

COMPLEMENTARY PROTECTION AND WORK AUTHORIZATION
ADDRESSING AND PREVENTING MIXED MIGRATION FLOWS CRISES

Master of Arts in Law and Diplomacy Capstone Project

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1. INTRODUCTION

1.1. A broken system

As of 2018, there were 258 million migrants in the world.¹ Although this only represents 3.4 percent of the global population, it amounts to a significant number of people crossing borders and restarting lives. Out of the 258 million migrants, 10 percent are considered either refugees or asylum seekers, leaving a whopping 232 million people to be considered economic migrants.² The legal, economic, and social implications behind attributing the titles of refugee or economic migrant to individuals on the move are vast, but can be summed up as follows: refugees lack agency and were forcibly displaced from their country of origin, therefore, they merit international protection and cannot be returned. Economic migrants, on the other hand, have voluntarily left their home countries in search of better livelihood opportunities and, therefore, require no international protection and can be turned away without repercussion. The reality is that many of those who are considered economic migrants are in fact forced migrants who lack the necessary documentation to prove their “well-founded fear of persecution,” do not belong to the narrow categories that merit

¹ Philippa Stroud, Rhiannon Jones, and Stephen Brien, “Global People Movements” (London, UK: Legatum Institute Foundation and Oxford Analytica, June 2018).

² Stroud, Jones, and Brien.

protection under current refugee law, or were prevented from seeking asylum altogether through a process of border securitization.

Differentiating between the two groups has become increasingly more challenging, as the complexity of migration drivers continues to grow adding new reasons for displacement, such as climate change, gang violence, severe inflation, among many others. Migration from Venezuela to neighboring countries presents a compelling case for changing our understanding of forced migration. When asked why they have left their homes, Venezuelan migrants will often list seeking employment and accessing healthcare as their primary drivers for migration. Further probing, however, unearths these same migrants lacked access to any employment opportunities and health services whatsoever due to the 1.62 million percent inflation rate the country faces, making life in Venezuela impossible to endure.³

Another critical issue raising the difficulty of determining migrant vulnerability is the increase in mixed migration flows. Migration from Nicaragua to Costa Rica highlights this challenge very clearly. Nicaraguans have historically migrated to Costa Rica for both temporary and permanent work opportunities. Nevertheless, the persecution and oppression by the Ortega regime - which has resulted in 512 deaths, 4,062 injuries, 1,428 detentions, and 1,303

³ "Venezuela Inflation Rate," Economy, Trading Economics, March 2019, <https://tradingeconomics.com/venezuela/inflation-cpi>.

disappearances⁴ – has forced 55,500 Nicaraguans to seek refuge in Costa Rica.⁵

As both displaced and economic migrants from Nicaragua flood their neighbor's borders, the Costa Rican government struggles to differentiate between migrants who require protection from the state and those who are in the country only to boost their earning potential.

The challenge behind attempting to distinguish between these two categories of migrants points to a greater systemic problem: the refugee system is no longer fit for purpose. Depending on the designation a migrant is afforded, they will be granted or denied access to relief, protection, employment, and basic rights in a host country. This may seem fair on the surface until a deep dive reveals far too many vulnerable migrants fall through the wide gap that exists between the two concepts.

Defining what it means to be a refugee and affording protection to forced migrants is not a new problem. So why is broadening the understanding of refugee so controversial and what can be done in the absence of this exercise?

⁴ “La ONG ANPDH eleva a 512 el número de muertos en Nicaragua,” *Deutsche Welle*, September 24, 2018, sec. America Latina, <https://www.dw.com/es/la-ong-anpdh-eleva-a-512-el-n%C3%BAmero-de-muertos-en-nicaragua/a-45620566>.

⁵ Liz Throssell, “One Year into Nicaragua Crisis, More than 60,000 Forced to Flee Their Country,” United Nations, UNHCR, April 16, 2019, https://www.unhcr.org/news/briefing/2019/4/5cb58bd74/year-nicaragua-crisis-60000-forced-flee-country.html?utm_source=NEWS&utm_medium=email&utm_content=1st+section+2nd+story+unhcr&utm_campaign=HQ_EN_therefugeebrief_external_20190416.

1.2. Purpose of the capstone

This paper aims to contribute to the growing body of scholarship suggesting a new direction must be taken in the way forced migration is understood and managed by receiving countries. The paper begins by looking at the evolution of understanding forced migration through history, focusing on the development of the term refugee and the protection mechanisms the concept engendered. In doing so, I present historical evidence of the circumstances that drove the change in understanding and the institutionalization of international protection mechanisms in order to compare these circumstances to current events. I then move on to identify the gaps the existing legal instruments have produced along with the consequences of these gaps. In the second chapter, I propose a mechanism to narrow the existing legal gaps, offering protection to forced migrants who do not qualify for refugee status and integrating them into local economies. To illustrate this mechanism, I look at Costa Rica as a prime case study for the implementation of the aforementioned complementary protection regime, since the sitting president has demonstrated the political will to pioneer such an initiative in his country. I then explain why this solution is the most viable, sustainable, effective, and humane avenue to address the mixed migration flows challenges the world is currently facing, and further propose this mechanism be implemented at the regional and not just domestic level. Lastly, I present my concluding remarks along with possible challenges adoption of such a mechanism could produce.

The scope of this paper is rather narrow and focuses solely on addressing the challenges of forced migration within mixed migration flows. I do understand there is much work to be done on protecting economic migrants and finding solutions to the pains of both sending and receiving countries of economic migrants; however, this is beyond the scope of the present work. Therefore, legal instruments that have emerged as a response to economic migration will not be covered nor will the circumstances that produce such migration.

That being said, it is important to acknowledge the complexity of migration and the difficulty behind dividing migrants into two discrete groups: voluntary and forced, economic migrants and refugees. Far too often, the reality of individuals and families who cross national borders is multifactorial and fails to fit under a neat designation, particularly the two vastly distinct designations that exist today.

Additionally, though the solution proposed hereto would help to curb migrant smuggling, it may do little to address human trafficking. This subject is also outside of the scope of the present paper.

1.3. Definitions

Asylum seeker: A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments.⁶

Complementary protection category: Refers to an international protection regime that offers safeguards to its beneficiaries and is complementary to refugee protection.

Country of origin: The country that is a source of migratory flows (regular or irregular).⁷

Economic migrant: A person moving from one State to another, or within their own country of residence, for the purpose of employment.⁸

Mixed migration flow: Cross-border movements of people including refugees fleeing persecution and conflict, victims of trafficking and people seeking better lives and opportunities. Motivated to move by a multiplicity of factors, people in mixed flows have different legal statuses as well as a variety of vulnerabilities.⁹

Forced migrant: A person whose migratory movement contains element of coercion, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects).¹⁰

⁶ According to IOM.

⁷ According to IOM.

⁸ According to IOM.

⁹ According to the Mixed Migration Centre.

¹⁰ According to IOM.

Irregular migration: Movement that takes place outside the regulatory norms of the sending, transit, and/or receiving countries.¹¹

Receiving country: Country of destination or a third country.¹²

Refugee/asylee: Someone who has been forced to flee his or her country because of persecution, war or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group.¹³ Although there are legal differences between refugees and asylees, I will use the terms interchangeably as they both address the existing protection mechanisms available to forced migrants.

¹¹ According to IOM.

¹² According to IOM.

¹³ According to UNHCR.

2. CURRENT FRAMEWORK

2.1. The evolution of international protection

Mixed migration flows are the crisis of today. Addressing the different challenges these flows pose has become increasingly more difficult as the flows themselves have grown more complex. The processes for addressing economic migration are vastly different from those addressing asylum seeking. When a country is presented with a healthy mix of trafficked, smuggled, economic, and forced migrants, the cards are less than stacked in their favor. Unfortunately, as the percentage of forced migrants has increased in this mix, the response from most receiving countries has been to narrow their understanding of refugee so as to contain what appears to be a growing humanitarian crisis.¹⁴

This narrowing of understanding is not a new process, however. In fact, most countries around the world have shifted between broadening and narrowing the definition of refugee throughout history. Whether through explicit inclusion or exclusion of groups and categories or through establishing mechanisms that limit access to asylum claims, the last century was fraught with controls on forced migrant protection. Indeed, it is this history that has precluded

¹⁴ Sara Staedicke and Michelle Mittelstadt, "Asylum Hangover? Governments Seek to Narrow Avenues for Humanitarian Protection," *MPI's Top 10 of 2018*, December 13, 2018, <https://www.migrationpolicy.org/article/top-10-2018-issue-7-asylum-hangover-countries-seek-narrow-avenues-humanitarian-protection>.

the international community from embracing more comprehensive protection mechanisms for those migrants most in need of protection.

In this chapter, I will follow the development of refugeehood from the 1800s to the present in an effort to illustrate how the need to protect and exert control over an ethnoculturally homogenous nation-state has taken precedent over any legitimate attempt to fix the broken refugee system. The chapter is divided into two broad sections. The first follows major events in world history that shaped the creation and evolution of international refugee protection. In addressing the understanding of refugee throughout this evolution, I refer to James C. Hathaway who proposes an evolution of the term from *de jure* to juridical and then to social, ending with the individual scope still recognized today.¹⁵ The second section looks at the gaps and challenges this evolution and the current protection mechanisms have produced for receiving countries and forced migrants.

2.1.1. Pre-WW I (1800s-1914)

Although the Treaty of Westphalia in 1648 is considered the foundation of the nation-state system, the French Revolution is often thought of as the birth of

¹⁵ James C. Hathaway, "The Evolution of Refugee Status in International Law: 1920—1950," *International and Comparative Law Quarterly* 33, no. 2 (1984): 348–80.

the modern nation-state.¹⁶ It was after the decade-long French upheaval that the West confirmed the importance of designating clear boundaries between its “nationals” and others. These boundaries went well beyond claims to territory and included defining what it meant to be a citizen of a given nation, demarcating which people belonged and which did not.¹⁷ Migration in this context challenges the modern notion of the nation-state, violating the carefully guarded physical, social, and political borders. Migration challenges the Westphalian model international order, questioning State sovereignty and inviting nation-states to develop stronger strategies to regain control.¹⁸

Despite the seemingly hardline-principles that prevailed in the early 1800s, the West was fairly open to migration. In the case of the United States, it clamored for more people as it attempted to expand its domain to the western, underpopulated side of the country.¹⁹ Most of the migration that took place throughout the XIX century was driven by economic factors, with Europe and the United States recruiting labor to increase their means of production. With the Industrial Revolution at its height and slave trade dwindling towards its end, the need for workers was pressing. The context was also ripe for the acceptance of forced migrants, such as Irish peasants escaping famine (1845-1860), Jews

¹⁶ John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State*. (Cambridge: Cambridge University Press., 2000), 3.

¹⁷ Torpey, 12.

¹⁸ Darshan Vigneswaran, *Territory, Migration and the Evolution of the International System* (Houndmills, Basingstoke, Hampshire ; New York: Palgrave Macmillan, 2013), 1.

¹⁹ “Immigration Timeline,” The Statue of Liberty-Ellis Island Foundation, accessed March 14, 2019, <https://www.libertyellisfoundation.org/immigration-timeline>.

fleeing the pogroms (1880-1920), and Cubans seeking refuge from economic and political turmoil on the island (1868-1898).²⁰ Nevertheless, as would prove true to this day, the embrace of foreigners throughout the West was proportionally affected by the state of a country's economy: In times of prosperity immigrants were a source of production and wealth; in times of hardship, immigrants were an unwanted burden.

Overall, the liberal principles that prevailed in the West lent themselves well to adopting a very broad definition of refugee, one that sought only to favor those who required protection from their countries of origin.²¹

2.1.2. WWI (1914-1918)

Although it is clear that mobility laws and the need for regulating the movement across borders was not a new phenomenon, the First World War did present a turning point for these types of instruments. It was during this period that the rise of nationhood and the need to identify with one particular culture, language, and geographic region drove countries to restrict access to citizenship and even restrict who was welcomed in their territory. The measures

²⁰ Hathaway, "The Evolution of Refugee Status in International Law: 1920—1950"; Jorge Duany, "Cuban Migration: A Postrevolution Exodus Ebbs and Flows," *Migration Policy Institute*, July 6, 2017, sec. Profile, <https://www.migrationpolicy.org/article/cuban-migration-postrevolution-exodus-ebbs-and-flows>.

²¹ Hathaway, "The Evolution of Refugee Status in International Law: 1920—1950."

that were already in place were seen as needing revamping and re-strengthening to account for gaps in the existing legal system.

Prior to the War, migration had seen a decline in various parts of Europe and Australia, as the demand for labor decreased and shipping fares increased.²² At the onset of the First World War, however, migration spiked with countries such as the United Kingdom inviting civilians from their colonies and other countries, including South Africa, West Indies, Mauritius, Fiji Islands, China, and Egypt to work in their British front, and France recruiting civilians from Spain, Portugal, Greece, Algeria, Indochina, Morocco, Tunisia, Madagascar, and China to join the war industry. These movements also strengthened existing regulations on mobility, as the need to control who entered and who got to stay became more eminent. For those who were deemed enemies of the state, internment camps and deportation became the only option, even if they had been previously naturalized.²³

At the onset of war, Russian Jews were quickly displaced. The tsar had propagated anti-Semitic campaigns and was ensuring all Jews be pushed out of Russian territories. By 1917 almost six million tsarist subjects - most of them non-

²² During this time the importance of shipping companies was marked. Transatlantic shipping companies were tasked with both circulating information on US immigration laws and practices to agents in Europe, as well as providing medical examinations to passengers, identifying anyone who would be rejected upon arrival to the United States, checking official documents, among other duties currently associated with border control.

²³ Marlou Schrover, "Migration and Mobility," in *International Encyclopedia of the First World War*, ed. Ute Daniel et al. (Berlin: Freie Universität Berlin, October 10, 2014), https://encyclopedia.1914-1918-online.net/article/migration_and_mobility.

Russians - had sought refuge in neighboring countries or were simply deported from Russia and now stateless. South of Russia, the Ottoman Empire, under the Young Turk government, engaged in a systematic campaign to annihilate the Armenian population, giving way to 1.5 million deaths and hundreds of thousands of refugees.²⁴

Government control throughout society was becoming more prevalent and the need to regulate growing migration fit nicely with the possibility of enforcing new and existing laws. During World War I, there were multiple attempts to continue this trend towards restriction; however, this trend was limited by the principle of reciprocity which made governments fear if they deported foreigners from their country, neighboring countries might follow suit affecting their own nationals.²⁵

By the end of World War I in 1918, the world experienced a shift in migration flows. The number of people seeking protection from their home States grew to unprecedented numbers and this change in volume prompted receiving countries to further exert control over different forms of mobility. Hundreds of thousands of people found themselves displaced within and outside their home countries and this bred unease among traditionally migrant-accepting nations.²⁶ Examples of massive displacement of people include one

²⁴ Schrover.

²⁵ Schrover.

²⁶ Hathaway, "The Evolution of Refugee Status in International Law: 1920—1950."

million Belgian refugees arriving in Holland, two million French and six million Russians all forced to leave their homes. Additionally, there were nine million prisoners of war detained throughout camps in Europe. It was the largest number of prisoners ever recorded in history up to that point, all of whom had to be repatriated once the war ceased.²⁷

As time went on, countries realized the importance of having a nationality and registering people to ensure that their nationality was known in order to prevent accidental enemy attacks. As expected, notions of race and nationality also gave way to exclusion. Indeed, it was these notions of nationality and nationhood that originated the so-called Yellow Peril and Red scare in the US and the Black Peril scare in Europe (Fear of Asian migrants, communists and socialists, and African migrants respectively). These fears resulted in regulations that would increase detentions and deportations as well as increase restrictions on mobility. In the United States this presented itself through the Chinese Exclusion Act of 1882, the 1921 Emergency Quota Act, the 1924 Immigration Act, Mexican Repatriation, and thousands of detentions in Ellis Island. In Europe, This resulted in thousands of deportations of black civilians as well as placing many black civilians in concentration camps.²⁸

Adding to the migration flows produced by World War 1, the Mexican Revolution broke out in 1910, increasing the influx of Mexicans, both authorized

²⁷ Schrover, "Migration and Mobility."

²⁸ Schrover.

and unauthorized, into the United States.²⁹ Nevertheless, this influx was received positively, as Mexicans were perceived as a valuable source of labor that could substitute the then dwindling numbers of Europeans and the undesirable Asian workers. In view of this, the United States even developed a guest worker program geared towards inviting Mexicans to provide temporary labor to the United States under a very limited rights regime.³⁰

World War I also reconfigured the geography of Europe and Asia. Many people found themselves in foreign lands without having moved at all, since the borders of their former nations were redrawn and crossed over them. This shifting of borders rendered many stateless and countless others were put to the mercy of their new countries of origin, which were tasked with providing them with the necessary citizenship documents in order for these populations to enjoy the same level of rights as native populations had before them. Governments were confronted with the challenge of redefining their citizenship or risk rendering thousands stateless. It was clear something needed to be done about this.³¹

2.1.3. Inter-war period (1919-1938)

²⁹ Peter Andreas, "Illicit Americas," in *American Crossings: Border Politics in the Western Hemisphere* (Baltimore, Maryland: Johns Hopkins University Press, 2015), 161–62.

³⁰ Torrie Hester, *Deportation: The Origins of U.S. Policy* (Philadelphia: University of Pennsylvania Press, 2017), 176.

³¹ Schrover, "Migration and Mobility."

As countries sought to end the War, a series of peace treaties were entered into, the most important of which was arguably the Treaty of Versailles, negotiated at the Paris Peace Conference. The Treaty of Versailles, signed on June 28, 1919, was drafted by two representatives each from Britain, France, the United States, Italy, and Japan in order to negotiate the peace terms of the war with Germany. The Treaty of Versailles served as the charter for the League of Nations, whose purpose was "to promote international cooperation and to achieve international peace and security."³² It was the signatories' expectation that the League would ensure the sovereignty of its member states and would take "any action...to safeguard the peace."³³ Despite President Woodrow Wilson's championing for the creation of the League of Nations, the United States never became a member for fear its membership would limit the United States' ability to defend its own interests. The League of Nations only existed for 26 years and was dismantled after failing to prevent World War II.³⁴

In February 1921, confronted with a growing displaced population, the International Committee of the Red Cross (ICRC) appealed to the Council of the League of Nations to push States towards taking action on providing refugee status to the millions who merited protection.³⁵ This appeal by the ICRC

³² "Treaty of Versailles" (1919).

³³ "Office of the Historian: The League of Nations, 1920," Government, Department of State, accessed March 20, 2019, <https://history.state.gov/milestones/1914-1920/league>.

³⁴ "History of the United Nations," United Nations, accessed March 17, 2019, <http://www.un.org/en/sections/history/history-united-nations/index.html>.

³⁵ Hathaway, "The Evolution of Refugee Status in International Law: 1920—1950."

was noteworthy in that it called on States to act not on the basis of a humanitarian obligation, but instead a duty to uphold international justice. The call to action prompted the creation of the office of the High Commissioner for Refugees and the first set of principles that would guide refugee protection through the Convention Relating to the International Status of Refugees.

One of the first orders of the office of the High Commissioner for Refugees was the creation of the Nansen passport, first issued in 1922 to address the stateless population.³⁶ The Nansen passport gained its name from Dr. Fridtjof Nansen who was the High Commissioner for Refugees for the League of Nations at the time. Dr. Nansen was commissioned with coordinating relief operations, resolving legal status challenges, and arranging voluntary repatriation.³⁷ The Nansen passport allowed holders to engage in international travel with few restrictions and provided an avenue for lawful employment, documentation for social insurance applications and temporary stay permits, and served as a means to rejoin family members from whom they had been separated by the war.³⁸ Nevertheless, the Nansen passport could only be issued to Russians and Armenians.

Only 54 countries recognized the Nansen passport for Russians and even fewer, 38, recognize it for Armenians. The countries which adopted the passport

³⁶ Jason Wordie, "The Passport That Was Lifeline for Refugee Jews and White Russians Who Fled to China and Hong Kong," *Post Magazine*, September 20, 2018.

³⁷ Katya Pestrova, "The Evolution of International Refugee Law: A Review of Provisions and Implementation," *Cambridge Review of International Affairs* 9, no. 2 (1995): 36–59.

³⁸ Pestrova.

soon realized they lacked a proper definition of what constituted a Russian or Armenian refugee, to which the High Commissioner for Refugees responded by establishing a definition in which the claimant had to be deprived of the protection of their country of origin and not have acquired a new nationality anywhere else. With this, countries were now able to administer the passports to identified refugees.³⁹

The Nansen passport unearthed a series of concerns, however, such as who would be responsible for those who are stateless? What rights would stateless people have? What sorts of freedoms in mobility and otherwise would these people enjoy? These were all questions that would have to be answered with the passage of time as a need for further protection both for States and for its people would become evident.⁴⁰

Additionally, the Nansen passport challenged the traditional understanding of refugeehood. Up until the 1920s, countries had conferred refugee status in a very liberal manner, opting for a *de jure* understanding of refugeehood.⁴¹ Throughout the XIX century, it was common practice to accord any individual or groups the right to enjoy protection by a State that was not their own on the basis of little more than a request. Nevertheless, efforts to consolidate national identity, fear of enemy infiltration, and a growing displaced

³⁹ Hathaway, "The Evolution of Refugee Status in International Law: 1920—1950."

⁴⁰ Schrover, "Migration and Mobility."

⁴¹ legally recognised, regardless whether the practice exists in reality

population led Western States to reconsider their liberal understanding of refugee.

Given the many challenges that followed the First World War, countries came together to sign the Convention on Certain Questions Relating to the Conflict of Nationality Laws on April 12th, 1930. This Convention offered a set of provisions to address issues of multiple nationalities and statelessness. This Convention laid out processes on determining one's nationality when one had been mistakenly afforded dual nationality, it presented procedures on expatriation permissions, how to deal with the nationality of married women, the nationality of children, and adoption.⁴² On the same date, the League of Nations opted to put in place procedures on how to deal with statelessness specifically through the Protocol Relating to a Certain Case of Statelessness. This Protocol set forth provisions on how to confer nationality when a state is not habitually conferring nationality based on birth in its territory alone.⁴³ One last important document drafted on the same date was the Protocol Relating to Military Obligations in Certain Cases of Double Nationality. This document set forth the exemption from all military obligations for those people possessing two or more nationalities who habitually resided in one of the countries whose

⁴² "Convention on Certain Questions Relating to the Conflict of Nationality Laws," 179 § (1930), <https://www.refworld.org/docid/3ae6b3b00.html>.

⁴³ "Protocol Relating to a Certain Case of Statelessness," No. 4138. 179 LNTS 115 § (1930), <https://www.refworld.org/docid/3ae6b39520.html>.

nationality they possessed.⁴⁴ Through these instruments, the States party to the League of Nations expected to address the challenges the increased plight for international protection presented. Nevertheless, the instruments did little to aid in the determination of asylum.

From 1920 until 1935, a refugee was redefined in juridical terms, meaning protection would be granted to those outside their country of origin who were refused protection by their home country governments and who met a defined criteria. The Convention Relating to the International Status of Refugees of 1933 provided rules for refugee status determination and a set of guarantees for its beneficiaries, such as identity documents (Nansen passports), protection from expulsion (principle of non-refoulement), access to courts, limited access to employment, medical care, education, and fair taxing regimes.⁴⁵ In terms of determining the qualifications for refugee status, the applicants had to be of Russian, Armenian, Assyrian or Assyro-Chaldaean, or Turkish origin.

The efforts to somehow codify existing definitions of refugee into a binding document were a response to States pushing back on the *de jure* definitions used until the 1920s, which aimed to protect the sovereignty and nationhood of the established countries while also according those most in need a protection mechanism under international law. ⁴⁶ It is important to note that refugee status

⁴⁴ "Protocol Relating to Military Obligations in Certain Cases of Double Nationality," 178 4117 § (1930), <https://www.refworld.org/docid/3ae6b38c10.html>.

⁴⁵ "Convention Relating to the International Status of Refugees.," CLIX No. 3663 § (1933), <https://www.refworld.org/docid/3dd8cf374.html>.

⁴⁶ Hathaway, "The Evolution of Refugee Status in International Law: 1920—1950."

could only be conferred to individuals who were outside their country of origin. For those who may have been stripped of their nationality but who remained within the boundaries of their home State, international protection through refugee status was unavailable.⁴⁷

In 1933, Adolf Hitler was appointed German Chancellor and, with the unwavering support of his National Socialist German Workers' Party (or Nazi Party for short) embarked on a ruthless campaign of oppression, bloodshed, and foreign invasion.⁴⁸ Under Hitler's leadership, the Nazis set out to eliminate anyone considered an enemy of the "new Germany," which included communists, socialists, liberals, pacifists, all Jews, and "non-Aryans."⁴⁹ The oppression of all those who were non-Aryans presented the Assembly of the League of Nations with yet another request to revise the definition of refugees. This time the request was born from the economic and social challenges the exodus of Germans posed for the United States, Palestine and the nations of Western Europe, all of which had become host countries to this new wave of forced migrants. In response, the Council established a system of international legal protection for the German refugees defining them as "any person having left German territory who does not enjoy or no longer enjoys the protection of the Government of the

⁴⁷ Hathaway.

⁴⁸ Mildred S. Wertheimer, *Germany under Hitler* (Foreign Policy Association and World Peace Foundation, 1935), 17–20.

⁴⁹ Wertheimer, 20.

Reich and who does not possess any nationality other than German nationality."⁵⁰

This juridical definition was thought to be a sufficient response to the growing number of displaced Germans, until 1939 when the annexations of other countries by Germany, including Czechoslovakia and Austria, in years prior gave way to a new group of displaced persons who did not fit prior definitions of refugee. The Council responded by extending the mandate of the High Commissioner to include “persons who, having formerly possessed Czechoslovak nationality, and not possessing any nationality other than German nationality, have found themselves compelled to leave the territory formerly part of the Czecho-Slovak State, where they were established.” The new mandate did not cover the protection of Sudetenlanders or Austrians, whose refugees had been growing in numbers as the Nazi party expanded their rule. Due to increased pressure, the Council was moved to redefine German refugees yet again, this time to include persons of Austrian nationality as well. By redefining refugees in this way, the League of Nations was shifting from a juridical definition, where the consequences of international displacement were of central importance and merited an international response in the form of protection and assistance, to a social definition, where the response addressed the social phenomenon of displacement by protecting large groups negatively

⁵⁰ Hathaway, “The Evolution of Refugee Status in International Law: 1920—1950.”

affected by a social or political event. Therefore, from 1935 to 1939, the definition of refugee was bound by the social and political challenges faced by targeted groups of people, in other words, a bona fide refugee.⁵¹

As Europe grappled to redefine refugeehood, the United States experienced a crackdown on immigration driven by a national resentment against newcomers and their threat to local jobs, health, and the country's national security. By 1921, Congress saw the need to instate quotas based on national origins. The new policy led to a drop in immigration from 236,000 in 1929 to 23,000 in 1933.⁵²

The Great Depression followed by a sudden flow of refugees fleeing Nazi persecution led the United States to buckle down on its restrictive immigration policies, forcing hundreds of thousands of Mexicans out of the country and closing the door on those displaced by the Nazi Party.⁵³ In 1929, the United States deported an unprecedented number of Mexicans following the Wall Street Crash. Research suggests nearly 1.8 million Mexicans were deported during the 1930s, 60 percent of whom were citizens of the United States.⁵⁴

⁵¹ Pestrova, "The Evolution of International Refugee Law: A Review of Provisions and Implementation."

⁵² Darrell M. West, *Brain Gain: Rethinking U.S. Immigration Policy*, Brookings Focus Books (Washington, D.C.: Brookings Institution Press, 2010), 28.

⁵³ "Immigration Timeline."

⁵⁴ Diane Bernard, "The Time a President Deported 1 Million Mexican Americans for Supposedly Stealing U.S. Jobs," *The Washington Post*, August 13, 2018, sec. Retropolis, https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/?utm_term=.ed0d6a0e03d1.

2.1.4. WW II (1939-1945)

In 1939, World War II broke out. The diversity in characteristics of those who were being forced out of their countries of origin, or who found themselves stuck in their home States yet lacking protection from their governments, paved the way to the establishment of the Intergovernmental Committee on Refugees (ICR) in 1938. The ICR was tasked with “facilitating the involuntary emigration from Germany and Austria of persons fleeing Nazi persecution.”⁵⁵ Through the mandate of the ICR the definition of refugee was yet again refined, this time towards a broader understanding:

“1. Persons who have not already left their countries of origin (Germany including Austria), but who must emigrate on account of their political opinions, religious beliefs and racial origin, and

2. Persons as defined in (1) who have already left their country of origin and who have not yet established themselves permanently elsewhere.”⁵⁶

The re-definition of refugee did not translate into greater protection of all those displaced, however. In fact, during and after WW I, the United States remained fearful of foreigners, especially distrusting Japanese, Germans, and Italians. After the Japanese attack of Pearl Harbor in 1941, President Franklin

⁵⁵ Hathaway, “The Evolution of Refugee Status in International Law: 1920—1950.”

⁵⁶ “Resolution of the Committee,” Doc. § (1938).

Roosevelt issued an executive order⁵⁷ to intern 120,000 Japanese men and women under fear they may be spies.⁵⁸

In 1941, at the height of World War II, the United States and Great Britain came together to pledge an alliance for building a better future post WW II. This pledge came to be known as the Atlantic Charter and was signed on to by 26 other nations in 1942, laying the foundation of what would become the United Nations.⁵⁹

As the consequences of World War II continued to flare, the definition of refugees had to undergo other changes that would eventually lead to the definition we are familiar with today. First, in 1943, the ICR included Sudetenlanders – up to that point lacking any sort of protection – by extending its mandate to include “those persons wherever they may be who, as a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs.”⁶⁰

2.1.5. Post-War period (1946-1967)

⁵⁷ West, *Brain Gain: Rethinking U.S. Immigration Policy*, 28.

⁵⁸ Over 60 percent of those interned were American citizens.

⁵⁹ “The Formation of the United Nations, 1945,” Government, Department of State, accessed March 20, 2019, <https://history.state.gov/milestones/1937-1945/un>.

⁶⁰ Daniele Lochak, “What Is a Refugee? The Political Construction of a Legal Category,” *Pouvoirs* 144, no. 1 (2013): 33–47.

After World War II ended in 1945, representatives of 50 countries came together in San Francisco to write the United Nations charter.⁶¹ The UN officially came to be on October 24, 1945 and was composed of a General Assembly made up of all member states, a Security Council composed of five permanent and six non-permanent members, an Economic and Social Council, an International Court of Justice, a Trusteeship Council to oversee certain colonial territories, and a Secretariat under a Secretary General.⁶² This time, the United States was not only a champion for the foundation of the international organization, but one of its most powerful members.

As the United Nations established itself, the need to create one organization to centralize all refugee matters became more apparent. In response, the UN created the International Refugee Organization in 1946, and with it, a new definition of refugee had to be considered. The demographic, social, economic, and political pressures of the post-war period eroded the good will of several member states, making consensus on who qualified for refugee status impossible. After much deliberation, countries arrived at a definition which granted refugee status to “an individual who might be described as a victim of recognized state intolerance or as a genuinely motivated political dissident.”⁶³ This new individualist definition sought to protect

⁶¹ “History of the United Nations.”

⁶² “The Formation of the United Nations, 1945.”

⁶³ Hathaway, “The Evolution of Refugee Status in International Law: 1920—1950.”

those who were escaping “fundamental incompatibility” with their home country government and it prevailed until 1951 when today’s accepted definition was crafted.

In 1946, in response to a repatriation effort by the United Nations Relief and Rehabilitation Administration (UNRRA), the mandate of the ICR was broadened again, this time to include “those persons within the Committee’s mandate who are unwilling or unable to return to their country of nationality or of former habitual residence.” Persons protected by the ICR were eligible for certain benefits, including maintenance and transportation assistance and eventually a travel document.⁶⁴

Again, prompted by another large wave of displacement, Europe found its standing definition of refugees to exclude emerging groups in need of protection. As such, the General Assembly of the newly established United Nations called for a revision of international refugee law. After holding a conference of plenipotentiaries, the Convention Relating to the Status of Refugees was drafted in 1951.⁶⁵ The Convention defined a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is

⁶⁴ Hathaway.

⁶⁵ Pestrova, “The Evolution of International Refugee Law: A Review of Provisions and Implementation.”

unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁶⁶ The definition created a practice of analyzing each case individually, a practice that was challenged in 1956 with the exodus of Hungarian refugees, and throughout the 1960s with important refugee flows from Morocco and Tunisia. Due to the impracticality of reviewing these cases on an individual bases, the practice of awarding refugee status *prima facie* was adopted, granting the status to large groups moving in mass for whom persecution was evident.⁶⁷

In the United States, President Truman urged Congress to establish pathways for the acceptance of thousands of refugees. In response, Congress drafted the Displaced Persons Act of 1948 allowing hundreds of thousands to seek refuge in the United States. Nevertheless, this acceptance of refugees proved to be a drop in the bucket as millions others were left to find refuge elsewhere.⁶⁸ The post-war economic prosperity required more labor, which in turn opened the U.S.’ doors to more migration.⁶⁹ Additionally, the Cold War pushed the U.S. to position itself as a bastion of freedom, easing its immigration policies further, eventually dismantling the immigration quotas based on

⁶⁶ “Convention Relating to the Status of Refugees.” (1951), <https://www.unhcr.org/3b66c2aa10>.

⁶⁷ Pestrova, “The Evolution of International Refugee Law: A Review of Provisions and Implementation.”

⁶⁸ “Immigration Timeline.”

⁶⁹ West, *Brain Gain : Rethinking U.S. Immigration Policy*, 29.

nationality that had been previously set.⁷⁰ In 1959, the United States welcomed approximately 1.4 million Cuban refugees fleeing the Cuban Revolution, a number that would continue to grow with the passage of time.⁷¹ The Vietnam war also produced an important flow of Southeast Asian migrants to the United States, Canada, and Australia.⁷²

Internationally, in 1967, after realizing the geographic and time-related limitations of the standing definition for refugees, countries drafted the Protocol Relating to the Status of Refugees in order to remove both constraints.⁷³ The removal of geographic and time-related constraints meant states would now recognize as refugees all forced migrants who complied with the 1951 definition regardless of their nationality or whether they had been displaced by causes not related to World War II.

2.1.6. Present day (1966-today)

Continuing wars, famine, natural disasters, and violence have produced countless forced migrants, most of whom fail to meet the requirements to be granted refugee status. Since the signing of the Protocol Relating to the Status of Refugees, various attempts have been made to broaden the definition of

⁷⁰ West, 30.

⁷¹ Duany, "Cuban Migration: A Postrevolution Exodus Ebbs and Flows."

⁷² Stephen Castles and Mark J. Miller, "Migration in the Asia-Pacific Region," *Migration Policy Institute*, July 10, 2009, sec. Feature, <https://www.migrationpolicy.org/article/migration-asia-pacific-region>.

⁷³ Lochak, "What Is a Refugee? The Political Construction of a Legal Category."

refugee to include the complexities and realities of the forced migrant population of today. These attempts have only been successful in some low to middle income countries, which have shouldered a disproportionate amount of the forced migration burden. Some of these include the 1969 Organization of African Unity (OAU) Convention relating to the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees.

The 1969 OAU Convention relating to the Specific Aspects of Refugee Problems in Africa expanded the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”⁷⁴ This Convention has been ratified by 45 out of the 54 member states of the OAU.

Similarly, in 1984, delegates from Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela came together to engineer solutions to the growing Central American refugee challenges of the time. The delegates acknowledged the existing protection framework failed to address the changing nature of forced migration, much of which was produced by non-state actor violence. The Cartagena Declaration, inspired by the 1969 OAU Convention, expanded the definition of refugees to

⁷⁴ “Convention Governing the Specific Aspects of Refugee Problems in Africa,” 14691 Treaty Series § (1969).

include “persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”⁷⁵ Although the Cartagena Declaration is not a binding document, many Latin American countries have adopted this definition and make no distinction between refugees under the Refugee Convention of 1951 and those under the Cartagena Declaration.⁷⁶ Some countries have also incorporated mass influx of displaced persons as a provision of their refugee regime. This addition has been promoted by UNHCR in the Americas as a mechanism of temporary protection to large flows of migrants.

Furthermore, the Cartagena Declaration was revolutionary in that it acknowledged the importance of promoting self-sufficiency among the refugee population, inviting countries to establish programs and projects that would foment employment and economic integration of refugees.⁷⁷

More recently, pressed by the burden the refugee crisis presented for low and middle income countries, the UN High Commissioner for Refugees was tasked with consulting with member states to develop a new framework to

⁷⁵ Organization of American States (OAS), “Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama” (1984), https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

⁷⁶ Countries which have adopted the definition include Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay.

⁷⁷ Organization of American States (OAS), Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.

guide refugee protection response. The consultation process was carried out through 2017 and 2018, concluding with an affirmed draft of the Global Compact on Refugees on December 17, 2018.

The Global Compact on Refugees is not legally binding and did not seek to expand on the current accepted definition of refugees. Instead, the Global Compact aimed to create “predictable and equitable burden- and responsibility-sharing among all United Nations Member States, together with other relevant stakeholders as appropriate [...]”⁷⁸ Unfortunately, the United States voted not to endorse The Global Compact along with Hungary, claiming it was “inconsistent with U.S. immigration policy” and “simply not compatible with U.S. sovereignty.”⁷⁹

2.2. Gaps in the system

The constant flux in the state of the international legal system throughout the first half of the XX century dictated the changes endured by the refugee system at the time. Crisis forced refugee law to be developed in an ad hoc manner, preventing States from holding a long-term view and crafting a legal document that could stand the test of time through flexibility and adaptability.

⁷⁸ “The Global Compact on Refugees” (2018), <https://www.unhcr.org/events/conferences/5b3295167/official-version-final-draft-global-compact-refugees.html>.

⁷⁹ Nayla Rush, “Avoiding the Quicksand of the Global Compact on Refugees: A Nesting Doll of International Commitments,” *Center for Immigration Studies*, December 4, 2018, <https://cis.org/Report/Avoiding-Quicksand-Global-Compact-Refugees>.

The current protection regime for forced migrants presents at least three major challenges:

1. It is far too narrow and excludes the vast majority of today's forced

migrants. In addition to precluding vulnerable populations from protection, the current regime places an additional burden on forced migrants: the title of economic migrants. Categorizing a vulnerable population that has fled its country of origin as economic migrants reinforces a false narrative that these populations are voluntary migrants, supporting their deportation and exclusion. Instead of broadening the understanding of what constitutes a refugee, States have created a set of restrictions making the conference of refugee status more challenging. Some of these restrictions include requiring documentation to prove persecution – most of which cannot be reasonably expected from individuals genuinely fleeing for their lives – and providing temporary protection to circumvent their obligations while also providing an escape valve to migration pressures.

2. It defends sovereignty over human rights and justice, while loosely

offering protection to a scarce few. The refusal to commit to an international, regional, or even domestic body of law that incorporates the nuanced challenges producing forced migration today, has stemmed from an effort to protect sovereignty and nationalism. In so doing, States have ignored their commitments to upholding human

rights, violated ratified conventions, and are jeopardizing an important demographic and economic investment for their nations.

- 3. Its geographic reach is far too broad.** Countries around the world have varying degrees of response capacity to large migration influxes, just as they have different needs and cultural contexts. A one-size-fits-all approach to such a complex issue was bound to fail in the long term. Migration policy would be best managed at the regional level, where smaller groups of countries with shared borders can find common ground to develop sustainable, flexible, and inclusive migration frameworks that are tailored to the region's realities.

In the following chapter, I propose a complementary framework to address these challenges. In order to better illustrate what these solutions would look like in practice, I contextualize the gaps in the current protection framework by using Costa Rica as a case study for implementation.

3. CASE STUDY: COSTA RICA

3.1. Background and context

Costa Rica has historically been a receiving, transit, and sending country for many fleeing violence, natural disasters, poverty, or simply looking to improve their standard of living. For the last decade, the country's net migration rate has been negative and is currently at six migrants per one thousand people.⁸⁰ This means Costa Rica is experiencing immigration at a higher rate than it is experiencing emigration. Though most of the immigration to Costa Rica is produced by intra-regional migration – primarily from Nicaragua and Colombia – over the last eight years, there has been an increase in extra-regional migration as well. From 2012 through 2016, Costa Rica experienced a significant increase of irregular Cuban, Haitian, African, and Asian migrants transiting through the country.⁸¹ Although most of these migrants were headed to the U.S., some opted to stay in Costa Rica and request asylum.

⁸⁰ "Can We Put an End to Human Smuggling?," Migration Policy Debates (The Organisation for Economic Co-operation and Development, December 2015), <https://www.oecd.org/migration/Can%20we%20put%20an%20end%20to%20human%20smuggling.pdf>.

⁸¹ Esteban Mata Blanco, Natasha Cambroner, and Esteban Oviedo, "Coyotaje de cubanos se disparó a vista y paciencia de la región," *La Nación*, November 22, 2015, sec. Política, <https://www.nacion.com/el-pais/politica/coyotaje-de-cubanos-se-disparo-a-vista-y-paciencia-de-la-region/VFNGHX6G6NFRXJBNFGIOGF7IYE/story/>.

On average, Costa Rica received 990 asylum requests every year between 2006 and 2013.⁸² However, in 2014, the requests for asylum doubled to 1,844, mainly due to the rise in extra-regional migration.⁸³ In 2015, a different flow of migrants, this time from El Salvador, contributed to yet another substantial increase in the number of asylum applications. Salvadoran asylum seekers accounted for 801 applications⁸⁴ of the 2,731 requests received in 2015.⁸⁵ In 2016, Venezuelan asylum seekers were added to the pool of persons of concern in Costa Rica, accounting for 47 percent of the 4,470 asylum requests received that year.⁸⁶

Nevertheless, only a few of these asylum requests were granted, as the designation of refugee or asylee is subject to the definition of the 1951 Refugee Convention, which only grants protection to those whose well-founded fear of persecution is rooted in reasons of race, religion, nationality, membership of a particular social group or political opinion.⁸⁷ During the first half of 2017, Costa

⁸² "Regional Report: 'Irregular Migration Flows to the Americas from Africa, Asia, and the Caribbean'" (Organization of American States (OAS) and International Organization for Migration (IOM), December 2016), OEA/Ser.D/XXVI.16, http://www.oas.org/documents/eng/press/Reporte-OIM_OEA_eng_030817_web.pdf.

⁸³ Ximena Alfaro, "Violencia lanza a salvadoreños a vivir calvario en Costa Rica," *La Nación*, November 26, 2017, sec. Servicios, <https://www.nacion.com/el-pais/servicios/violencia-lanza-a-salvadorenos-a-vivir-calvario-en/MB4Y34GN65GDBICYRKBZ4DL7CI/story/>.

⁸⁴ "Regional Report: 'Irregular Migration Flows to the Americas from Africa, Asia, and the Caribbean.'"

⁸⁵ "Regional Report: 'Irregular Migration Flows to the Americas from Africa, Asia, and the Caribbean.'"

⁸⁶ Karla Barquero, "Costa Rica: el país que más refugiados recibe en Centroamérica," *La República*, December 4, 2017, sec. Ranking, <https://www.larepublica.net/noticia/costa-rica-el-pais-que-mas-refugiados-recibe-en-centroamerica>.

⁸⁷ "Convention and Protocol Relating to the Status of Refugees," Convention (Geneva: United Nations High Commissioner for Refugees (UNHCR), 1951), <http://www.unhcr.org/en-us/3b66c2aa10>.

Rica received 2,582 asylum requests but only approved 359.⁸⁸ In 2018, Costa Rica approved 6 percent of all asylum request cases, or nine out of every ten.⁸⁹ After an asylum request is denied, the asylum petitioner can appeal the decision within three days. If the second request is denied, the petitioner can request a hearing before the Migration Administrative Tribunal (TAM). If the TAM also denies the request, the petitioner is left with three options: find an alternative visa category they may be eligible for, voluntarily return to their country of origin, or remain in the country illegally.⁹⁰ Most migrants have chosen illegality over returning home, and a few others have managed to navigate the complicated immigration system and find a visa that suits their needs.

The sudden surge in asylum requests has also led to extended wait times for visa processing. The refugee application process in Costa Rica was developed to take no more than three months from the day of application to the emission of an identification document confirming the status of refugee. Scheduling the application interview was to take no more than a week. Currently, the waiting period for an interview alone is three months.⁹¹

⁸⁸ "Costa Rica ha recibido más de 2.500 solicitudes de refugio en lo que va del año," Government, Ministerio de Gobernación y Policía, June 20, 2017, <http://www.mgp.go.cr/prensa/noticias/48-costa-rica-ha-recibido-mas-de-2-500-solicitudes-de-refugio-en-lo-que-va-del-ano>.

⁸⁹ "Migración Rechaza 9 de Cada 10 Solicitudes de Refugio," June 19, 2018, <https://presidencia.go.cr/accion-policial/2018/06/migracion-rechaza-9-de-cada-10-solicitudes-de-refugio/>.

⁹⁰ "Solicitud Denegada," United Nations High Commissioner for Refugees (UNHCR), n.d., <http://help.unhcr.org/costarica/condicion-de-refugiado/solicitud-denegada>.

⁹¹ Maricela Hinkelammert, Extra-Continental Migration in Costa Rica. Interview with CENDEROS' Director, Skype, February 20, 2018.

Ethnographic studies confirm that long wait times increase illegality in migration.⁹² The hours and days of lost wages build up quickly, pressuring migrants to abandon attempts at regularity.

Although Costa Rica offers a humanitarian visa in addition to asylum, the process to obtain this visa is complicated and involves providing a series of documents that may be difficult to obtain for forced, vulnerable migrants seeking to obtain a protected status. These include a formal address to receive correspondence, a letter detailing the reasons for the visa request, bank receipt of payment with the solicitor's name, proof of fingerprint registration issued by the Ministry of Public Security, proof of consular registration determined by the respective consulate, apostilled birth certificate, apostilled criminal record issued by the former country of residency or country of origin, proof of valid legal entry into Costa Rica, certified photocopies of all pages in the migrant's valid passport, and 'appropriate' proof of the humanitarian circumstances driving the visa request.⁹³ Moreover, the DGME can require a technical evaluation of the circumstances exposed in the migrant's visa request from any pertinent public institution.⁹⁴ Some of these requirements involve interacting with different governmental agencies, many of which are not abreast of the humanitarian

⁹² Caitlin E. Fouratt, "Temporary Measures: The Production of Illegality in Costa Rican Immigration Law," *PoLAR: Political and Legal Anthropology Review* 39(1), no. 1 (2016): 144–60.

⁹³ DGME, "Categoría Especial por Razones de Humanidad," n.d., http://www.migracion.go.cr/extranjeros/permisos/razones_humanidad/Categoria%20especial%20por%20razones%20de%20humanidad.pdf.

⁹⁴ DGME.

visa's conditions. The entire process makes for a bureaucratic labyrinth that is hard to navigate, can lead to confusion, and is rarely satisfied, incentivizing migrants to abandon the humanitarian visa process and remain in Costa Rica illegally.

3.2. A protection framework that promotes irregularity

Counting irregular migrants proves a difficult task, since the nature of their migratory status forces this population to live in the shadows. Nevertheless, Costa Rica identified such pervasive irregularity in the country that it warranted the creation of the *Ley General de Migración y Extranjería* in 2005, and a reform to the same law in 2010, as an attempt to address this irregular migration.⁹⁵ Unfortunately, the 2005 Law had the opposite effect. The 2005 Law proposed the securitization of borders and establishment of costly penalties and fees for those seeking regularization, pushing more migrants into the shadows.⁹⁶ The 2010 Law failed to address the oversights of the former Law and instead strengthened border securitization, increased visa application fees, and instituted a US \$100 a month penalty for each month a migrant was undocumented in the country.⁹⁷

⁹⁵ Gloriana Sojo-Lara, "Business as Usual? Regularizing Foreign Labor in Costa Rica," *Migration Policy Institute*, August 26, 2015, sec. Feature, <https://www.migrationpolicy.org/article/business-usual-regularizing-foreign-labor-costa-rica>.

⁹⁶ Gabriela Segura, "Acceso a La Regularización Migratoria e Integración Social de Las Personas Migrantes En Costa Rica" (Programa Estado de la Nación, 2016), https://estadonacion.or.cr/files/biblioteca_virtual/022/Equidad/Segura_2016.pdf.

⁹⁷ This penalty has been taken up again

In a time when the average irregular migrant was making between US \$160 and US \$390 a month, these fines were unattainable.⁹⁸ Paradoxically, the 2010 Law also included language promoting migrants' human rights and acknowledged the existence of a humanitarian visa for the first time,⁹⁹ although it did not define criteria for eligibility. Instead, the Law simply stated that its award would be at the sole discretion of the General Directorate of Migration (DGME).¹⁰⁰

After two years in effect, the 2010 Law had proved ineffective at reducing the number of irregular migrants. Therefore, the DGME developed a temporary provision allowing four categories of undocumented migrants to regularize their status within a period of six months without incurring any penalties: "(1) those with expired residency, who had failed to renew; (2) the parents of Costa Rican-born children; (3) 'special categories' of young adults who entered the country as minors, people with disabilities, and the elderly; and (4) agricultural and domestic workers".¹⁰¹ These 'special categories' were granted a humanitarian visa upon fulfillment of the visa's requirements.¹⁰² For young adults who had entered the country as minors, the temporary provisions proved ineffective at

⁹⁸ Fouratt, "Temporary Measures: The Production of Illegality in Costa Rican Immigration Law."

⁹⁹ La Asamblea Legislativa de la República de Costa Rica, "Ley General de Migración y Extranjería" (Law N° 8764, August 19, 2009), <http://www.migracion.go.cr/institucion/leyes%20migratorias/leyes/Ley%208764%20Migracion%20y%20Extranjeria.pdf>.

¹⁰⁰ La Asamblea Legislativa de la República de Costa Rica.

¹⁰¹ Fouratt, "Temporary Measures: The Production of Illegality in Costa Rican Immigration Law."

¹⁰² Kathya Rodríguez Araica, "Categorías Especiales por Razones Humanitarias," Pub. L. No. DG-0014-04-2014 (2012), <http://www.migracion.go.cr/institucion/leyes%20migratorias/circulares%20y%20directrices/Circular%20casos%20por%20razones%20de%20humanidad.pdf>.

regularizing their status yet again, as the humanitarian visa did not grant them permission to work. Those who obtained the humanitarian visa and worked without a permit, were in violation of their visa conditions, and thereby lost their visa status.¹⁰³

The latest iteration of humanitarian visas came about through an agreement with the International Organization for Migration and the United Nations High Commissioner for Refugees (UNHCR) signed in July 2016. This agreement - financed by UNHCR and operated by the IOM - grants 200 humanitarian visas a year to Northern Triangle¹⁰⁴ nationals so they may reside in Costa Rica while they undergo asylum consideration in the U.S., Canada, Switzerland, and Australia.¹⁰⁵ For its part, Costa Rica provides these migrants with English as a Second Language classes, cultural acclimation courses, and housing for a period no longer than six months.¹⁰⁶ This agreement allows for visa processing time to be reduced to five days. Although the agreement addresses the increase of Northern Triangle refugees seeking asylum in North America, it does nothing to address the thousands of requests for asylum in Costa Rica.

¹⁰³ Fouratt, "Temporary Measures: The Production of Illegality in Costa Rican Immigration Law."

¹⁰⁴ The Northern Triangle is composed of Honduras, El Salvador, and Guatemala.

¹⁰⁵ Gerardo Ruiz R., "Costa Rica dará visa humanitaria a 200 refugiados de Honduras, Guatemala y El Salvador," *La Nación*, July 26, 2016, sec. Política, <https://www.nacion.com/el-pais/politica/costa-rica-dara-visa-humanitaria-a-200-refugiados-de-honduras-guatemala-y-el-salvador/SR343IN2VVFCFJBA2AYBECZIUU/story/>. and International Redaction, "Costa Rica, un hogar temporal para los centroamericanos en peligro," *El Espectador*, July 26, 2016, sec. El Mundo, <https://www.elespectador.com/noticias/elmundo/costa-rica-un-hogar-temporal-los-centroamericanos-pelig-articulo-645507>.

¹⁰⁶ Ruiz R., "Costa Rica dará visa humanitaria a 200 refugiados de Honduras, Guatemala y El Salvador."

Moreover, extending the scope of asylum and the humanitarian visa regime to temporarily include these types of agreements, has contributed to further confusion among the country's migrant population, making an already circuitous and bureaucratic application process more difficult.

Though data collection on migration in Costa Rica is scarce, ethnographic studies show the continuous change in Costa Rican immigration law, the unrealistic processing fees, the waiting times, and the circuitous application process have been responsible in great part to the advancement of irregular migration.¹⁰⁷

Irregular immigration leads to the invisibility of undocumented people. Migrants without a valid visa are deprived of the protections afforded by the State to all other migrants and find themselves suspended in time and space without recourse.¹⁰⁸ This invisibility has predominantly been studied in the context of labor exploitation. Employers looking to access a cheap labor market know to look within the irregular migrant population. Employers are able to offer unpaid overtime, unsafe work environments, subpar wages, and no benefits to these migrants, without retribution.¹⁰⁹ Despite many attempts by the Ministry of Labor to eradicate the exploitation of undocumented migrant workers in Costa

¹⁰⁷ Fouratt, "Temporary Measures: The Production of Illegality in Costa Rican Immigration Law."

¹⁰⁸ Fouratt.

¹⁰⁹ Meghan Benton, "Spheres of Exploitation. Thwarting Actors Who Profit from Illegal Labor, Domestic Servitude, and Sex Work," Transatlantic Council on Migration (Migration Policy Institute, January 2014), https://www.migrationpolicy.org/sites/default/files/publications/BadActors-BentonFINALWEB_0.pdf.

Rica, employers have continued to seize the opportunity to underpay irregular migrants and deny them access to social services through the Costa Rican Social Security Fund (CCSS).¹¹⁰

A state of irregularity may also promote crime, as there is a tendency among undocumented migrants to underreport crimes in countries with restrictive immigration policies. Undocumented migrants fear deportation and are therefore less likely to report a crime to Costa Rican authorities. Furthermore, Costa Rican asylum seekers and refugee applicants may have ill perceptions of law enforcement. In the case of Venezuelan, Salvadoran, and Nicaraguan asylum seekers, their experiences with law enforcement have been particularly negative, as police from their home States are corrupt and favor the government and gangs. Underreporting immediately endangers the lives of victims but also perpetuates criminal activity that goes unpunished.¹¹¹

¹¹⁰ Editorial, "Las reformas necesarias a la ley de Migración de Costa Rica," *La Nueva Prensa*, October 28, 2017, <http://lanuevaprensacr.com/editorial-las-reformas-necesarias-a-la-ley-de-migracion-de-costa-rica/>. and "Ministerio de Trabajo pide a inmigrantes denunciar incumplimiento de derechos," *La Nación*, December 9, 2015, sec. Trabajo, <https://www.nacion.com/el-pais/trabajo/ministerio-de-trabajo-pide-a-inmigrantes-denunciar-incumplimiento-de-derechos/IQPJOBQAQRAG5OP75KD2WREY54/story/>.

¹¹¹ Rob Arthur, "Latinos In Three Cities Are Reporting Fewer Crimes Since Trump Took Office," *FiveThirtyEight*, May 18, 2017, sec. Immigration, <https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation/>. and Jeff Daniels, "Immigrants Are Afraid of President Trump's Crackdown, Making It Harder to Prosecute Crimes, ACLU Report Says," *CNBC*, May 4, 2018, sec. Politics, <https://www.cnbc.com/2018/05/04/crimes-tougher-to-prosecute-due-to-immigrant-fears-says-aclu-report.html>. and Tom Dart, "Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes," *The Guardian*, March 23, 2017, <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>. and John Burnett, "New Immigration Crackdowns Creating 'Chilling Effect' On Crime Reporting," *Morning Edition*, May 25, 2017, <https://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting>.

There are public health implications to irregular immigration as well. After the CCSS underwent a serious financial crisis in 2011, Costa Rica sought to restrict access to medical services for irregular migrants, offering only emergency care.¹¹² Limiting access to health on financial grounds can prove to backfire, as treatable conditions requiring a basic checkup can quickly turn into chronic illnesses or more serious diseases, necessitating emergency care and expensive procedures.¹¹³ Restricting health care can also have catastrophic implications for society, as communicable diseases are not identified before becoming widespread.¹¹⁴

There has also been a recent interest in evaluating how the state of irregularity impacts the mental and emotional health of migrants. Stress factors such as fear of being deported, inability to report abuses or crimes, and societal rejection have been associated with an increase in depression and substance abuse.¹¹⁵ Years of studies have additionally highlighted a strong connection between substance abuse and crime. A study carried out in nine countries in 2014 found “48 percent of homicide offenders had alcohol in their systems at

¹¹² Tania Avendaño Huete, “El Acceso a La Salud y a La Seguridad Social Como Derecho Fundamental y Humano de Las Mujeres Migrantes Nicaragüenses En Costa Rica” (Ciudad Universitaria Rodrigo Facio, 2015), <http://ijj.ucr.ac.cr/wp-content/uploads/bsk-pdf-manager/2017/06/El-Acceso-a-la-Salud-y-a-la-Seguridad-Social-como-Derecho-Fundamental-y-Humano-de-las-Mujeres-Migrantes-Nicarag%C3%BCenses-en-Costa-Rica..pdf>.

¹¹³ Gonzalo Fanjul, “Las consecuencias de negar la sanidad al inmigrante irregular,” *El País*, April 21, 2012, sec. 3500 millones, https://elpais.com/elpais/2012/04/21/3500_millones/1335032983_133503.html.

¹¹⁴ Fanjul.

¹¹⁵ Elena Sabogal and Lorena Núñez, “Middle- and Working-Class Peruvians in Santiago and South Florida,” *Latin American Perspectives*, 5, 37, no. 174 (2010).

the time of their offense while 37 percent were intoxicated.”¹¹⁶ Asylum seekers in Costa Rica – most of whom are forced migrants – have experienced violence, natural disasters, and extreme poverty. These experiences alone may cause post-traumatic stress, rendering access to medical services even more important for these populations.

Moreover, there are serious financial implications to irregular migration. Costa Rica may be losing millions of dollars annually due to unpaid taxes. Migrants forced to work in the informal economy, as well as the employers who hire them, fail to fulfill their fiscal responsibilities. As of November 2016, one of the key problems facing the nation was a shortage in tax revenue, since the government spending has increased by 3.6 percent, whereas income has only increased by 0.9 percent.¹¹⁷ This expensive oversight can also further resentment among nationals toward the general migrant population, making efforts at migrant and refugee integration more taxing on the State.

The country may also be losing out on income-generating opportunities by limiting migrant's access to entrepreneurial ventures. An OECD study conducted in 2016 found immigrants in Costa Rica started and owned

¹¹⁶ Romeo Vitelli, “How Are Substance Abuse and Violence Related?,” *Psychology Today*, March 8, 2018, <https://www.psychologytoday.com/us/blog/media-spotlight/201803/how-are-substance-abuse-and-violence-related>.

¹¹⁷ “Vigesimosegundo Informe Estado de la Nación en Desarrollo Humano Sostenible/PEN-CONARE” (San José, Costa Rica: Programa Estado de la Nación en Desarrollo Humano Sostenible, 2016), https://www.estadonacion.or.cr/files/biblioteca_virtual/022/PEN-22-2016-BOOK-BAJA.pdf.

businesses at the same rate as native Costa Ricans.¹¹⁸ Nevertheless, irregular migrants are precluded from accessing credit and acquiring the necessary licenses to register a new business. Less access to entrepreneurship means Costa Rica is forgoing opportunities for job creation. The country's unemployment rate is currently 12 percent and could stand to benefit from immigrant's entrepreneurial skills.¹¹⁹

Access to decent work and entrepreneurship opportunities also empowers the migrant population, eases the social burden of the state and thwarts incentives to access the informal economy.

In general, continuous failure in migrant integration, regardless of status, can have lasting repercussions. Restrictivism and illegality result in unnecessary government spending, promote tax evasion, strengthen the informal economy, and run counter to Costa Rica's efforts of ensuring "secure, orderly, and regular migration."¹²⁰

3.3. Recommendations

¹¹⁸ OECD, "What Impacts Does Migration Have on Development in Costa Rica?," in *Interrelations between Public Policies, Migration and Development in Costa Rica* (Paris: OECD Publishing, 2017), 87–88, <https://doi.org/10.1787/9789264278967-8-en>.

¹¹⁹ "Costa Rica Unemployment Rate," *Economy, Trading Economics*, 2018, <https://tradingeconomics.com/costa-rica/unemployment-rate>.

¹²⁰ "Migración lanza II Plan Nacional de Integración," *Government, Ministerio de Gobernación y Policía*, December 8, 2017, <http://www.mgp.go.cr/component/content/article/35-noticias/6-migracion-lanza-ii-plan-nacional-de-integracion?Itemid=108>.

In an effort to address the lack of clarity and regulation of Costa Rica's current forced migrant protection regime, and understanding the challenges behind creating of a new migration category, I propose the following:

1. **Properly determine the conditions under which protection will be granted.**

As previously discussed, structure and predictability are essential in fostering a culture of regular migration. Given the volume and vulnerability of migrants seeking protection in Costa Rica, a complementary protection category should be clear in defining the conditions required for its award. Special consideration should be provided to protected categories not covered under the 1951 Refugee convention, such as victims of ongoing criminal violence, domestic abuse, natural disasters, climate change, and famine. However, clarity should not be achieved at the expense of flexibility. To avoid a rigid regime that could become obsolete in the next few years, the complementary protection regime should include a provision calling for periodic review of extraordinary circumstances which may merit protection.

2. **Ensure accessibility of fees and documentation requirements.** Most forced

migrants have no money when they arrive in Costa Rica. All too often, their journey begins precipitously, allowing little time to arrange for document gathering and normal visa formalities. Additionally, migrants fleeing government persecution are unable and unwilling to communicate with their country's government officials, both at home and

once in Costa Rica. Requirements for the complementary protection should consider these limitations while also incorporating international best practices in vetting processes.

- 3. Provide immediate work permit upon designation of protective status.** All migrants have the right to decent work. Obstructing this right by establishing bureaucratic processes may push migrants into irregularity. Conversely, a streamlined process promotes compliance with labor laws and allows for safer working conditions. Less irregularity among migrants will also lead to greater integration of migrants into the economy and state, helping reduce the stigma of migrants draining the social system, increasing tax revenue for the Costa Rican government, and leading to job creation through migrant entrepreneurship.

3.4. Challenges behind complementary protection in Costa Rica

In order to safeguard the human rights of thousands seeking refuge in Costa Rica while ensuring the well-being of the country, the creation of a well-defined and implemented complementary protection regime is needed. Nonetheless, this change would not be without challenges and growing pains.

Costa Rica struggles with a growing deficit and increased pressure to contain government spending.¹²¹ Tax revenue is not being generated at the same rate as the demand for social services, and the influx of migrants through and to Costa Rica has imposed a tremendous financial burden on the government. In this climate, it may seem unreasonable to justify further spending on foreigners. The creation of a new protection regime will force the government to incur significant costs to plan, hold work sessions, and train pertinent ministries and institutions. However, effective implementation could also generate a substantial increase in tax revenue, by regularizing migrants' status and incorporating them into the formal economy. As more migrants abandon the informal economy, more employers will be obligated to comply with labor laws, thereby also contributing to an increase in tax revenue. The legislature may be hesitant to move forward based on speculations, so a quantitative study carried out by *Programa Estado de la Nación* (PEN) to assess potential migrant contributions may prove a strong negotiating tool.

The subject of migration has become highly politicized. The presidential elections in 2018 were very contentious, presenting candidates with opposing views on immigration who relentlessly refused to find common ground. Otto Guevara with the Libertarian Movement, Antonio Álvarez Desanti with the National Liberation Party (PLN), and Fabricio Alvarado Muñoz with National

¹²¹ "Vigesimosegundo Informe Estado de la Nación en Desarrollo Humano Sostenible/PEN-CONARE."

Restauración, all proposed a more restrictive approach to migration, arguing Costa Rica's hospitality had been taken advantage of and the economy could no longer bear the burden.¹²² On the opposite end stood social-democrat Carlos Alvarado Quesada with the Citizen Action Party (PAC). His political agenda, in terms of migration, includes reducing the fees for visa processing, improving communication among pertinent institutions, and incorporating recommendations from multilateral and non-profit organizations.¹²³ During the first round of elections, over 43 percent of voters sided with the PLN and National Restauración.¹²⁴ Although the presidency was eventually won by Alvarado Quesada - by a margin of over 20 percent - the first round is illustrative of the sentiment of a considerable number of Costa Ricans.¹²⁵ This places a great deal of pressure on incoming President Alvarado to navigate the treacherous waters of representing the population that awarded him the presidency and the population that voted against him. If President Alvarado chooses political expediency over equitable representation, long term policy planning will be hindered and any changes he makes to the immigration law may be limited to

¹²² Josué Bravo, "Políticos costarricenses impulsan sentir antiinmigrante en campaña electoral," *Diario Las Américas*, March 26, 2017, sec. América Latina, <https://www.diariolasamericas.com/america-latina/politicos-costarricenses-impulsan-sentir-antiinmigrante-campana-electoral-n4118154>.

¹²³ Alejandro Gago, "Personas Migrantes y Refugiadas," Carlos Alvarado Presidente, n.d., <https://carlos.cr/personas-migrantes-y-refugiadas>.

¹²⁴ "Voto 2018," *La Nación*, 2018, <https://www.nacion.com/gnfactory/especiales/2018/elecciones/elecciones.html>.

¹²⁵ Esteban Oviedo and Natasha Cambroner, "Carlos Alvarado Será El Presidente Número 48 de Costa Rica: Barrió Con El 60,79% de Los Votos," *La Nación*, April 1, 2018, sec. Política, <https://www.nacion.com/el-pais/politica/siga-aqui-los-resultados-aqui-a-partir-de-las-81/JETDJHQ4FZG6JNQSR2MBJL2ROA/story/>.

a presidential term. It is critical for President Alvarado not to lose touch with the Costa Rican people and listen to the concerns of the opposition. Changes to the current protection regime should be reflective of the concerns of all Costa Ricans.

Public perception of immigrants in today's global climate is proving to be the most difficult challenge to overcome. Despite data contradicting increases in immigration being correlated to increases in crime, many Costa Ricans continue to believe the rise of insecurity is due to immigration.¹²⁶ Unfortunately, the response to this sense of threat over the past twenty years has been to alienate immigrants and increase border control. Restrictive immigration policies have produced more irregular migration, which leads to the expansion of the underground migration industry, which in turn encourages the proliferation of organized transnational crime.¹²⁷ In addition to insecurity, Costa Ricans worry more immigrants will entail lower wages. Economists have for long argued about whether immigration is good for the economy or not. Most data indicate immigration produces a redistribution of income, meaning low-skilled nationals may be negatively affected by immigration, while high-skilled workers and employers are positively affected.¹²⁸ According to American economist, George

¹²⁶ Fouratt, "Temporary Measures: The Production of Illegality in Costa Rican Immigration Law."

¹²⁷ Douglas S. Massey, "A Missing Element in Migration Theories," *Migration Letters* 12, no. 3 (September 2015): 279–99.

¹²⁸ George J. Borjas, "Yes, Immigration Hurts American Workers," *Politico Magazine*, 2016, <https://www.politico.com/magazine/story/2016/09/trump-clinton-immigration-economy-unemployment-jobs-214216>.

J. Borjas, the costs and benefits offset each other, and the economy remains balanced in the end. However, low-skilled Costa Ricans displaced by immigrants will be less concerned with the health of the national economy and more concerned with the detriment immigration could mean for them.

A complementary protection category that allows migrants to work lawfully in Costa Rica would aid in reducing crime and protecting the jobs of low-skilled nationals. By taking migrants away from the informal economy, transnational organized crime is reduced. This measure also safeguards migrant's labor rights and makes wages competitive across all sectors, ensuring nationals are not displaced by informal employer agreements. Unfortunately, the challenge of overcoming the anti-migrant sentiment will require time. As the country experiences improvements in the economy and society as a whole, the stigmatization against foreigners may begin to subside.

A significant challenge is that of creating a protection framework flexible enough to keep up with the dynamism of migration, yet predictable enough to provide consistency and structure. In migration policy, a common obstacle to effective implementation is the rigidity of proposed solutions.¹²⁹ However, when working across government sectors, the different goals and agendas of each institution make flexibility difficult to attain. By encouraging the participation of

¹²⁹ "Plan Nacional de Integración para Costa Rica 2018 – 2022" (San José, Costa Rica: Dirección de Integración y Desarrollo Humano, December 2017), http://www.migracion.go.cr/integracion_desarrollo/Plan%20Nacional%20de%20Integracion%20Costa%20Rica%202018%20-%202022..pdf.

all pertinent ministries, different government perspectives may be addressed, and conflicting interests may be avoided.

3.5. A Regional Approach

Notwithstanding Costa Rica's political will, the creation of a complementary protection category will not address the intended problems unless it is part of a regional effort that recognizes the need for such a solution. Due to migration being a multi-jurisdictional concept, a framework impacting multiple countries is required. However, the 'net' of policy must be the right size, to ensure the most impact. Cast a net too wide (globally), and you run the risk of diluting the net's efficiency as you cater to every national actor. Cast a net too small (nationally), and you miss the issues faced beyond a country's borders – in turn missing out on the cross-jurisdictional nature of migration.

The private sector echoes the power of a regional approach as well. Although the scenarios are significantly different, companies like GE, Toyota, and Walmart realize a 'one-size' global approach does not result in the most success. The surge in overall global trade over the past half century even shows that regional trade amongst countries accounted for much of the increase.¹³⁰ The importance of respecting and seizing on the cultural, administrative,

¹³⁰ Pankaj Ghemawat, "Regional Strategies for Global Leadership," *Harvard Business Review*, December 2005.

economic, and geographic proximity of country-groups is very high when dealing with a complex phenomenon such as migration.

A great example of regionalizing migration matters is the Regional Conference on Migration (RCM) in the Americas. Established in 1996, the RCM is a place for cooperation and convergence on various migration related policies and initiatives. In the past fifteen years, it has addressed numerous topics, including enhanced security and biometric identification, assisting with repatriation of regional and extra-regional migrants, development of guidelines for member countries on a multitude of topics, ongoing seminars and workshops for the private and public sector through the region, and more.¹³¹ Unfortunately, the agreements developed under the RCM are non-binding, which is why a binding protection framework is sorely needed.

¹³¹ Gabriela Hernandez, "Regional Conference on Migration: 15 Years" (San José, Costa Rica: Regional Conference on Migration, 2013).

4. CONCLUSION

Costa Rica is not alone in its experiences. The US and Europe also receive an important number of asylum requests and fail to approve the vast majority of them. In 2018, Europe rejected nearly 80 percent of the asylum requests it received.¹³² Similarly, the US only granted asylum to 33 percent of those who requested it during the same year.¹³³

Throughout the world the subject of migration has become so politicized it has allowed unlikely leaders to emerge and take power, as was the case of President Donald Trump; and unlikely decisions to be taken, as was the case of Brexit.

Furthermore, the circumstances that engendered the protection regime we have today are not unlike those faced in the XX century. We have replaced internment camps with detention centers and refugee camps. Most violence is now perpetrated by non-government actors but continues to produce significant displacement around the world. We no longer talk about a Yellow Peril or Red scare, however the repression and discrimination of Africans and their descendants remains prevalent, as does the Brown Peril.¹³⁴ States today

¹³² "Distribution of First Instance Decisions on (Non-EU) Asylum Applications, 2018," EuroStat, 2018, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Distribution_of_first_instance_decisions_on_\(non-EU\)_asylum_applications,_2018_\(%25\)_YB19_3.png](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Distribution_of_first_instance_decisions_on_(non-EU)_asylum_applications,_2018_(%25)_YB19_3.png).

¹³³ "Asylum Decisions and Denials Jump in 2018," Syracuse University, Trac Immigration, 2018, <https://trac.syr.edu/immigration/reports/539/>.

¹³⁴ Refers to the indiscriminate fear of Latin Americans, Southeast Asians, and Muslims.

appear to be re-exerting their dominance on the world stage and to do so are attempting to re-define what it means to be a nation in the narrowest terms. This has led to buckling down on restrictive immigration policies and turning a blind eye to the catastrophic consequences of shutting people out.

At the same time, Japan, France, Germany, among many other western nations, are facing a considerable aging population. The United States has until now escaped the decline in its demographics thanks to its immigrant population, which continues to meet and exceed replacement fertility rates. Nevertheless, most aging States refuse to accept migration as a solution to their population decline.

Moreover, the inclusion of more migrants into the economy can serve countries well. In general, migrants are employed at the same, if not a higher, rates than native born populations. This is particularly striking when considering the additional challenges migrants face in the job market, such as language barriers and insufficient documentation. However, migrants are not only job-consumers, they are also job-creators. According to the Kauffman Index for Entrepreneurship (KIE), immigrants in the United States were twice as likely to start a business in 2017 than native-born Americans. Immigrants currently account for nearly 30 percent of all new ventures, a rise from 2007 when they made up 24.6 percent.¹³⁵ In South Africa, migrants reported self-employment at

¹³⁵ Robert Fairlie, Sameeksha Desai, and A.J. Herrmann, "2017 National Report on Early-Stage Entrepreneurship," Kauffman Indicators of Entrepreneurship (Kansas City: Ewing Marion Kauffman Foundation, February 2019).

over quadruple the rate of native South Africans (28 percent versus 6 percent).¹³⁶ The OECD has found through many studies that immigrants tend to be self-employed at higher rates than the native-born population.¹³⁷ In the present context, redefining refugeehood is not only a question of humanitarian principles or even international justice, but also one of economic opportunity.

There are several challenges to the solution I propose, however. The backlog that currently exists in receiving countries is likely to be aggravated by such an approach, as more requests will need to be processed. This problem can be addressed by increasing personnel dedicated to processing applications for asylum seekers and those seeking complementary protection.

This solution does entail greater upfront costs, both financial and political, as it requires a major bureaucratic shift domestically and across borders. Nevertheless, in the long-term, this solution pays for itself and will reduce xenophobia, violence, and promote social cohesion.

A better approach would seek to change refugee law altogether; however, attempting such a shift in the current international climate is likely to lead to more losses than gains.

In conclusion, the refugee system is no longer fit for purpose. It precludes the majority of the forced migrant population from protection, focuses its norms on defending State borders over human lives, and attempts to address forced

¹³⁶ Loren B Landau and Karen Jacobsen, "Refugees in the New Johannesburg," *Forced Migration Review*, no. 19 (January 2004).

¹³⁷ OECD, "What Impacts Does Migration Have on Development in Costa Rica?," 88.

migration challenges throughout the world using the same, antiquated approach. The solutions proposed thus far by the international community have promoted irregularity and encouraged dependency of vulnerable migrants on the State. The need to afford protection to all forced migrants in a sustainable way is thus critical to gaining acceptance of such a regime by the vast majority of countries. Nevertheless, this approach is only viable if agreed upon and implemented at a regional level.

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