that other important civil liberties would be affected if this trend were to continue apace is therefore high. Any solution, therefore, must be framed as widely as possible in order to ensure the broadest degree of protection.

Finally, any solution must grapple with the complicated politics of this trend. The openness with which states once embraced the cause of refugee rights has, over the past decades, shifted toward a significantly more wary approach, evidenced by the rise of refugee deterrence policies generally.<sup>164</sup> This shift can be traced to a number of factors,<sup>165</sup> but one of the most important is undeniably the change in popular attitudes toward refugees in many receiving states.<sup>166</sup> Indeed, in at least some cases, the decision to pursue refugee deterrence policies has been pushed not from the top down but from the bottom up.<sup>167</sup> Therefore, any solution to the

---

protection standards” because “no country wants to . . . be faced with disproportionate costs” associated with higher degrees of refugee protection).

162. For instance, an international solution would create greater international scrutiny and therefore create greater external pressure to avoid the temptation to pursue such policies. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2635–41 (1997) (essay review) (analyzing the “managerial” approach to understanding international law, which “suggest[s] that the ultimate impetus for compliance comes from fear not of sanction, but of loss of reputation”).

163. See *supra* section ILC (discussing American, Hungarian, and Australian policies).

164. See *supra* section IIA.

165. See, e.g., Chimni, *supra* note 72, at 351–52 (arguing that the end of the Cold War and the growing number of refugees from the global South sparked the restrictionist turn in refugee policies); Thomas Gammeltoft-Hansen, *International Refugee Law and Refugee Policy: The Case of Deterrence Policies*, 27 *J. Refugee Stud.* 574, 579–83 (2014) (surveying explanations for refugee deterrence policies under different theoretical approaches).

166. See, e.g., Richard Devetak, *Comment*, In Fear of Refugees: The Politics of Border Protection in Australia, 8 *Int'l J. Hum. Rts.* 101, 102–04 (2004) (discussing the political and cultural developments underpinning Australia’s refugee deterrence policies); Heaven Crawley, Stephen Drinkwater & Rukhsana Kauser, *Regional Variations in Attitudes Towards Refugees: Evidence from Great Britain* 22 (Inst. for the Study of Labor, Discussion Paper No. 7647, 2013), <http://repec.iza.org/dp7647.pdf> (on file with the *Columbia Law Review*) (“The evidence presented in this paper indicates that the British public has become less tolerant towards refugees since the early 1990s . . .”).

167. See, e.g., Pickering & Weber, *supra* note 130, at 1008–09 (noting Australia’s Labor Party, after initially attempting to reverse elements of Australia’s deterrence policies, was forced by political pressures to reinstate those deterrence policies when irregular arrivals increased).

trend identified in this Note must be able to cope with potentially significant resistance from both government policymakers and citizens themselves.

### B. *Potential Approaches*

A number of different approaches to halting the growth of this new type of refugee-deterrence policy could be pursued. This section will examine the benefits and drawbacks of the main approaches currently available. Section III.B.1 will look at the potential for statutory strategies. Section III.B.2 will investigate potential litigation strategies. Finally, section III.B.3 will consider possible political strategies.

1. *Statutory Strategies.* — One of the most obvious, direct methods for combatting civil liberties infringements arising from refugee deterrence policies is to pass legislation prohibiting such practices. Such a statutory strategy could be pursued at either the national or international level. The benefits and drawbacks of each approach will be discussed in turn.

National-level legislation would have a number of important benefits. For one, it would be significantly more politically feasible than an international-level treaty, simply because of the absence of a need for buy-in from states with a more hostile view toward refugee law and the responsibilities it entails.<sup>168</sup> Additionally, as a statutory strategy, national-level legislation would be likely to offer comprehensive protection for the greatest number of domestic civil rights.<sup>169</sup>

In spite of these important benefits, such an approach also suffers from key drawbacks. First, the very fact that this approach would be more politically feasible than an international treaty underscores its limitations: The states most likely to adopt this type of legislation are also those least likely to ever pursue such refugee deterrence policies. More importantly, however, the pursuit of an exclusively national-level approach would run into the problems identified in section III.A.<sup>170</sup> Therefore, while a national-level statutory approach would carry important benefits, it would, by itself, be an insufficient response to the trend identified in this Note.

---

168. See Exec. Comm. of the High Comm'r's Programme, Note on International Protection: International Protection in Mass Influx para. 8, U.N. Doc. A/AC.96/850 (Sept. 1, 1995) [hereinafter UNHCR, Note on International Protection] ("States do not appear prepared currently to undertake additional binding obligations towards refugees."); cf. Fitzpatrick, *Revitalizing the Convention*, supra note 48, at 234 (noting the "reluctance of the international community" to pursue a new refugee treaty arises out of "pragmatic awareness that hoped-for advances might instead dilute standards of protection").

169. More than most other approaches to protecting rights, statutory approaches leave room for broad language that can be applied in a wider variety of contexts. See, e.g., George C. Christie, *Vagueness and Legal Language*, 48 Minn. L. Rev. 885, 885 (1964) (arguing "it is precisely this vagueness in language which often permits the law to perform so many of its social functions").

170. See supra notes 159–162 and accompanying text (arguing for the necessity of an international-level solution).

An international-level statutory approach, whether in the form of regional compacts or something like a new protocol to the existing Convention, would resolve many of the problems suffered by the national-level approach. As previously discussed,<sup>171</sup> it would preempt the types of collective-action problems and negative incentive structures that purely national-level approaches suffer from. It would also, as a result, ensure that the states most likely to implement these types of deterrence policies would be prevented from doing so.<sup>172</sup> Finally, an international treaty has the potential to spur positive legal developments even in those countries which do not accede to the law itself.<sup>173</sup>

The major challenge faced by such an approach, of course, is the significant political pushback it would likely face. In order to succeed, international-level legislation would require the consent of a large number of states that have already demonstrated their aversion to upholding their responsibilities under the existing refugee-protection regime.<sup>174</sup> This fact, combined with the general trend among developed nations against offering more comprehensive protection for refugees,<sup>175</sup> would suggest that the likelihood of passage for a new international instrument aimed at prohibiting states from adopting the types of deterrence policies discussed in Part II is quite low, at least at the present juncture.<sup>176</sup>

2. *Litigation Strategies.* — A second approach that could be taken to prevent the spread of refugee deterrence policies that infringe on domestic civil rights is strategic litigation. As with the statutory approach, litigation could be pursued at either the national or international level. The benefits and drawbacks of each approach will be discussed in turn.

Because of the essential role that it plays in upholding the existing refugee regime,<sup>177</sup> litigation at the national level would appear to be a

---

171. See *supra* notes 159–162 and accompanying text.

172. Cf. Colloquium on Development of Refugee Law, *supra* note 32, at para. 44 (“[N]othing was done in the field of internal legislation to give effect to the recommendations contained in the Arrangement of 30 June 1926 . . . . However, when they had been inserted in the 1933 and 1938 Conventions, these same provisions were incorporated in the law of the contracting countries.” (quoting U.N. Secretary-General, *Statelessness & Related Problems, Status of Refugees & Stateless Persons, Memorandum by the Secretary-General to the Ad Hoc Comm. on Statelessness & Related Problems* 6, U.N. Doc. E/AC.32/2 (Jan. 3, 1950))).

173. See *id.* (“A general convention . . . encourages Governments to associate themselves with the work of their forerunners; even if those Governments are not in a position to accede to it, such a convention sometimes exerts a direct influence on the administrative and legal practice of their countries.”).

174. See *supra* note 168 and accompanying text.

175. For a discussion of the prevailing trends in refugee law and policy over the past several decades, see *supra* section II.A.

176. See UNHCR, *Note on International Protection*, *supra* note 168, at para. 8.

177. See Hathaway et al., *supra* note 59, at 323–24 (discussing the role of domestic legal systems in upholding rights under the Refugee Convention).

natural response to fighting this trend in refugee law. The benefits of this type of approach are easy to envision: Existing legal and advocacy organizations form an effective apparatus for pursuing this type of strategy immediately,<sup>178</sup> and pursuing a strategy of litigation through neutral judicial arbiters can help to avoid many of the political challenges that other types of approaches are likely to face.<sup>179</sup> Finally, this type of strategy would benefit significantly from the variety of different grounds upon which potential suits could be based<sup>180</sup> because it would permit multiple avenues of attack against the same policy.

Nevertheless, the drawbacks that a national-level litigation strategy would inevitably encounter are substantial. For one, this type of approach would necessarily be narrow and reactive in nature: Litigation brought against a specific policy's impact on domestic civil rights, even if successful, would be no guarantee that new policies with different civil rights impacts would be prevented. Furthermore, a litigation strategy pursued solely within individual nations would suffer from the same limitations as the national-level statutory approach.<sup>181</sup> Finally, as experience has shown, courts are not entirely politically neutral creatures and they tend to be particularly deferential to other branches of government in the realm of immigration and refugee policy.<sup>182</sup> As a result, even a litigation-based strategy might suffer from some of the same political headwinds as other strategies.

Litigation on the international level would likely need to be pursued under the Refugee Convention, the primary international instrument

---

178. See U.N. High Comm'r for Refugees, Strategic Litigation, Refugee Legal Representation and Advocacy: Pathways to Protection, Durable Solutions and Refugee Rights 1–2 (July 4, 2012) (unpublished manuscript), <http://www.unhcr.org/ngo-consultations/ngo-consultations-2012/legal-services-background.pdf> [<http://perma.cc/P5YX-BHKX>] (discussing ways UNHCR and local organizations work together to pursue refugee litigation, including strategic litigation).

179. As the history of the civil rights movement in the United States should make clear, litigation can be a critical tool for politically unpopular groups to vindicate essential rights. See, e.g., Stephen C. Yeazell, *Brown*, the Civil Rights Movement, and the Silent Litigation Revolution, 57 Vand. L. Rev. 1975, 1977 (2004) (noting the civil rights movement's success in *Brown v. Board of Education* "gave us a model for social change through litigation").

180. Litigation at the national level could incorporate any viable theory under national law, such as claims that particular civil rights restrictions violate constitutional or statutory grants, or under international law, either customary or statutory. See generally George Slyz, Note, International Law in National Courts, 28 N.Y.U. J. Int'l L. & Pol. 65 (1996) (discussing the application of different forms of international law in national courts).

181. See *supra* note 170 and accompanying text.

182. See, e.g., Daniel Kanstroom, Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law, 71 Tul. L. Rev. 703, 737 (1997) (describing immigration law as the "area of administrative law known for deference far beyond even that which" the *Chevron* doctrine of deference requires).

governing refugee rights.<sup>183</sup> The Convention does, in fact, contain a dispute resolution mechanism in Article 38, permitting litigation regarding the “interpretation or application” of the Convention.<sup>184</sup> A potential argument could be made that the types of refugee-deterrence policies implicating domestic civil rights that states have tried to pursue represent a dereliction of the broader duty of *non-refoulement*, and therefore litigation under the Refugee Convention is appropriate to combat these policies.<sup>185</sup> The advantage this approach would have over a national-level litigation strategy is that, in addition to enjoying the benefits of the national approach,<sup>186</sup> such a litigation strategy would, if successful, be broadly applicable to all signatories of the Convention or Protocol and would therefore have a much more significant effect on stopping the spread of these types of policies.

Unfortunately, the drawbacks to this approach are even more pronounced than those associated with litigation at the national level. First, the types of legal arguments that could be made against these policies as a violation of the Convention would be dramatically limited in comparison to national-level approaches.<sup>187</sup> More importantly, though, litigation under the Convention may be pursued only by parties to the Convention, rather than individual actors.<sup>188</sup> As no state has ever taken the step of pursuing this course,<sup>189</sup> the likelihood of any choosing to do so over concerns about the civil rights of citizens in *another* state would appear quite low.

3. *Political Strategies.* — A final approach to combating the types of deterrence policies discussed in this Note would involve the mobilization of civil society and refugee rights advocates in a political campaign against these policies. As a practical matter, this would likely involve adopting tactics such as media campaigns to raise awareness about these types of policies and lobbying political actors to embrace refugee and

---

183. See *supra* note 5 and accompanying text (describing the primacy of the Refugee Convention).

184. See Refugee Convention, *supra* note 6, art. 38.

185. See Gammeltoft-Hansen & Hathaway, *supra* note 8, at 257–82 (examining potential legal challenges to refugee deterrence policies under international law).

186. See *supra* notes 177–180 and accompanying text.

187. See *supra* note 180 and accompanying text (describing the variety of instruments and arguments available in national forums).

188. See Maja Janmyr, *Protecting Civilians in Refugee Camps* 183 (2013) (noting under Article 38 “it is governments themselves which ultimately remain responsible to ensure that refugees are treated as the Convention requires”).

189. Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, in *Human Rights and Immigration* 19, 63 (Ruth Rubio Marín ed., 2014) (“Article 38 has never been invoked by states parties to the Geneva Convention, thus highlighting the limits inherent in such interstate means of dispute settlement for ensuring the effective protection of individuals.”).

civil rights-friendly policies, among other things.<sup>190</sup> The ultimate purpose would be two-fold: to put pressure on policymakers to avoid adopting these types of measures in the first place and to increase the potential for passage of the types of legislative remedies discussed in section III.B.1.

Pursuing a political approach to this trend would have several benefits. First, as with the litigation strategy, an already-existing coalition of organizations at both the national and international levels could be mobilized relatively easily to pursue this approach.<sup>191</sup> Second, the more overtly normative nature of political advocacy, in comparison to the legalistic strategies described above, fits comfortably with the imperative to protect as many rights as possible. Finally, a politically focused approach might be able to reorient the challenging political atmosphere currently surrounding refugee issues, particularly if special emphasis is made on the overlap between refugee and citizens' rights.<sup>192</sup>

The drawbacks of an exclusively politically oriented approach, however, would be significant. For one, the degree to which such an approach would in fact be able to reorient the current political atmosphere is unclear. More importantly, though, a politically focused strategy carries a far greater degree of uncertainty. To the extent that political advocacy is aimed at preventing policymakers from adopting harmful policies, changing conditions may overwhelm its effects more significantly than would be the case with legislative enactments or legal doctrine.<sup>193</sup> Thus, this approach would necessarily have less overall capacity for protecting rights than those discussed above.

### C. *A Hybrid Approach*

As the discussion in section III.B makes clear, each of the potential options for addressing the rise of this new model of deterrence policy has significant drawbacks that make pursuit of any one of those strategies insufficient on its own. However, a hybrid approach combining the most useful elements of the three strategies identified would resolve their individual insufficiencies. This section will discuss the outlines of this proposed hybrid approach and then address its benefits and drawbacks.

---

190. For a useful overview of the types of tactics that have been employed by other social movements attempting to protect valuable rights, see generally Jo Freeman, *Resource Mobilization and Strategy: A Model for Analyzing Social Movement Organization Actions*, in *Waves of Protest: Social Movements Since the Sixties* 221, 221–40 (Jo Freeman & Victoria Johnson eds., 1999).

191. See *supra* note 178 and accompanying text.

192. See *supra* note 88 and accompanying text (discussing the interaction between domestic civil rights and refugee rights created by the new method of deterrence policies).

193. Events in Hungary over the course of 2015 demonstrate how this can operate in practice. See Jan-Werner Müller, *supra* note 110 (describing the political developments, including an increase in support for the Hungarian government's refugee policies, as the refugee crisis unfolded).

1. *The Strategy Defined.* — A hybrid approach to combatting the new model of refugee deterrence policies could take a variety of forms. Describing the form most properly suited to resolving the problem in precise detail is outside the scope of this Note. Instead, the main issues that would need to be resolved will be discussed in turn.

First, how to organize the pursuit of these separate strategies would need to be addressed. At one extreme, the approach would simply be carried out by disparate actors and organizations across the world, with no centralizing force. At the other extreme, a single central organization would decisively direct the various litigation, statutory, and political strategies worldwide. Both of these extreme approaches would be seriously flawed. An entirely decentralized approach would lack the messaging discipline needed to make the political elements of the hybrid strategy effective, and it would be susceptible to failures in individual states where actors are less likely to be available to respond.<sup>194</sup> An entirely centralized approach, on the other hand, would likely fail to be properly adapted to local circumstances<sup>195</sup> and would require substantial resources in order to function effectively. Therefore, an organizing approach somewhere between these extremes would be necessary. Ideally, this would consist of a limited central organization that would monitor the development of the types of policies identified in this Note and work with local and international actors to pursue the litigation, statutory, and political strategies together in a coherent fashion. Existing refugee or human rights organizations could easily play this role.<sup>196</sup>

---

194. This is particularly true in states where illiberal governments have taken steps to restrict the types of civil-society groups that would be necessary to carry out effective pursuit of many of these strategies. See, e.g., Jessica Leigh Doyle, *The Future of Civil Society in Erdoğan's Turkey: Between Control and Co-option*, *OpenDemocracy* (Aug. 8, 2016), <http://www.opendemocracy.net/jessica-leigh-doyle/future-of-civil-society-in-erdo-s-turkey-between-control-and-co-option> [<http://perma.cc/3VM8-EW5B>] (describing the Justice and Development Party's efforts to restrict the autonomy of nonprofit and civil-society organizations); Ákos Keller-Alánt, *Krétakör and the Current Status of NGOs in Hungary*, *World Pol'y: Blog* (June 13, 2016, 9:04 AM), <http://www.worldpolicy.org/blog/2016/06/13/kr%C3%A9tak%C3%B6r-and-current-status-ngos-hungary> [<http://perma.cc/WGP2-FUBQ>] (describing the Fidesz party's efforts to restrict the autonomy of nonprofit and civil-society organizations).

195. See, e.g., Oliver Bakewell, *Uncovering Local Perspectives on Humanitarian Assistance and Its Outcomes*, 24 *Disasters* 103, 114–15 (2000) (discussing the importance of recognizing the local experience of refugee arrivals in shaping responses).

196. An organization like the UNHCR probably would not be able to do this type of work, because of its avowed commitment to political neutrality. See David Forsythe, *UNHCR's Mandate: The Politics of Being Non-Political 1–2* (U.N. High Comm'r for Refugees, Working Paper No. 33, 2001), <http://www.unhcr.org/3ae6a0d08.pdf> [<http://perma.cc/K28N-WMSS>] (discussing the complicated nature of UNHCR's role, which involves advocacy but requires minimizing involvement in local controversies). On the other hand, independent organizations such as *Refugees Int'l*, which are more explicitly dedicated to playing an advocacy role and influencing government policy could adapt to this type of role. See generally *What We Do*, *Refugees International*,

Second, in order to function effectively, the hybrid approach would need to set priorities among the different strategies identified in section III.B. This would require an assessment of the likelihood of success each strategy possesses, both in the short and long term, as well as the degree to which successful pursuit of a particular strategy would stop the growth of the trend identified in this Note. For instance, as discussed in section III.B.1, the likelihood of a new international agreement to ban these types of policies appears to be quite low at the moment,<sup>197</sup> but such an agreement would also have the greatest potential among the strategies identified to stop this trend in refugee policies.<sup>198</sup> National litigation strategies, on the other hand, have the greatest likelihood of success in the near term of stopping individual expressions of this phenomenon but also carry the least potential to stop the trend overall. Those carrying out the hybrid approach would need to weigh these competing considerations in order to determine how much relative effort to expend on each strategy.

Finally, the interrelation between the different strategies making up the hybrid approach would need to be taken into account. Pursuit of any one strategy will often have consequences for the potential of other strategies. In many cases, these consequences will be salutary: Successful pursuit of the political strategy, for instance, would make policymakers more aware of the existence of a coalition favoring refugee and domestic civil rights and therefore more receptive to enacting the types of legislation supported by the legislative strategy.<sup>199</sup> There may also be circumstances, however, in which the consequences of pursuing one strategy are detrimental to another: Successful pursuit of the litigation strategy might undermine the political strategy, for instance, if citizens of the country in which the strategy is pursued view it as undermining the democratic process.<sup>200</sup> Whether salutary or detrimental, then, those carrying out the hybrid strategy would need to understand these

---

<http://www.refugeesinternational.org/currentwork/> [<http://perma.cc/CQ8A-HY8Y>] (last visited Feb. 3, 2017).

197. See *supra* note 174–176 and accompanying text.

198. See *supra* section III.B.1.

199. See, e.g., Warren R. Leiden, *The Role of Interest Groups in Policy Formulation*, 70 *Wash. L. Rev.* 715, 720–24 (1995) (discussing advocacy groups' role in pushing policy changes, specifically in the immigration context, and arguing "[b]ecause they are motivated and have the capacity to act in a concerted fashion, advocacy groups are best able to build the sort of temporary alliances necessary to win support for policy enactment").

200. Concerns about the use of strategic litigation undermining democratic accountability occur in a wide variety of contexts. See, e.g., Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 *U. Chi. Legal F.* 71, 84–93 (examining the ways in which the class action procedural device undermines democratic norms). For a discussion of the specific concerns relating to international human rights litigation and democratic norms in the United States, see Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 *Chi. J. Int'l L.* 457, 464–69 (2001).

interrelations in order to make effective determinations about setting priorities.

2. *Benefits and Challenges.* — A hybrid approach combining different aspects of the three strategies detailed in section III.B would be able to overcome many of the problems associated with the individual approaches. However, it would also come with its own challenges. These benefits and drawbacks will be discussed in turn.

The main benefit of pursuing a hybrid approach is that it would best be able to balance the likelihood and degree of success in stemming the growth of this new trend in refugee deterrence policies. As should be clear from the discussion in section III.B, an inverse relationship tends to exist between those strategies that are most realistically feasible in the present and those that are most likely to stop the overall trend.<sup>201</sup> A hybrid approach eliminates this problem by creating space both for strategies that are most likely to be immediately effective as well as those that are likely to have the greatest overall effect.<sup>202</sup> Moreover, the pursuit of a hybrid approach may amplify some of the strengths and reduce some of the weaknesses of each individual strategy. For instance, successfully pursuing national-level statutory strategies may make an international-level agreement more likely,<sup>203</sup> thus reducing one of the key weaknesses of that strategy.

A hybrid approach is not without its own problems, however. As noted above, such an approach would need some kind of central, organizing force to be most effective, and those involved in the effort would need to make complicated determinations of priority and interrelation.<sup>204</sup> This would be a difficult task requiring careful judgment, and a mistaken allocation of resources and effort among these various strategies might ultimately result in a worse outcome than pursuing any one of them alone. Similarly, the blurring of different strategies and emphases, sometimes requiring strictly reactive local action and at other times requiring long-term internationalist thinking, may ultimately dilute the focus and effectiveness of those coordinating the strategy.

---

201. Compare, e.g., *supra* notes 171–176 and accompanying text (discussing the substantive benefits and political drawbacks of international-level litigation), with *supra* notes 177–180 and accompanying text (discussing the political benefits and substantive drawbacks of national-level litigation).

202. E.g., the short term benefits of national-level litigation could still be realized without sacrificing the pursuit of a longer-term goal of pursuing more comprehensive statutory protection.

203. By binding themselves to refrain from pursuing certain types of deterrence policies, states both remove a disincentive they might have to adopting an international agreement (i.e., concerns about sovereignty and burden-sharing) and create a positive incentive to spur adoption of such an agreement among other states (i.e., concerns about collective action and burden-shifting by noncomplying states).

204. See *supra* section III.C.1.

True as these concerns may be, however, they are more than offset by the important benefits that the hybrid approach offers. While the approach does suffer from a risk of misallocating resources, so too do the individual strategies discussed above—and to a much greater degree.<sup>205</sup> Indeed, by pursuing a diversified range of strategies, the hybrid approach is an important mechanism to *minimize* the risk of misallocating effort and resources by ensuring that the benefits of each individual approach are at least partially realized. Concerns about dilution of focus, meanwhile, would in many ways be ameliorated by the differing roles to be played by those carrying out this strategy: The most local approaches, such as national-level litigation, would necessarily be carried out by local actors, with limited support and guidance from the central organizing group,<sup>206</sup> which would put more of its focus on longer-term and more international efforts and thereby relieve local actors from needing to participate extensively in this element of the strategy. Overall, then, the benefits of the hybrid approach should be seen as substantially outweighing its drawbacks, particularly in comparison to any individual strategy.

#### CONCLUSION

Protecting civil rights and civil liberties is a critically important endeavor in its own right. However, with respect to international refugee law, it carries particular salience: The domestic rights of citizens are often an important factor in ensuring the fair and just treatment of refugees themselves, as when concerned workers in refugee centers make public the conditions they witness. Thus, the emergence of a new trend in international refugee policy of states adopting deterrence models, which include restrictions on domestic civil liberties, should be seen as a worrying development. The policies which have already been adopted represent a problem in their own right, but what they suggest about the future of refugee policy may be even more alarming: In emergencies, real or perceived, states may be willing to make significant encroachments on domestic rights to pursue their policies of *non-entrée*. To prevent this scenario, international actors need to take note of this trend and begin to pursue preemptive strategies at the national and international levels in order to protect both citizen and refugee rights.

---

205. For instance, focusing exclusively on the adoption of an international agreement runs the risk of expending a great deal of resources without a high likelihood of success. See *supra* notes 174–176 and accompanying text. On the other end of the spectrum, pursuing only reactive, national-level litigation runs the risk of protecting too narrow a class of rights without stopping the overall trend. See *supra* section III.B.2.

206. An obvious model, in this case, is the role the UNHCR plays in assisting regional and local actors with refugee litigation. See *supra* note 178 and accompanying text.

