

Fall 12-1-2020

## Global Apathy and the Need for a New, Cooperative International Refugee Response

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### Recommended Citation

Emily Gleichert, *Global Apathy and the Need for a New, Cooperative International Refugee Response*, 16 *Nw. J. L. & Soc. Pol'y.* 119 (2020).

<https://scholarlycommons.law.northwestern.edu/njlsp/vol16/iss1/5>

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# Global Apathy and the Need for a New, Cooperative International Refugee Response

Emily Gleichert\*

## ABSTRACT

*While an increasing number of nations move toward isolationist, nationalist policies, the number of refugees worldwide is climbing to its highest levels since World War II. The United Nations High Commissioner for Refugees (UNHCR) is the international body tasked with protecting this population. However, the office's traditional solutions for refugees – local integration, resettlement in a third country, and voluntary repatriation – have mostly eluded refugees who spend an average of twenty years in exile. The limitations UNHCR's structure imposes on the office, specifically in its ability to fund its operations and compel nations to act, have contributed to its failure to effect durable solutions for refugees. The Global Compact on Refugees, proposed by UNHCR and adopted by most United Nations member states, seeks to address these structural limitations. Nonetheless, the Global Compact on Refugees does not fundamentally alter the constraints that currently prevent refugees from accessing durable solutions. The United Nations must work collaboratively across its organs to craft a solution. Moving forward, the United Nations Security Council should use its power under Chapter VII to create a centralized tribunal for refugees that will harmonize protection for refugees, increase burden sharing among nations, and facilitate a durable solution for refugees. The centralized tribunal will only be possible if structured to give nations the correct incentives to buy in. However, if there is successful buy in, the centralized tribunal may address the refugee crisis – and the global apathy toward it – in ways UNHCR has not and cannot.*

## INTRODUCTION

“There are no humanitarian solutions to humanitarian problems.”<sup>1</sup> —  
Sadako Ogata, Former United Nations High Commissioner for Refugees

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\* J.D. Candidate, Northwestern Pritzker School of Law, 2021. I am grateful for Professor Stephen Sawyer whose class and guidance inspired this Note, the staff of the Northwestern Journal of Law and Social Policy who provided thoughtful edits, and friends and family who supported me throughout the process.

<sup>1</sup> *No Refuge: Why the World's Swelling Refugee Population Has Shrinking Options*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/interactive/refugee-crisis/#!/a-system-under-strain> (last visited Mar. 15, 2020); see also Vivian Tan, *Ogata Calls for Stronger Political Will to Solve Refugee Crisis*, UNHCR USA (May 27, 2005), <https://www.unhcr.org/en-us/news/latest/2005/5/4297406a2/ogata-calls-stronger-political-solve-refugee-crises.html>.

Sajad Jacob fled Afghanistan with his family when he was a young child to escape violent persecution for being a Hazara, a Shia Muslim minority.<sup>2</sup> He spent the next twenty years of his life in an Indonesian detention center.<sup>3</sup> The United Nations High Commissioner for Refugees rejected Sajad and his family's application for recognition of refugee status at least twice.<sup>4</sup> Like Sajad, most of the other 14,000 asylum seekers in Indonesia live in immigration-controlled housing with no access to work or education.<sup>5</sup> With only 556 refugees resettled to a third country last year, refugees in Indonesia live with little hope.<sup>6</sup> After nearly two decades in detention and limbo, Sajad passed away at twenty-four years old after soaking himself in petrol and lighting himself on fire.<sup>7</sup> John Arash Sedigh, an Iranian Christian also seeking a permanent solution as a refugee while stuck in Indonesia, said, "If there was hope, it would be better. But when there is no option to go back, to stay as a human, or to get resettled, maybe we will all end it ourselves."<sup>8</sup>

The number of refugees like Sajad and John recently reached its highest level worldwide since the end of World War II.<sup>9</sup> Yet the United States has cut the number of spots available for refugee resettlement to a maximum of 18,000—the lowest number of spots the United States has offered since 1980, the year the United States Refugee Act was passed.<sup>10</sup> Public attention is focused on attempts by developed countries (such as the United States and members of the European Union) to retreat from refugee support,<sup>11</sup> drawing attention away from the fact that lesser developed countries host 84% of refugees worldwide.<sup>12</sup> As of March 2015, only 1% of global refugees were able to access resettlement as a solution.<sup>13</sup>

This global migration crisis is occurring in part because international collaborative bodies lack a durable solution for refugees.<sup>14</sup> This Note will imagine a new role for

<sup>2</sup> Ian Morse, 'Open Prison': *The Growing Despair of Refugees Stuck in Indonesia*, AL JAZEERA (Mar. 3, 2019), <https://www.aljazeera.com/news/2019/02/prison-growing-despair-refugees-stuck-indonesia-190225055714272.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Jens Manuel Krogstad, *Key Facts about Refugees to the U.S.*, PEW RESEARCH CENTER (Oct. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/09/27/key-facts-about-refugees-to-the-u-s/>.

<sup>10</sup> *Id.* This figure is compared to the 110,000 spots for refugee resettlement set by the Obama administration in fiscal year 2017 and the 232,000 spots for refugee resettlement in fiscal year 1980. *Id.*

<sup>11</sup> Richard Hall, *EU 'Letting Refugees Die' at Sea After Cancelling Mediterranean Rescue Missions*, THE INDEPENDENT (Mar. 28, 2019), <https://www.independent.co.uk/news/world/europe/eu-refugee-migrant-crisis-libya-mediterranean-rescue-missions-a8843556.html>; see also *Operational Portal: Mediterranean Situation*, U.N. HIGH COMM'R FOR REFUGEES, <https://data2.unhcr.org/en/situations/mediterranean> (last visited Dec. 18, 2019) (120,426 refugees and migrants arriving in EU through Mediterranean sea route through December 16, 2019).

<sup>12</sup> Press Release, U.N. High Comm'r for Refugees, Resettlement is Critical Lifeline for Refugees and Needs Strengthening (July 1, 2019), <https://www.unhcr.org/news/press/2019/7/5d19dd524/unhcr-resettlement-critical-lifeline-refugees-needs-strengthening.html>.

<sup>13</sup> Office of Internal Oversight Serv., Rep. on the Evaluation of the Office of the U.N. High Comm'r for Refugees, U.N. Doc. E/AC.51/2015/5 (Mar. 18, 2015).

<sup>14</sup> "Filippo Gransi, United Nations High Commissioner for Refugees, said that there is a sense of an overwhelming crisis, with refugees and migrants stigmatized in an unprecedented fashion. Traditional responses to the global crisis have become increasingly inadequate, he noted..." Press Release, Security

international collaborative institutions, specifically the United Nations High Commissioner for Refugees (UNHCR), in addressing the global migrant crisis during a time of widespread isolationist policies. Part I outlines the history and mandate of UNHCR and the boundaries its structure imposes on the office. Part II examines UNHCR's historical solutions for refugees and discusses their viability as durable solutions in today's geopolitical context. Part III traces UNHCR's current efforts to address shortcomings in the international refugee regime, specifically the Global Compact and its potential successes and limitations. Finally, Part IV proposes solutions to the refugee crisis that utilize the power of the United Nations to act in the interest of international peace and security.

## I. UNHCR MANDATE AND STRUCTURE

The United Nations General Assembly (General Assembly) created UNHCR in the wake of World War II to “assume the function of providing international protection . . . and of seeking permanent solutions for the problem of refugees.”<sup>15</sup> In pursuit of this mandate, UNHCR has implemented various protection strategies and expanded its role to include non-refugee vulnerable populations as well. Nonetheless, the office has fallen short in its pursuit of refugee protection. The structure of UNHCR and the agreements it monitors limit UNHCR's capacity to address global refugee needs in several important ways; namely, UNHCR's structure lacks both the funding and power to compel action necessary to fulfill its mandate.

### A. Mandate

In addition to the core mandate assigned by the General Assembly, UNHCR's mandate is rooted in international treaty law.<sup>16</sup> Most notably, the 1951 Convention relating to the Status of Refugees<sup>17</sup> (1951 Convention) and the 1967 Protocol relating to the Status of Refugees<sup>18</sup> (1967 Protocol) oblige states who ratify the instruments to cooperate with UNHCR in order to protect the rights of those fleeing persecution in their own country.<sup>19</sup> The office of UNHCR acts as the “guardian” of these international agreements by

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Council, Efforts to Tackle Global Displacement Crisis ‘Fragmented’, Refugee Agency Chief Tells Security Council, Saying They Address Mere Symptoms, Not Root Causes, SC/13770 (Apr. 9, 2019), <https://www.un.org/press/en/2019/sc13770.doc.htm>.

<sup>15</sup> G.A. Res. 428 (V), annex, ¶ 1 (Dec. 14, 1950); see Div. of Internal Prot., Note on the Mandate of the High Comm’r for Refugees and his Office (Oct. 2013) at 1, <https://www.unhcr.org/en-us/protection/basic/526a22cb6/mandate-high-commissioner-refugees-office.html> [hereinafter Div. of Internal Prot., Note on the Mandate].

<sup>16</sup> Convention Relating to the Status of Refugees, Apr. 22, 1954, S. TREATY DOC. No. 2545, 189 U.N.T.S. 137, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx> [perma.cc/F7YT-A9RR]; see Div. of Internal Prot., Note on the Mandate, *supra* note 15.

<sup>17</sup> Convention Relating to the Status of Refugees, *supra* note 16. 145 states are party to the 1951 Convention Relating to the Status of Refugees. Notably, the United States was not a signatory to the 1951 Convention. *Id.*

<sup>18</sup> Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-5.en.pdf>. The United States was among the 146 states that ratified the 1967 Protocol. *Id.*

<sup>19</sup> Div. of Internal Prot., Note on the Mandate, *supra* note 15.

supervising their application in signatory countries.<sup>20</sup> Presiding over the office of UNHCR and this mandate is a High Commissioner for Refugees (High Commissioner), who is elected by the General Assembly and serves a five-year term as the office's representative.<sup>21</sup>

At its inception, the 1951 Convention restricted UNHCR's working definition of refugee to those of European descent affected by events prior to 1951. This restriction aimed to address the plight of those affected by World War II.<sup>22</sup> The 1967 Protocol modified the definition to cover "all persons outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and who, as a result, require international protection."<sup>23</sup> The core mandate of UNHCR was meant to encompass advocacy for the rights of these defined refugees and asylum seekers, returnees, and stateless people.<sup>24</sup> Over the years, however, UNHCR has taken on a broader role in the protection of vulnerable populations not traditionally within its mandate.<sup>25</sup> Notably, the General Assembly has authorized UNHCR to assist internally displaced people and those requiring assistance through UNHCR's "good offices."<sup>26</sup>

### B. Funding Structure

UNHCR's mandate to protect refugees and find a solution to the refugee problem is not political. However, its job is inherently political. Making decisions about who is a refugee and how they should be protected are value-laden political judgments. Recently UNHCR chastised the United States for its policy barring refugees from entering if they have not applied for asylum in a country they passed through on their journey to the United States (third-country transit ban).<sup>27</sup> By doing so, UNHCR entered the political arena by opposing the United States' political judgment about who it would consider a refugee at its

<sup>20</sup> Convention Relating to the Status of Refugees, *supra* note 16; *see also* U.N. High Comm'r for Refugees, The 1951 Refugee Convention, <https://www.unhcr.org/en-us/1951-refugee-convention.html> (last visited Dec. 18, 2019).

<sup>21</sup> *The High Commissioner*, UNHCR, <https://www.unhcr.org/en-us/the-high-commissioner.html#:~:text=%E2%80%9CUNHCR%20is%20navigating%20extraordinarily%20difficult%20waters.&text=Filippo%20Grandi%20is%20the%2011th,term%2C%20until%2031%20December%202020> (last visited Nov. 5, 2020).

<sup>22</sup> Joel Glasman, *Seeing Like a Refugee Agency: A Short History of UNHCR Classifications in Central Africa*, 30 J. OF REFUGEE STUDIES 337, 341 (2017); The 1951 Refugee Convention, *supra* note 20.

<sup>23</sup> Div. of Internal Prot., Note on the Mandate, *supra* note 15; However, UNHCR's mandate did not, nor does not contemplate "persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict." That population falls under the United Nations Relief and Works Agency for Palestine Refugees in the Near East. *See* U.N. Relief and Works Agency for Palestine Refugees in the Near East, *Palestine Refugees*, <https://www.unrwa.org/palestine-refugees> (last visited Dec. 18, 2019).

<sup>24</sup> Div. of Internal Prot., Note on the Mandate, *supra* note 15; *see also* G.A. Res. 428 (V) (Dec. 14, 1950).

<sup>25</sup> Div. of Internal Prot., Note on the Mandate, *supra* note 15; *see also* Gil Loescher, *UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy*, 33 REFUGEE 77, 81 (2017) ("Western governments were willing politically and financially to support UNHCR's operational expansion into the developing world, because international action on the refugee issue was also now viewed as a way to deal with both a growing humanitarian issue and a potentially significant source of instability in the Global South.").

<sup>26</sup> Rep. of the U.N. High Comm'r for Refugees, U.N. Doc. A/4771/Rev.1 (Jan. 1, 1962).

<sup>27</sup> *Id.*

borders. Although this criticism is unlikely to influence the United States' current administration,<sup>28</sup> advocacy by High Commissioners has been an effective tool for UNHCR under some circumstances.<sup>29</sup> For example, when thousands of Haitians were fleeing their homes in boats only to be forcibly returned by the United States, UNHCR stepped in with outright criticism, which eventually led to a reversal of the controversial policy.<sup>30</sup> This type of persuasive political advocacy can be an asset for UNHCR even though the United Nations imagined a nonpolitical role for the office.

However, UNHCR's funding structure is in tension with its role as a political advocate. The mandate of UNHCR designates that "all [non-administrative] activities of the High Commissioner through his Office are to be financed through voluntary contributions."<sup>31</sup> In 2018, UNHCR received "\$2.3B of the \$8.2B it needed for its annual program."<sup>32</sup> In the same year, nearly 40% of the agency's budget came from the United States' contributions.<sup>33</sup> UNHCR's reliance on one country (or a small subset of countries) for a large stream of funding could influence some High Commissioners to be more careful or reticent in their criticism of that country.<sup>34</sup> Accordingly, UNHCR's budget deficit undermines the independence and efficacy of the agency, as does the fact that much of its funding comes from states the agency seeks to police.<sup>35</sup>

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<sup>28</sup> Maggie Haberman, *A President Who Believes He Is Entitled to His Own Facts*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/18/us/politics/donald-trump-foreign-leaders.html>.

<sup>29</sup> U.N. High Comm'r for Refugees, *Evaluation of Effectiveness and Relevance of Advocacy Approaches with the EU and in EU/EFTA Countries*, at 4-5, U.N. Doc. ES/2019/01 (2019), <https://www.unhcr.org/5d09f6fd7.pdf>.

<sup>30</sup> Robert Suro, *U.N. Refugee Agency Says U.S. Violates Standards in Repatriating Haitians*, WASH. POST (Jan. 11, 1995) <https://www.washingtonpost.com/archive/politics/1995/01/11/un-refugee-agency-says-us-violates-standards-in-repatriating-haitians/fa5fd302-4cba-4169-aac0-3b751ae84f63/>.

<sup>31</sup> Div. of Internal Prot., *Note on the Mandate*, *supra* note 15; "It may be ironic that at times states provide support to the agency so that it [UNHCR] can then lobby states to change their policies and so that it can criticize states for having inappropriate policies." David Forsythe, *UNHCR's Mandate: The Politics of Being Non-political* 3-4 (New Issues in Refugee Research, Working Paper No. 33), <https://www.unhcr.org/3ae6a0d08.pdf>.

<sup>32</sup> Jeff Crisp, *As the World Abandons Refugees, UNHCR's Constraints are Exposed*, REFUGEES DEEPLY (Sept. 13, 2018) <https://www.newsdeeply.com/refugees/community/2018/09/13/as-the-world-abandons-refugees-unhcrs-constraints-are-exposed>.

<sup>33</sup> *Id.*

<sup>34</sup> UNHCR has publicly rebuked the E.U. for failing to improve the situation of migrants in Libya but has remained quiet about the E.U.'s role in intercepting and returning refugees trying to leave Libya by boat. Crisp, *supra* note 32. The European Union is UNHCR's second biggest donor. It and four of its member states made up half of UNHCR's top ten government donors in 2018. *Donors*, UNHCR, <https://www.unhcr.org/en-us/donors.html> (last visited Mar. 15, 2020).

<sup>35</sup> *Donors*, UNHCR, <https://www.unhcr.org/en-us/donors.html> (last visited Mar. 15, 2020); Conversely, the power of states to influence UNHCR action can be an important monitor on the agency, as it was when Germany and the UK withheld funds from UNHCR Uganda for fraud and corruption. Though for good cause in this instance, it makes clear that states view withholding of funds as a tool for influencing agency action. Samuel Okiror, *Key Donors Freeze Uganda Refugee Aid After UN Mismanagement Scandal*, THE NEW HUMANITARIAN (Feb. 28, 2019), <http://www.thenewhumanitarian.org/news/2019/02/28/donors-freeze-uganda-refugee-aid-after-un-mismanagement-scandal>.

### C. Tools to Compel Action

World leaders' receptivity to UNHCR's persuasive pressure also limits UNHCR's political influence, the agency's main tool to encourage action.<sup>36</sup> For example, though UNHCR rebuked the United States' third-country transit ban,<sup>37</sup> UNHCR cannot compel the United States to change policies or take action.<sup>38</sup> In fact, its only real power—bad publicity—has not changed the United States' stance on the issue.<sup>39</sup> Thus, UNHCR's power to compel action through shaming is a limited one that relies on world leaders' receptivity.<sup>40</sup>

The growth in states' own sophisticated legal systems further limits UNHCR's persuasive power. As a temporary specialized agency of the United Nations, the International Refugee Organization dealt with European WWII refugees from 1946 to 1952.<sup>41</sup> At UNHCR's inception, the entire legal unit at the International Refugee Organization moved to UNHCR. This gave the agency institutional knowledge and capacity at a time when member states did not have the requisite level of expertise to contradict UNHCR legal practice and policy.<sup>42</sup> However, since then, many states have developed their own legal expertise.<sup>43</sup> Consequently, many of these states now have the

<sup>36</sup> Convention Relating to the Status of Refugees, *supra* note 16; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-5.en.pdf>; *see also* Forsythe, *supra* note 31 at 16 (“UNHCR has nothing more, usually, than the capability to engage in persuasion based on norms of its mandate, and its reputation for action faithful to its mandate.”).

<sup>37</sup> Press Release, U.N. High Commissioner for Refugees, UNHCR Deeply Concerned About New U.S. Asylum Restrictions (July 15, 2019), <https://reliefweb.int/report/united-states-america/unhcr-deeply-concerned-about-new-us-asylum-restrictions>.

<sup>38</sup> G.A. Res. 428 (V) Art. 8 (Dec. 14, 1950). UNHCR can act on its mandate by: “Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities; promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States; endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement; obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them; keeping in close touch with the governments and inter-governmental organizations concerned; establishing contact in such manner as [it] may think best with private organizations dealing with refugee questions; facilitating the coordination of the efforts of private organizations concerned with the welfare of refugees.”

<sup>39</sup> *See* Muzaffar Chishti & Sarah Pierce, *Despite Trump Invitation to Stop Taking Refugees, Red and Blue States Alike Endorse Resettlement*, MIGRATION POLICY INSTITUTE. (Jan. 29, 2020), <https://www.migrationpolicy.org/article/despite-trump-invitation-stop-taking-refugees-red-and-blue-states-alike-endorse-resettlement> (“In November, the Department of Homeland Security (DHS) began deporting asylum seekers to Guatemala under an asylum cooperation agreement (ACA) signed with the Guatemalan government last July. . . . So far, the United States has sent more than 300 migrants from Honduras and El Salvador, including many children, to Guatemala.”).

<sup>40</sup> “Condemnation from the outside is rarely effective for leaders who scorn the international system.” Sarah Deardorff Miller, *Xenophobia Toward Refugee and Other Forced Migrants 5* (World Refugee Council Research Paper No. 5, 2018), <https://www.cigionline.org/sites/default/files/documents/WRC%20Research%20Paper%20no.5.pdf>.

<sup>41</sup> Constitution of the International Refugee Organization, Dec. 15, 1946, 18 U.N.T.S. 283.

<sup>42</sup> Loescher, *supra* note 25, at 84.

<sup>43</sup> *Id.*

capacity to create alternative policies countering those UNHCR issues. Even if UNHCR condemns a state's refugee policies in an attempt to compel compliance with the 1951 and 1967 refugee agreements, the state may argue a different interpretation.<sup>44</sup> For example, UNHCR deemed the United States' third-country transit ban a violation of international law. However, the United States is free to argue it is not, and UNHCR has no recourse.<sup>45</sup> Since UNHCR relies on states to give effect to its recommendations and interpretations, and has no power to compel compliance, a state's divergent interpretation of the legal agreement undermines the efficacy of UNHCR.

## II. INABILITY OF UNHCR TO FULFILL ITS MANDATE IN THE MODERN ERA

UNHCR's structural limitations, in both funding and compelling action, prevent many refugees from accessing a durable solution in the modern era. Traditionally, UNHCR relied on three solutions: voluntary repatriation, resettlement to a third country, or local integration.<sup>46</sup> The current length of refugees' exile, however, illustrates UNHCR's failure to implement these solutions with success in today's geopolitical context.<sup>47</sup> At the end of 2011, 75% of refugees under UNHCR's mandate were living in a protracted refugee situation.<sup>48</sup> It is estimated that refugees spend an average of twenty years in exile, meaning they have not been voluntarily repatriated, locally integrated, or resettled.<sup>49</sup> This Part discusses why UNHCR's traditional solutions have not been viable options for a majority of refugees. It then discusses how UNHCR has attempted to carry out its protection mandate for those refugees who have not accessed a durable solution.

Local integration of refugees has failed as a solution for several reasons. As democracy emerged in states who host the vast majority of refugees,<sup>50</sup> it became harder for governments to defend providing more services to refugees than those available for citizens.<sup>51</sup> States also became concerned about security. States feared the possibility that a

<sup>44</sup> *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399, 1408 (Mar. 2018), <https://harvardlawreview.org/2018/03/american-courts-and-the-u-n-high-commissioner-for-refugees-a-need-for-harmony-in-the-face-of-a-refugee-crisis/>.

<sup>45</sup> This argument between legal interpretations plays out in the court of public opinion. Jasmine Aguilera, *Trump's New Restrictions on Asylum Seekers Violate U.S. and International Law, Experts Say*, TIME (July 24, 2019 1:21 PM), <https://time.com/5626498/trump-asylum-rule-international-law/>.

<sup>46</sup> GIL LOESCHER ET AL., *THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR): THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY*, 110-11 (Thomas G. Weiss & Rorden Wilkinson eds., 2008).

<sup>47</sup> The Palestinian refugee situation provides an apt example. Though the United Nations Relief and Works Agency for Palestine Refugees in the Near East, an organ closely related to UNHCR, has been in existence since 1949, there are still five million people living under its auspice in 2019 and nearly one-third of that population lives in refugee camps. G.A. Res. 302(IV) (Dec. 8, 1949); U.N. Relief and Works Agency for Palestine Refugees in the Near East, *Palestine Refugees*, <https://www.unrwa.org/palestine-refugees> (last visited Dec. 18, 2019).

<sup>48</sup> THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES, 153 (Elena Fiddian-Qasmiyeh et al. eds., 2014).

<sup>49</sup> *Id.*

<sup>50</sup> U.N. High Comm'r for Refugees, *Global Trends: Forced Displacement in 2018*, <https://www.unhcr.org/globaltrends2018/>, (last visited Dec. 18, 2019). Eighty-four percent of refugees are hosted in "lesser developed" states, often those bordering the conflict region from which refugees flee. *Id.*

<sup>51</sup> Loescher, *supra* note 46, at 114; Steven Erlanger & Kimiko de Freytas-Tamura, *U.N. Funding Shortfalls and Cuts in Refugee Aid Fuel Exodus to Europe*, N.Y. TIMES (Sept. 19, 2015),

large influx of refugees could bring with them racial, ethnic, or religious tensions, or exacerbate existing tensions in the country by changing regional or national demographics with their presence.<sup>52</sup> Even today, shifting attitudes around hosting immigrants drive state decisions on local integration.<sup>53</sup> For example, Germany's Chancellor Angela Merkel demonstrated strong commitment to integrating migrants into German society. However, she changed positions in a politically expedient deal after several high profile assaults involving migrants turned public sentiment.<sup>54</sup> As a result, instead of absorbing migrants into German society, new border camps for asylum seekers are being built.<sup>55</sup> When movement of refugees is controlled in this way, it undermines refugees' freedom to integrate into local communities in a host country.<sup>56</sup> State resistance to local integration is one of the causes of protracted refugee situations which proliferate the refugee experience today.

UNHCR's limited ability to compel action undermines its ability to incentivize states to integrate refugees into local communities. Due to its protection mandate, UNHCR now acts as the main provider for refugees who have not been able to access local integration (or resettlement or repatriation) as solutions.<sup>57</sup> This disincentivizes host countries from crafting long term solutions because they can shrug off the burden of providing for refugees within their borders.<sup>58</sup> The provision of basic needs is a necessary humanitarian function that UNHCR has taken on in order to fulfill its mandate to protect refugees.<sup>59</sup> It would be contrary to UNHCR's protection mandate to not fill the gap left by states who are unwilling or unable to provide basic needs to refugees. However, the current system allows states to shirk responsibility for refugees because UNHCR acts as a safety net for those refugees. Ultimately, the current system fails to provide local integration for refugees as a durable solution.

Resettlement to a third country – one that is not the refugee's native country or the country to which he or she fled – implicates the same structural limitation on UNHCR's ability to compel action. Wealthier countries are not inclined to open their borders to

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<https://www.nytimes.com/2015/09/20/world/un-funding-shortfalls-and-cuts-in-refugee-aid-fuel-exodus-to-europe.html> (“About 70 percent of registered Syria refugees living in Lebanon, for example, are below the poverty line, creating tensions with local inhabitants for jobs and health services...host communities [are] seeing their populations double or triple, straining health services and infrastructure and creating competition for jobs while driving down wages.”).

<sup>52</sup> Loescher, *supra* note 46, at 113-14.

<sup>53</sup> Katrin Bennhold & Melissa Eddy, *Merkel, to Survive, Agrees to Border Camps for Migrants*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/world/europe/angela-merkel-migration-coalition.html>; see also Beth Elise Whitaker, *Funding the International Refugee Regime: Implications for Protection*, 14 GLOB. GOVERNANCE 241 (2008).

<sup>54</sup> Bennhold & Eddy, *supra* note 53.

<sup>55</sup> *Id.*

<sup>56</sup> Loescher, *supra* note 46, at 113-14; Whitaker, *supra* note 53, at 251 (“In response both to rising crime rates and repeated accusations by Burundi that the camps were harboring rebels, Tanzanian officials placed severe limitations on refugee movement and other activities. In most areas, the ‘four kilometer rule’ was strictly enforced, limiting the distance that refugees could stray from camp. Because most camps were at least that far from local villages, refugees could no longer work on Tanzanian farms.”).

<sup>57</sup> Loescher, *supra* note 46, at 112.

<sup>58</sup> *Id.* at 123 (“So long as UNHCR is the main provider of assistance to refugees in camps, states are able to defer considering longer-term solutions to protracted refugee situations.”).

<sup>59</sup> U.N. High Comm’r for Refugees, *Basic Needs Approach in the Refugee Response* (2017) <https://www.unhcr.org/en-us/protection/operations/590aefc77/basic-needs-approach-refugee-response.html>.

refugee resettlement.<sup>60</sup> The most UNHCR can do to facilitate relocation is lobby these countries to accept larger numbers of refugees through their resettlement programs.<sup>61</sup> Again, success relies on the receptivity of world leaders to UNHCR's pleas and pressure. Additionally, these lobbying efforts are often directed at the countries who UNHCR relies upon for funding, creating tension between UNHCR's nonpolitical and advocacy roles.<sup>62</sup>

UNHCR must also navigate differing interests in resettlement that create tension between funding countries and hosting countries. Funding countries, such as the United States, desire a policy of containment.<sup>63</sup> Instead of offering or facilitating asylum for refugees in their own country, funders desire refugees to be "contained" in their country of origin.<sup>64</sup> One reporter illustrates this desire for containment: "Wealthier countries are making increasingly severe efforts to keep out the uninvited: in 1990, according to research by geographer Reece Jones, 15 countries had walls or fences on their border; by the beginning of 2016, that number had risen to almost 70."<sup>65</sup> UNHCR must balance these funders' interest in keeping refugees out, which limits resettlement, with host countries' desire to keep refugees contained, which precludes local integration.<sup>66</sup>

Voluntary repatriation is also an elusive solution for most refugees. The nature of conflicts which drive refugees from their countries is changing. In the past, refugees fled their countries due to government persecution. Today, refugees are fleeing their countries due to independent armed groups such as Islamic State of Iraq and the Levant or Boko Haram.<sup>67</sup> UNHCR, which only has influence over nation states, holds no bargaining position with these armed groups. Therefore, it has no means to facilitate peace that would provide an opportunity for a refugee to voluntarily return to their home country.<sup>68</sup>

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<sup>60</sup> See Krogstad, *supra* note 9.

<sup>61</sup> Press Release, U.N. High Comm'r for Refugees, Central Mediterranean Situation: UNHCR Calls for an Additional 40,000 Resettlement Places (Sept. 11, 2017), <https://www.unhcr.org/news/press/2017/9/59b6a5134/central-mediterranean-situation-unhcr-calls-additional-40000-resettlement.html>.

<sup>62</sup> Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT'L MIGRATION REV. 33, 49 (2001) ("To fully promote protection would threaten funding, access to conflict situations, and the ability to be operational.").

<sup>63</sup> Loescher, *supra* note 46, at 100.

<sup>64</sup> *Id.*; see, e.g., Press Release, U.N. High Comm'r for Refugees, UNHCR Deeply Concerned About New U.S. Asylum Restrictions, (July 15, 2019). By using "country of origin," I am not referring to a refugee's home country from which they fled, but rather the host country that they are occupying now that they have left their own.

<sup>65</sup> Daniel Trilling, *Five Myths About the Refugee Crisis*, THE GUARDIAN (June 25, 2018), <https://www.theguardian.com/news/2018/jun/05/five-myths-about-the-refugee-crisis>.

<sup>66</sup> Relatedly, UNHCR must also make decisions about the distribution of funding to host countries, which requires political balancing. For example, amidst a refugee crisis in Tanzania UNHCR "reportedly limited the country office's ability to solicit more funds from donors because it did not want to divert resources from other areas of the world." Whitaker, *supra* note 53, at 253.

<sup>67</sup> Eric Schmitt, *Where Terrorism is Rising in Africa and the U.S. is Leaving*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/world/africa/africa-terror-attacks.html> ("In Burkina Faso alone, Islamic State and Al Qaeda affiliates and splinter groups conducted 137 attacks last year, up from 12 in 2016.").

<sup>68</sup> Although UNHCR has often engaged directly or indirectly with non-state armed groups over the past three decades, engagement is primarily for humanitarian access and not humanitarian protection. WILLIAM CARTER & KATHERINE HAVER, HUMANITARIAN ACCESS NEGOTIATIONS WITH NON-STATE ARMED GROUPS 9 (Oct. 2016), [https://www.gppi.net/media/SAVE\\_\\_2016\\_\\_Humanitarian\\_access\\_negotiations\\_with\\_non-state\\_armed\\_groups.pdf](https://www.gppi.net/media/SAVE__2016__Humanitarian_access_negotiations_with_non-state_armed_groups.pdf).

In search of durable solutions, UNHCR has adapted its strategy for meeting its protection mandate by changing its conception of protection over the years. At its inception, UNHCR provided juridical advice, such as distributing travel documents, granting residence permits, and assisting refugees in obtaining legal status from states.<sup>69</sup> At this time, UNHCR viewed the mandate of protection as a legal task.<sup>70</sup> Due to this view, protection was closely tied to the traditional solution of resettlement.

Several decades after its creation, UNHCR linked “material aid” to its protection mandate.<sup>71</sup> Instead of simply taking care of refugees’ legal needs, the agency argued that African states would accept refugees and care for them if they were given material aid to do so.<sup>72</sup> As a result, UNHCR started providing refugees with tools and seeds in exchange for their work on host country development projects, equating protection with self-sufficiency and integration.<sup>73</sup> This strategy closely aligned with the traditional solution of local integration.

Today, the increasing number of refugees paired with countries’ increasing reluctance to host refugees has eliminated UNHCR’s ability to provide refugees with resources that enable work and eventual land acquisition.<sup>74</sup> Instead, refugee settlements have turned into emergency sites where UNHCR provides basic needs like food to stranded refugees.<sup>75</sup> Ultimately, UNHCR now fulfills its protection mandate with this basic needs provision instead of legal mobility and self-sufficiency. Although the basic needs provision contributes to problems with the traditional solutions, UNHCR must fill this essential human rights role as the United Nations’ organ for refugee protection.

### III. A NEW APPROACH TO PROTECTING REFUGEES

Recognizing the current state of refugee affairs required change, the General Assembly tasked the High Commissioner with proposing a new Global Compact on Refugees.<sup>76</sup> The General Assembly tasked the High Commissioner with this responsibility in the 2016 New York Declaration for Refugees and Migrants, in which all 193 member states agreed to share responsibility for refugee protection.<sup>77</sup> The General Assembly adopted the Global Compact on Refugees (Global Compact) in 2018 after a two-year consultation process led by UNHCR.<sup>78</sup> Notably, the United States did not adopt the Global Compact.<sup>79</sup> The Global Compact provides a framework for global responsibility sharing of refugee support.<sup>80</sup> It outlines four key objectives to accomplish the goal of moving away

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<sup>69</sup> Glasman, *supra* note 22, at 341.

<sup>70</sup> *Id.* at 345.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 347.

<sup>74</sup> *Id.* at 349-50.

<sup>75</sup> *Id.*

<sup>76</sup> U.N. High Comm’r for Refugees, Global Compact on Refugees, <https://www.unhcr.org/en-us/the-global-compact-on-refugees.html> (last visited Nov. 22, 2020); G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016).

<sup>77</sup> G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016).

<sup>78</sup> U.N. High Comm’r for Refugees, *Global Compact on Refugees*, U.N. Doc. A/73/12, (Aug. 2, 2018).

<sup>79</sup> Margaret Besheer, *UN States Adopt Global Compact on Refugees*, VOICE OF AMERICA (Dec. 17, 2018), <https://www.voanews.com/europe/un-states-adopt-global-compact-refugees>.

<sup>80</sup> *Global Compact on Refugees*, *supra* note 78.

from a refugee camp model: easing pressures on host countries, enhancing refugee self-reliance, expanding access to third-country solutions, and supporting conditions in the countries of origin for return in safety and dignity.<sup>81</sup>

The Global Compact represents a global recognition that the international refugee system requires change. It also attempts to address limitations discussed above, such as UNHCR's funding and limited tools for compelling action. The Global Compact outlines a "global arrangement for international cooperation," which calls for a Global Refugee Forum every four years.<sup>82</sup> The Global Compact declares that the Global Refugee Forum will serve as an opportunity for member states and stakeholders to convene and announce pledges and contributions.<sup>83</sup> Notably, the Global Refugee Forum may provide an opportunity for a donation in the public eye, or it may include different stakeholders who can act as funders in coming years.<sup>84</sup> Ultimately, the Global Refugee Forum may even increase UNHCR's persuasive power by shining a light on the plight of refugees. The spotlight could give UNHCR an additional opportunity to both exert pressure on nations to act and to frame public action as supportive of a state's interest in becoming (or remaining) a politically valuable player on the global stage.<sup>85</sup>

The Global Compact also addresses local integration in lesser developed countries, which has been stymied by local government resistance to providing social services to refugees.<sup>86</sup> It calls for the refugee's needs—such as education, jobs, and health—to be met by a system in which host country nationals can benefit as well. This new system would replace the existing parallel system in which refugee services are provided separately from local services.<sup>87</sup> The new system may address host countries' resistance to being the service provider for refugees; if local populations are also benefiting from services, it will become politically viable to provide those services. It may even address host countries' security concerns by ameliorating tensions between locals and refugee populations; xenophobic sentiments born of "us" versus "them" diminish when one group does not feel as if the other is taking what is "theirs."<sup>88</sup> At the very least, the Global Compact moves the conversation surrounding refugees' basic needs forward by raising the issue of social services for residents and refugees alike.

However, the Global Compact fails to resolve UNHCR's funding and action problems.<sup>89</sup> The Global Compact will not change the funding mechanisms that have created a \$6 billion deficit in UNHCR's budget.<sup>90</sup> Although the Global Refugee Forum will provide a designated call for donations, the voluntary nature of the contributions does not meaningfully shift the funding paradigm. Nation states are still free to fund refugee

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<sup>81</sup> *Id.*; Press Release, UN News, UN Affirms 'Historic' Global Compact to Support World's Refugees, UN NEWS (Dec. 17, 2018), <https://news.un.org/en/story/2018/12/1028791>.

<sup>82</sup> *Global Compact on Refugees*, *supra* note 78.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; see also Volker Turk, *The Promise and Potential of the Global Compact on Refugees*, 30 INT'L J. REFUGEE L. 575 (Feb. 8, 2019).

<sup>86</sup> *Global Compact on Refugees*, *supra* note 78.

<sup>87</sup> *Id.*

<sup>88</sup> Miller, *supra* note 40, at 2-3.

<sup>89</sup> James C. Hathaway, *The Global Cop-Out on Refugees*, 30 INT'L J. OF REFUGEE L. 591, 598 (2019), <https://academic.oup.com/ijrl/article/30/4/591/5310192>.

<sup>90</sup> *Id.* at 596.

protection and solutions at their discretion.<sup>91</sup> Therefore, the underlying problem remains the same. Without new incentives, funders will still rely heavily on lesser developed countries to bear the burden of refugee settlement, while lesser developed countries will still rely heavily on UNHCR for the care and maintenance of refugee populations, the combination of which has led to protracted refugee situations. Local integration may be more palatable for host countries under the Global Compact if UNCHR and funders provide adequate support. However, the voluntary nature of funding and lack of new incentives will perpetuate the cycle that exists now; “so long as UNHCR is the main provider of assistance in camps, states are able to defer considering long-term solutions to protracted refugee situations.”<sup>92</sup> Thus, UNHCR will continue to be the main provider for refugees who increasingly lack durable solutions.

#### IV. PROPOSED SOLUTIONS TO PROTRACTED REFUGEE SITUATIONS

The United Nations Security Council (Security Council) should use its power under Chapter VII of the United Nations Charter to declare the current refugee crisis a threat to international peace and security. This will allow the Security Council to create a centralized tribunal that can manage refugee resettlement for the benefit of all parties, particularly the five permanent Security Council Members (P5).<sup>93</sup> Section A will address where the Security Council gets authority for such an action. Section B will discuss a model for the operation of a centralized tribunal created by the Security Council. Finally, Section C will propose incentives for Security Council members with a veto to approve such an expansive use of Security Council power.

##### A. UN Security Council Authority to Create a Tribunal

Chapter VII of the United Nations Charter empowers the Security Council “to determine the existence of *any threat* to the peace . . . [and] make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”<sup>94</sup> The words “*any threat*” depict a broad grant of power. The rest of Chapter VII continues the use of deferential language with phrases like “as [the Security Council] deems necessary or desirable.”<sup>95</sup> Without limiting language, there is ample room to determine what is necessary or desirable. Though the articles in the Chapter are structured to increase action incrementally, there is no indication that the action available to the Security Council has a limit.<sup>96</sup>

<sup>91</sup> See *Our Finances*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/about/finances> (last visited Feb. 3, 2020).

<sup>92</sup> Loescher, *supra* note 46, at 123.

<sup>93</sup> The five permanent members of the UN Security Council are the United Kingdom, the United States of America, China, France, and Russian Federation. *Current Members*, UNITED NATIONS SECURITY COUNCIL, [https://www.un.org/securitycouncil/content/current-members#:~:text=Five%20permanent%20members%3A%20China%2C%20France,end%20of%20term%20year\)%3A](https://www.un.org/securitycouncil/content/current-members#:~:text=Five%20permanent%20members%3A%20China%2C%20France,end%20of%20term%20year)%3A) (last visited September 23, 2020).

<sup>94</sup> U.N. Charter, art. 39 (emphasis added). Action by the Security Council under Chapter VII does not require General Assembly approval and is binding on member states. *Id.*

<sup>95</sup> U.N. Charter, art. 40.

<sup>96</sup> Gabriel H. Oosthuizen, *Playing the Devil’s Advocate: The United Nations Security Council is Unbound by Law*, 12 LEIDEN J. INT’L L. 549, 554-55, 562-63 (Sept. 1999) (“Ultimately, then, there are no international legal limits to the SC’s Chapter VII enforcement powers.”).

Under the auspice of this broad grant of power in Chapter VII, the Security Council could find that the refugee crisis presents a threat to “the peace.” There are now almost seventy-one million people displaced worldwide.<sup>97</sup> The movement of almost seventy-one million people from their homes creates the opportunity for smuggling, for human rights abuses of vulnerable populations, for food and land shortages in neighboring countries, and for armed groups’ recruitment of desperate people.<sup>98</sup> In fact, various bodies of the United Nations have explicitly recognized that refugee movement is a threat to international peace and security, which is the prerequisite for Chapter VII action.<sup>99</sup> Furthermore, the Security Council itself has previously considered the instability refugees cause surrounding countries when authorizing unilateral intervention pursuant to its Chapter VII powers.<sup>100</sup> Thus, the Security Council could reasonably find that the current refugee crisis presents a threat to the peace that authorizes Chapter VII action.

Pursuant to its Chapter VII powers, the Security Council should find the current refugee crisis a threat to international peace and security and pass a resolution creating a centralized tribunal. The Security Council could design this tribunal to create a structure for refugee processing, allocate responsibility among nation states, serve as a means of financing, and force burden sharing by evenly distributing and processing refugee assistance across nations. The tribunal would address two limitations of the Global Compact: first, it would provide a mechanism to compel states to comply or submit to a burden shifting buy out; and second, it would provide funding for UNHCR.

The Security Council’s creation of a tribunal is not unprecedented, nor are the obligations that such an action would impose on member states. In 1993 the Security Council authorized the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) to address past violations of international humanitarian law.<sup>101</sup> Like ICTY, the creation of a centralized tribunal for refugees would also deal with international

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<sup>97</sup> U.N. High Comm’r for Refugees, Figures at a Glance, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Dec. 18, 2019).

<sup>98</sup> See *UN Report Sheds Light on ‘Unimaginable Horrors’ Faced by Migrants and Refugees in Libya, and Beyond*, UN NEWS, (Dec. 20, 2018), <https://news.un.org/en/story/2018/12/1029031>.

<sup>99</sup> “[N]onmilitary sources of instability in the economic, social, humanitarian, and ecological fields” were recognized as threats to international peace and security by the UN Security Council’s Summit Declaration of 1992. Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT’L SECURITY 43, 60, (1996). A 1986 report, endorsed by the General Assembly, explicitly defined refugee flows as a threat to peace and security: “[M]assive flows of refugees might not only affect the domestic order and stability of receiving States but also jeopardize the political and social stability and the economic development of entire regions and thus endanger international peace and security.” U.N. G.A. Note, *International Co-operation to Avert New Flows of Refugees*, U.N. G.A. Note (May 13, 1986), <https://www.unhcr.org/en-us/protection/historical/3ae68bee4/international-co-operation-avert-new-flows-refugees-note-secretary-general.html>.

<sup>100</sup> Security Council Resolution 814 contemplated “the difficulties caused to [neighboring countries] due to the presence of refugees in their territories.” S.C. Res.814 ¶ 3, (March 26, 1993); see also Samuel M. Makinda, *Seeking Peace from Chaos: Humanitarian Intervention in Somalia*, ÉTUDES INTERNATIONALES 67 (Lynne Rienner Publishers, Occasional Paper Séries, 1993). (“Somalia as a state did not pose a direct security threat to its neighbors, but its political instability and the high number of refugees emanating from it had destabilizing consequences in the region.”); S.C. Res. 688 (Apr. 5, 1991) “...gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten *international peace and security* in the region.” (emphasis added).

<sup>101</sup> S.C. Res. 827 (May 25, 1993).

humanitarian law, albeit outside of the criminal context.<sup>102</sup> Additionally, the Security Council has imposed new obligations on States pursuant to its Chapter VII powers to address international peace and security.<sup>103</sup> For example, Security Council Resolution 1373 (Resolution 1373) created uniform counter-terrorism obligations that are binding on all member states. Previous international counterterrorism conventions only bound states who became parties to these conventions.<sup>104</sup> Resolution 1373, however, went beyond the prior norm by imposing obligations on all member states. Among other obligations, Resolution 1373 requires affirmative state action to criminalize terrorism financing, freeze terrorists' assets, improve border security, exchange information concerning terrorists with other states, and provide judicial assistance to other states in terrorism-related criminal proceedings.<sup>105</sup> The Security Council could look to this precedent as support for creating a centralized tribunal.

### *B. Using the Common European Asylum System as a Model*

As a baseline, a centralized tribunal for refugees could use the Common European Asylum System (CEAS) as a model. CEAS sets asylum procedure standards and harmonizes the grounds for international protection in asylum decisions in the European Union.<sup>106</sup> With the Dublin Regulation, another European Union refugee law, CEAS also establishes criteria for determining which member state is responsible for an application for international protection.<sup>107</sup> Implemented in 2013, the current Dublin Regulation considers a number of factors (such as family considerations, recent possession of a visa or residence permit in a member state, or type of entrance into the European Union) to determine which state has responsibility for an applicant.<sup>108</sup> Although CEAS does not have a centralized tribunal that hears and processes asylum cases of refugees, it does act as a central refugee scheme for European Union member states.

Proposed in 2016, the fourth iteration of the Dublin Regulation provides the most useful example of state burden sharing in a centralized scheme. The proposal includes a fairness allocation mechanism that accounts for burdens on a nation's immigration system and the nation's efforts to resettle those in need of international protection.<sup>109</sup> Based on country size and wealth, the new scheme would determine when a country handles a

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<sup>102</sup> Notably, from the 1920s through WWII, nations submitted to an international agency (the Nansen International Office for Refugees and later the International Refugee Organization) that determined who qualified as a refugee. States agreed to be bound by those determinations. Hathaway, *supra* note 89, at 600.

<sup>103</sup> S.C. Res. 1373 (Sep. 28, 2001).

<sup>104</sup> *Id.*; see also Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AMERICAN J. INT'L L. 333, 334 (Apr. 2003).

<sup>105</sup> S.C. Res. 1373 (Sep. 28, 2001); see also U.N. Sec. Council Counter-Terrorism Comm. Exec. Directorate, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*, Counter-Terrorism Committee Executive Directorate, (2017), <https://www.un.org/sc/ctc/wp-content/uploads/2017/08/CTED-Technical-Guide-2017.pdf>.

<sup>106</sup> *Common European Asylum System*, EUROPEAN COMM., [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en) (last visited Mar. 15, 2020).

<sup>107</sup> Commission Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, O.J. (L 049) 50.

<sup>108</sup> *Country Responsible for Asylum Applications (Dublin)*, EUROPEAN COMMISSION, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en) (last visited Dec. 18, 2019).

<sup>109</sup> *Id.*

disproportionate number of asylum applications and redistribute any new applications to other member states.<sup>110</sup> Under the proposal, if a member state did not want to take part in the reallocation of refugees, then it could make a set contribution to the member state who receives the application instead.<sup>111</sup>

A centralized tribunal would facilitate the cooperative goals of CEAS on a global scale and to a greater extent than is possible with more than twenty individual national systems. The centralized tribunal on refugees would hear asylum cases, make decisions about refugees' statuses, and then allocate refugees fairly across nations. Critics may contend that a centralized tribunal could not economically or procedurally manage the millions of global refugee cases. However, the centralized tribunal would eliminate the inefficiency of having numerous different asylum systems. In fact, wealthy countries spend nearly \$20 billion *each* to run their own domestic refugee systems.<sup>112</sup> A centralized tribunal would eliminate the necessity for domestic systems, and a central scheme's cost of assessment, relocation, and support "could easily be funded" for less than that.<sup>113</sup> Therefore, a centralized tribunal would not only unify and create a more equitable and stable asylum system, but it would also unburden nations' own systems.<sup>114</sup> This creates value for nation states and could incentivize states to buy in and support the new system.

Additionally, the centralized tribunal would harmonize protection for refugees by hearing asylum cases based on a set of procedures applied uniformly to all refugees. Right now, refugees are subject to the disparate application of procedure based on the nation or current administration of the nation to which they are able to flee. Again, the United States' third-country transit ban provides an apt example. UNHCR deemed the third-country transit ban a violation of international law, so the refugees subject to the policy will not receive the same protection under international asylum law as those who are not subject to it.<sup>115</sup> A centralized tribunal would ensure that refugees would receive the same procedural treatment no matter which border they were able to reach, thus eliminating this disparate treatment created by individual nation states' policy choices or legal interpretations. By deciding refugees' cases, the centralized tribunal would also be able to apply uniform standards for asylum qualification. Lastly, the centralized tribunal would allocate refugees for resettlement fairly across nations, the ethical implications of which will be explored in the next Section. Allocating refugees according to a nation's ability to host would ameliorate the strain on countries who currently host many refugees with too few resources.

### *C. Incentivizing P5 Nations to Create a Centralized Tribunal*

Any one of the P5 nations can block Security Council action under Chapter VII by veto.<sup>116</sup> It seems likely that at least one of the P5 members will resist being bound by a central system that more evenly distributes protection for refugees among member states. Although the United States claims that its third-country transit ban arises out of an overly

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Hathaway, *supra* note 89, at 600.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Aguilera, *supra* note 52.

<sup>116</sup> Rep. of the S.C., *The Veto* (Oct. 19, 2015),

[https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research\\_report\\_3\\_the\\_veto\\_2015.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf).

burdened national system,<sup>117</sup> which a centralized tribunal could ameliorate, the United States is unlikely to agree to relinquish its own control over the refugee resettlement process.<sup>118</sup> Additionally, the United Kingdom is undergoing an exit from the European Union prompted by fears of immigration,<sup>119</sup> making it unlikely the United Kingdom will agree to be bound to serve migrants. Therefore, the creation of a centralized tribunal for refugee cases will not pass unless the United Nations first finds the right incentives for P5 countries, such as the United States and Britain, to submit to the jurisdiction and operating terms of such a tribunal.

Any centralized tribunal for refugees will rely on resettlement to implement the burden-sharing mechanism imagined by a central scheme. The Global Compact makes resettlement an important tool by stating: “Apart from being a tool for protection of and solutions for refugees, resettlement is also a tangible mechanism for burden- and responsibility-sharing and a demonstration of solidarity, allowing States to help share each other’s burdens and reduce the impact of large refugee situations on host countries.”<sup>120</sup> However, the Global Compact does not address how to make resettlement palatable to countries who have expressed policies contrary to the ethos of burden-sharing. This is a fundamental shortcoming that any new proposal must address because a resolution will not pass without all the P5 nations’ approval.

To incentivize subjection to a centralized tribunal for refugees, the United Nations could credit nation states who voluntarily increase the number of refugee spots available for resettlement in their country. The difficulty with this proposal is in assessing what kind of credit would compel nation states to shift from short term investment in refugee protection, which leads to basic services and refugee camps, to the long-term investment of resettlement. This Note proposes that this credit could take one of two forms, monetary or reputational, but would ideally adopt aspects of both.

### 1. Reputational Credits

In partnership with UNHCR, the tribunal could implement a reputational “credit” with both the “naming and shaming” mechanism used in international human rights law and the “virtuous circle” mechanism contemplated in international agreements such as the Paris Agreement of 2015. At the Global Refugee Forum every four years, though preferably more often, the High Commissioner could praise countries who made substantial commitments to resettling refugees within their borders. By highlighting the good behavior of countries and praising them for it on the world stage, the High Commissioner could incentivize others to implement similar refugee protection policies in

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<sup>117</sup> *Id.*

<sup>118</sup> The United States declined to sign on to the Global Compact on Migration citing the following reasons: “We recognize the right of every nation in this room to set its own immigration policy in accordance with its national interests just as we ask other countries to respect our own right to do the same...*Migration should not be governed by an international body unaccountable to our own citizens.*” CNBC Television, *Trump: United States Will Not Participate in Global Compact on Migration*, YOUTUBE (Sep. 25, 2018), [https://www.youtube.com/watch?v=WQ\\_kwGe\\_S5w](https://www.youtube.com/watch?v=WQ_kwGe_S5w), (emphasis added).

<sup>119</sup> May Bulman, *Brexit: People Voted to Leave EU Because They Feared Immigration, Major Survey Finds*, THE INDEPENDENT (June 28, 2017), <https://www.independent.co.uk/news/uk/home-news/brexit-latest-news-leave-eu-immigration-main-reason-european-union-survey-a7811651.html>.

<sup>120</sup> *Global Compact on Refugees*, *supra* note 76.

order to join the ranks of favored, “virtuous” countries.<sup>121</sup> This may be especially important for countries that are similarly situated, or competitors on the world stage. For example, if China and the United States each want to be regarded as the best in the world, as we have seen them strive for in the past, recognizing the other’s high achievements may spur on the remaining country.

While the High Commissioner is praising countries who have surpassed expectations, he or she may call out countries who have fallen short of the global refugee protection goals. This is colloquially referred to as the “naming and shaming” mechanism in the international human rights context. Studies have shown that shaming from the foreign community can have a large reputational effect and invoke response from governments.<sup>122</sup> Past experience demonstrates the efficacy of this technique. For example, China was sharply criticized for its involvement in Sudan and its implicit abetting of the genocide in Darfur in the lead up to China’s hosting of the 2008 Olympics.<sup>123</sup> An international campaign to brand the 2008 Olympics as “The Genocide Olympics” was effective in causing China to change its position and apply pressure on Sudan to allow United Nations peacekeepers to be admitted to Darfur.<sup>124</sup> Thus, naming and shaming can create political will if a government feels that the global community, and more importantly, its own citizens, are viewing its actions poorly.

Naming and shaming, however, cannot stand alone since it perpetuates the same limitations on compelling action that UNHCR currently faces. The High Commissioner already holds persuasive power over countries and uses it to express dissatisfaction with member states. For example, the High Commissioner addressed the United States’ recent decrease of refugee resettlement spots to 18,000 by stating that “UNHCR is naturally troubled by this trend in the United States and elsewhere.”<sup>125</sup> Despite UNHCR’s “shaming” of the United States for several refugee policy changes over the last several years, the United States has not shifted its position.<sup>126</sup> This demonstrates the weakness of the current system that relies solely on persuasive power. As discussed above, its efficacy is subject to

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<sup>121</sup> In response to international pressure, the Barbados Government plans to recognize same-sex civil unions. The Governor General explains that: “on this matter, the world has spoken. If we wish to be considered amongst the *progressive nations* of the world, Barbados cannot...allow itself to be ‘blacklisted’ for human and civil rights abuses or discrimination on the matter of how we treat to human sexuality and relations.” *Government to Recognise ‘a Form of Civil Unions’ for Same Sex Couples*, BARBADOS TODAY (September 15, 2020), <https://barbadostoday.bb/2020/09/15/government-to-recognise-a-form-of-civil-unions-for-same-sex-couples/>, (emphasis added).

<sup>122</sup> Dustin Tingley & Michael Tomz, *The Effects of Naming and Shaming on Public Support for Compliance with International Agreements: An Experimental Analysis of the Paris Agreement*, (Harvard U., Working Paper), <https://scholar.harvard.edu/files/dtingley/files/tingleytomzparis-shame.pdf>; Aryeh Neier, “*Naming and Shaming*”: *Still the Human Rights Movement’s Best Weapon*, OPENGLOBALRIGHTS (July 11, 2018), <https://www.openglobalrights.org/Naming-and-shaming-still-the-human-rights-movements-best-weapon/>.

<sup>123</sup> Nicholas Kristof, *China’s Genocide Olympics*, N.Y. TIMES (Jan.24, 2008), <https://www.nytimes.com/2008/01/24/opinion/24kristof.html>.

<sup>124</sup> *Id.*

<sup>125</sup> Press Release, U.N. High Comm’r for Refugees, UNHCR Troubled by Latest U.S. Refugee Resettlement Cut (Nov. 2, 2019), <https://www.unhcr.org/en-us/news/press/2019/11/5dbd87337/unhcr-troubled-latest-refugee-resettlement-cut.html>.

<sup>126</sup> *Id.*; Press Release, U.N. High Comm’r for Refugees, UNHCR Deeply Concerned About New U.S. Asylum Restrictions (July 15, 2019), <https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html>.

the strength with which a High Commissioner pursues political advocacy and the receptivity with which a nation's leader receives it. Therefore, a system based purely on reputational credit does not address UNHCR's existing limitations.

## 2. Monetary Credits

A monetary credit could be slightly more difficult to implement because it requires a plan for raising the necessary funds. It also presents the problem, if the incentive is neutral, of overcompensating developed nations and under compensating developing nations for supporting refugees. This Section proposes two different systems to address these issues. Both systems would attempt to accomplish the essential function of giving the P5 (and other influential, wealthy nations likely to oppose a centralized tribunal for refugees) an out, or a veto on the system.

In the first proposed system, UNHCR could coordinate with the centralized tribunal to create a system in which a global fund doles out monetary incentives on a graduated scale for the receipt of refugees. To create the graduated scale, each nation would designate how many refugees it believed its infrastructure and services could handle. For example, the current United States administration has set that number at 18,000, citing the high burden on the United States immigration system at this time.<sup>127</sup> Whether the number is actually related to a nation's capacity to support refugees may be subject to the naming and shaming mechanism described above. Once the number is set, UNHCR could offer a monetary amount for every refugee resettled in the country above the quota.

This model poses several drawbacks, however. First, a monetary incentive must be calibrated to deal with the wealth disparity of nations. Monetary incentives are likely to be attractive to developing nations. However, they are unlikely to persuade more developed nations to accept more refugees within their borders because they do not need that money. Therefore, this regime would still fail to incentivize burden-sharing among the countries most poised to support refugees. Second, this system also poses the risk that countries will set their quota number low in order to receive money for those they receive over that number. In that case, the number would not reflect a nation's actual ability to support refugees. As a solution, UNHCR could set a number for each nation. However, without any additional provisions that allow a nation to work around that number, it is likely to fail with the P5. Finally, this system does not solve the funding problem UNHCR currently experiences, nor does it solve where the money to dole out incentives would come from.

If the incentive system were implemented despite its potential shortcomings, data promulgation and advocacy could naturally address some nations' reticence to burden share. Data shows that there are economic incentives to having refugees resettle in a nation. For example, in the United States, "refugees brought in \$63 billion more in government revenues over the past decade than they cost."<sup>128</sup> If the money in the global refugee fund, discussed below, was used to expand refugees' capacity to integrate and contribute to society, and if this narrative was reproduced instead of the one which currently labels

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<sup>127</sup> J. Jens Manuel Krogstad, *Key Facts about Refugees to the U.S.*, PEW RESEARCH CENTER (Oct. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/09/27/key-facts-about-refugees-to-the-u-s/>; Aguilera, *supra* note 45.

<sup>128</sup> Julie Hirschfeld Davis & Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html>.

refugees as burdens on infrastructure, then nations may become more receptive to hosting through a natural process over time.

In the second proposed system, the centralized tribunal, in partnership with UNHCR, could designate how many refugees each nation should be compelled to take by an indicator like gross domestic product. Another possible indicator could be the interaction of a country's wealth and size, the indicator that CEAS uses.<sup>129</sup> The tribunal could compel adherence through fines incurred by nations for noncompliance, payable to the centralized tribunal for refugees or the global refugee fund discussed below. These fines would operate similarly to economic sanctions authorized in Article forty-one of the Charter and would have to be approved by the P5.<sup>130</sup>

UNHCR and the centralized tribunal for refugees could also calculate the cost of resettling the quota number of refugees for each nation in addition to the quota number itself. Then, the nation could choose to either accept that number of refugees within their own borders, or pay other nation states the calculated value in exchange for taking in the requisite number of refugees for the paying nation. This system is similar to the UN Peacekeeping mission budget and troop allocation. The United States funds a very large part of the budget, but sends almost no troops, instead relying on other countries to do so—a buy out option.<sup>131</sup> This buy out could act as the necessary valve for nations, specifically the P5 and wealthier nations, to agree to a system in which mandated reallocation of refugees occurred. It is essentially a nation's veto power.<sup>132</sup> In theory, the veto power would be available for any nation willing to pay for it, but in reality it will only be available to wealthier nations who already host low numbers of refugees. Consequently, a buy out option may not completely solve the burden sharing issue, but it will still compel the funding of other nations' care for refugees.

Ethically, there are problems with a model that allows wealthier nations to buy out of hosting responsibilities. First, it could commoditize refugees, a particularly vulnerable population. Equally troubling, even if the buy out is supposed to be bookmarked for the provision of services for refugees, there is a risk that states do not use the money for such activities. It also takes away the autonomy of the refugee to choose where he or she would like to settle. For example, if refugees have family in France or know of a large community from their same ethnic group in Canada and are told that there are no spots for them there because those countries have bought out their responsibilities, their preference is stymied. A buy out also has the danger of perpetuating the narrative that refugees are not people who are desirable in a particular society, which could lead to (and in fact, already has led

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<sup>129</sup> Sarnata Reynolds has also suggested merging GDP with rank on the Human Development Index and the Fragile States Index to calculate fair sharing of burdens and responsibilities. Hathaway, *supra* note 89, at 601-02.

<sup>130</sup> Though this expands the ability to compel compliance by nation states in the refugee arena considerably, it would not do so completely. Since the P5 would have to approve sanctions, the P5's own compliance might be jeopardized since each P5 has the veto power.

<sup>131</sup> *Troop and Police Contributors*, UNITED NATIONS PEACEKEEPING, <https://peacekeeping.un.org/en/troop-and-police-contributors> (last visited September 23, 2020).

<sup>132</sup> At the inception of the United Nations, the permanent five nations made participation in the global body contingent on a veto option. It is unlikely any of the P5 submits to a new body without a similar "out." Rep. of the S.C., *The Veto* (Oct. 19, 2015), [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research\\_report\\_3\\_the\\_veto\\_2015.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf).

to) racist rhetoric about the value of certain groups of people.<sup>133</sup> These problems are exemplified by the European Union's payment to Turkey to hold refugees within Turkey's borders. The European Union justified the payment by designating the number of migrants and refugees in Greece a humanitarian crisis. However, the European Union neglected to consider the consequences of the much greater number in Turkey, a country one-seventh the size of the European Union with \$18,000 less GDP per capita.<sup>134</sup> Holding migrants in a country where they cannot be adequately supported poses serious concerns.

To address these ethical issues this Note makes three suggestions: a strong appeals process, uniform implementation of post-legal services, and a powerful oversight body. First, the centralized tribunal should have a strong appeals process for placement in a disfavored country. On appeal, the central tribunal should grant the requested relief so long as the refugee gives any facially legitimate answer as to why they prefer a different placement. There should also be a strong presumption that any given answer is facially legitimate, and therefore a strong presumption in granting requested relief. This may create a situation in which refugee preference outpaces nations' available spots for resettlement. The system could try to address this issue with the second proposed suggestion.

Second, UNHCR, as a partner of the centralized tribunal, should distribute services for refugees equitably across countries after tribunal decisions. It is important refugees feel equally supported in their new homes. If refugees resettled in one country cannot access the same support services as in another, the system will not work. Not only will it create a distributional problem, with one country preferred over others, but it will also create an equity problem for refugees assigned to nations offering less support. The funds to supplement support in nations offering fewer services could derive from fees assessed or buy out payments.

Third, the United Nations should create a separate body to oversee the tribunal and its processes. The ideals of the new centralized system cannot be realized unless the tribunal and its partners apply protection equally across refugee groups. Therefore, an oversight body must provide a check on every aspect of the tribunal's refugee resettlement process. Finally, it is of paramount importance that stakeholders, namely refugees, are given a voice in the decision-making of this oversight body, and in the decision-making around the ethical implications of a new system in general.

Ultimately, if the ethical implications could be resolved, the right incentives to create buy in (and not necessarily buy out) of the schema can lead to successful outcomes for seemingly intractable global problems. Though certainly different from the refugee crisis and its human rights implications, the international community has collaboratively addressed climate change, another problem that requires coordinated, global action. For example, the Montreal Protocol successfully implemented a system in which chlorofluorocarbons were almost completely phased out by all nations involved.<sup>135</sup> In order

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<sup>133</sup> See Alan Cumming, *The Racism Behind Anti-Immigration Rhetoric is Palpable to Every Immigrant. Including Me*, NBC (Nov. 29, 2019), <https://www.nbcnews.com/think/opinion/racism-behind-anti-immigration-rhetoric-palpable-every-immigrant-even-me-ncna1091476>; Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 11, 2018).

<sup>134</sup> Kenan Malik, *The Dark Side of the EU-Turkey Refugee Deal*, ALJAZEERA (Mar. 9, 2016), <https://www.aljazeera.com/indepth/opinion/2016/03/dark-side-eu-turkey-refugee-deal-160309080433064.html>.

<sup>135</sup> UN Environ. Prog., *The Montreal Protocol*, <https://www.unenvironment.org/ozonaction/who-we-are/about-montreal-protocol> (last visited Dec. 18, 2019).

to fulfill the Montreal Protocol's goals, four UN organs implemented and administered a Multilateral Fund, which provided financial and technical assistance for the phaseout of chlorofluorocarbons in developing nations.<sup>136</sup> If the centralized tribunal for refugees used fines to compel state action, the tribunal could put the fines into a similar fund to the Multilateral Fund to help refugees reach self-sufficiency. Furthermore, nations' contributions given in exchange for releasing some of their hosting duties could create a steady pool of assets for refugee protection, which is something UNHCR does not currently have and something the Global Compact does not adequately address.<sup>137</sup>

#### CONCLUSION

The global refugee crisis seems like an intractable problem. Moreover, it seems like one that could exist in perpetuity, so long as persecution exists within nations. An overhaul of the system is a lofty goal, unlikely to be negotiated and implemented immediately. However, the work of the United Nations has been successful with incremental change. For example, the United Nations held summits on climate change for thirty years, but it was not until 2015 that an agreement between nation states became a reality.

Though the Global Compact is a lofty undertaking, and a demonstrated commitment on behalf of UNHCR and stakeholders to address the current refugee crisis, it falls short of real structural change capable of inciting global collaborative action. The Global Compact leaves UNHCR with many of the same limitations it has today. UNHCR does not have steady funding for the work it does since contributions to the agency are voluntary, and the Global Compact does not address this shortcoming. UNHCR does not have proper mechanisms to incentivize lesser developed countries to integrate refugees into local society, or to incentivize more developed countries to open refugee resettlement spots. This is why refugees like Sajad are stuck with no permanent solution. The Global Compact does not address this shortcoming either. Though a step in the right direction, the Global Compact adopts only vague principles without introducing fundamentally new ways to deal with this problem.

In the future, the United Nations must take an approach that crosses over its multiple organs to realize UNHCR's goals for its protection mandate. A central tribunal for refugees, created by the Security Council's Chapter VII power, would protect refugees in a way that UNHCR has been unable to do. With the right incentives or "veto" options, like a buy out, the centralized scheme is a realistic approach to solving the collective global apathy of nation states toward refugees.

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<sup>136</sup> *Id.*

<sup>137</sup> Hathaway, *supra* note 89, at 594 ("The Compact, in other words, is all about process – a bureaucrat's dream perhaps, but nothing that comes even close to dependably addressing the operational deficits of the refugee regime.").