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FULFILLING THE PROMISE?: WHEN HUMANITARIAN OBLIGATIONS AND FOREIGN POLICY GOALS CONFLICT IN THE UNITED STATES

ELEANOR E. DOWNES*

SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA. By María Cristina García. Berkeley: University of California Press. 2006. Pp. 289.

Abstract: In *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada*, María Cristina García evaluates the United States' response to political and military upheavals in Central America in the 1980s. García explains that both international and domestic law demanded that the United States provide refugee status to individuals with a "well-founded fear of persecution." She suggests that, because it played a significant role in creating these refugees, the United States had an even greater responsibility to provide for their refuge. This Book Review evaluates the failure of U.S. law and policy to realize even the minimal standards established under international agreements with regard to the protection of refugees. In examining the situations in Central America in the 1980s and Iraq now, it concludes that the United States must fulfill its obligations under international law without regard to whether the United States contributed to the refugee-creating crisis.

INTRODUCTION

The 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention), the fundamental international agreement regarding refugees, defines 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 unwilling to avail himself of the protection of that country."¹ Be-

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¹ U.N. Convention Relating to the Status of Refugees, art.1, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, *available at* <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [hereinafter 1951 Convention]. The 1951 Convention "provides the most com-

tween 1974 and 1996 millions of Central Americans were driven from their homes by military forces that used violence to terrorize and incite fear among civilians.² Similarly, since the U.S.-led invasion of Iraq in 2003, hundreds of thousands of Iraqis have sought refuge throughout the world in an effort to save themselves from violence and persecution.³ In both situations, U.S. foreign policy contributed to the violent persecution of innocent civilians that in turn drove thousands from their homes.⁴ Whether these migrants have been recognized as refugees has depended upon the formal and informal immigration, refugee, and foreign policies of the country where they sought safety.⁵

In her book, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada*, María Cristina García explores the causes and effects of mass migration from Nicaragua, El Salvador, and Guatemala to North America during the 1980s and, in doing so, asserts that the United States failed to fulfill its obligation to respond to the needs of millions.⁶ García begins by providing a brief history of the political upheavals and wars in these three Central American countries.⁷ She details the economic and political sources of struggle and identifies the role the United States played in exacerbating each of these crises.⁸ By

prehensive codification of the rights of refugees yet attempted on the international level." U.N. HIGH COMMISSIONER FOR REFUGEES, INTRO. TO CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 5 (UNHCR/MRPI/C.1CONV&PRO/ENG/OCTOBER 2006) (2006), available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [hereinafter UNHCR, INTRO. TO CONVENTION & PROTOCOL] (unofficial introduction to 1951 Convention, *supra*).

² MARÍA CRISTINA GARCÍA, *SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA* 31–32 (2006).

³ Sabrina Tavernise, *The Struggle for Iraq: Refugees; for Iraqis, Exodus to Syria and Jordan Continues*, N.Y. TIMES, June 14, 2006, at A15; UNHCR, Field Info. and Coordination Support Section, Div. of Operational Serv., *2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR*, tbl.2 (June 9, 2006), available at <http://www.unhcr.org/statistics/STATISTICS/4486ceb12.pdf> [hereinafter UNHCR, *Global Refugee Trends*].

⁴ See GARCÍA, *supra* note 2, at 1, 13; Tavernise, *supra* note 3. The president of the non-governmental group, the U.S. Committee for Refugees and Immigrants, Lavinia Limon, has stated that the nearly 900,000 Iraqis who left Iraq between 2003 and 2005 are “the biggest new flow of refugees in the world.” See Tavernise, *supra* note 3.

⁵ GARCÍA, *supra* note 2, at 32–33.

⁶ *Id.* at 1–2.

⁷ *Id.* at 14–43.

⁸ See *id.* From 1934 until 1977, the United States provided financial and military support to the ruling Somoza family in Nicaragua; this aid secured the loyalty of Nicaragua against Communist forces during the early Cold War. See *id.* at 13–14. In the early 1970s, the United States supported the Somoza’s containment of the Sandinista National Liberation Front (FSLN) that advocated revolutionary political and socioeconomic changes. *Id.* at 14, 15. The FSLN increasingly took control away from the Somoza dictatorship. *Id.* at 15. Their revolu-

ignoring human rights abuses and providing aid to military regimes known to be committing human rights abuses, the United States attempted to secure the loyalty of changing regimes and to contain the spread of Communism.⁹ The results of war and upheaval in Nicaragua, El Salvador, and Guatemala were immense.¹⁰ Between 1974 and 1996, approximately 250,000 people were killed, 1,000,000 were displaced within their home countries, and 2,000,000 fled Central America to

tionary efforts were eventually supported by the United States when President Jimmy Carter announced, in 1977, that the United States would withdraw economic and military support from Latin American countries whose human rights policies did not meet U.S. expectations. *Id.* at 17. The United States quickly recognized the FSLN government and for approximately two years provided copious aid in hopes that the Sandinistas would provide peace and security for Nicaragua. *Id.* Toward the end of President Carter's administration, the United States began covertly supporting anti-Sandinista organizations and canceling promised aid. *See id.* at 18. President Reagan's administration further advanced the anti-Sandinista opposition by placing a trade embargo on Nicaragua and supporting the *contra-revolucionarios* (Contras) in stopping the flow of arms to a leftist revolutionary group in El Salvador. *See id.* The first Bush administration continued policies that undermined the Sandinistas and provided a great deal of support to opposition parties during the 1989 election. *Id.* at 20. This support contributed to the election of Violeta Barrios de Chamorro who represented a coalition of fourteen opposition parties. *Id.* In 1990, the United States lifted the trade embargo and provided aid to this newly elected coalition government. *Id.*

Beginning in 1932, El Salvador was ruled by generals with connections to fourteen dominant families that controlled over sixty percent of the farm land in the nation. *Id.* By the 1960s, unequal power and resource distribution led to the development of civil disobedience and the Catholic Church's advocacy of a "theology of liberation." *See id.* at 21. A military-civilian junta overthrew the existing government in 1979; it and the three other juntas that took over between 1979 and 1982 failed to enact reform measures. *Id.* at 22. Neither President Carter's 1977 declaration that aid to Latin American countries would be dependent on respect for human rights nor the killing of over 13,000 civilians in 1981 had a significant effect on military or economic aid to the Salvadoran government. *See id.* at 24. In fact, the United States provided \$6 billion of aid over a twelve year period. *See id.* at 25–26; *see also* Gregory L. Smith, *Immune to Truth? Latin American Truth Commissions and U.S. Support for Abusive Regimes*, 33 COLUM. HUM. RTS. L. REV. 241, 257 (2001) (explaining that truth commissions have failed to consider the role of the United States in the perpetration of human rights abuses).

In 1954, the U.S. Central Intelligence Agency assisted in a military coup that overthrew a democratically elected government in Guatemala. GARCÍA, *supra* note 2, at 26. Over the forty years that followed, military rulers received substantial support from the United States in the form of military training, corporate investment, and development aid. *See id.* at 26, 29. This assistance continued essentially undisrupted despite rampant human rights abuses including religious and cultural persecution and the murder and "disappearance" of hundreds of thousands of citizens. *See id.* at 26–29; Smith, *supra*, at 261. García quotes President Reagan as having said that General Efraín Ríos Montt of Guatemala "was a man of 'great personal integrity' whom human rights monitors had given a 'bum rap.'" GARCÍA, *supra* note 2, at 29. President Reagan made this comment in 1982, the same year in which, on a single day, 500 Guatemalan army forces entered a small village and murdered 350 civilians. *See id.* at 28, 29.

⁹ *See* GARCÍA, *supra* note 2, at 13–29.

¹⁰ *See id.* at 1.

find refuge.¹¹ Most of these migrants sought refuge in Mexico, Canada and the United States; however, the policies of these North American countries generally reflected a prioritization of state interests over humanitarian obligations.¹² In contrast with its neighbors that were not involved in the military conflicts of Central America, the United States, which was intricately involved in supporting at least one side of each country's war,¹³ was "reluctant to admit that its policies caused displacement and generated refugees."¹⁴

The hesitance of the United States to take responsibility for its role in creating Central American refugees was accompanied by a reluctance to fully address the needs of those seeking refuge.¹⁵ García introduces her book by arguing that although "foreign policy decisions often cause the displacement of populations, migration should not be used as an instrument for undermining or bolstering a specific regime."¹⁶ Later, she echoes the argument of many U.S. citizens and the United Nations High Commissioner for Refugees (UNHCR) that the United States had

¹¹ *Id.*

¹² *See id.* While García fully explores the policies of Mexico and Canada, this Book Review focuses on her analysis of the U.S. handling of Central American migration. Canadian and Mexican refugee and immigration policies, while far from flawless in the 1980s, were more generous than that of the United States. *See id.* at 77, 119. Both Canada and Mexico approached the conflicts in Central America as domestic issues with which they intentionally avoided interference. *Id.* at 125. As such, their immigration and refugee policies bore little connection to their foreign policies of non-involvement; both nations adopted more generous and adaptive approaches to Central American migrants than did the United States. *See id.* at 77, 119, 125. Furthermore, Mexico was not a signatory to the 1951 Convention or the 1967 Protocol until 2000, and was therefore in no way legally obligated to accept refugees during the period García discusses. *See id.* at 46; UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, 3, available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last visited Mar. 28, 2007) [hereinafter UNHCR, *Parties to Convention*]. Canada signed the 1951 Convention and the 1967 Protocol in 1969. UNHCR, *Parties to Convention*, *supra*, at 2.

¹³ *See* GARCÍA, *supra* note 2, at 18, 24, 26. In the span of three years, the United States provided substantial support to three opposing groups within Nicaragua. *See id.* at 17–19.

¹⁴ *See id.* at 33. García quotes a Salvadoran immigrant explaining the reluctance of the United States to accept Central Americans as refugees despite their need for humanitarian relief:

"The Reagan Administration doesn't want to accept us as refugees because it would be admitting that the military aid it sends to El Salvador does not help, rather destroys and creates refugees. I didn't come here because I wanted to. I had no economic need to come. I left my country because I had to."

Id. at 84.

¹⁵ *See id.* at 86. In 1981, the UNHCR accused the United States of failing to fulfill its obligations towards refugees when it routinely forced Salvadoran refugees to return to their country. *Id.* at 89.

¹⁶ *Id.* at 8.

a responsibility, beyond that codified in the 1951 Convention, towards Central American migrants because of its role in instigating the conditions that led them to flee their home countries.¹⁷ According to this perspective, the United States should have liberally granted refugee assistance in order to account for its foreign policy decisions.¹⁸

This Book Review argues that while the responsibility of the United States to provide humanitarian relief and refugee status is clear under international and domestic law, inferring additional responsibilities based on foreign policy unnecessarily creates the risk that humanitarian relief will become a tool of foreign policy and as such will fail to serve the human need it is intended to address. Part I provides an analysis of international refugee standards and explores how U.S. policies towards Central American migrants from 1974 to 1996 failed to meet the obligations imposed by those standards. Part II analogizes the political upheaval, war, and migration from Central America in the 1980s to the current political, military, and migration crises in Iraq. Part III argues that the United States should fulfill its current international obligations by addressing the humanitarian needs of Iraqi refugees without allowing those needs to be politicized.

I. MAKING AND BENDING REFUGEE STANDARDS

A. *Well-Founded International Standards for Refugees*

Following the Second World War, the newly formed United Nations adopted standards for the protection of refugees based on an underlying assumption that “human beings shall enjoy fundamental rights and freedoms without discrimination,” and that these rights could not be adequately protected “without international co-operation.”¹⁹ While the 1951 Convention continues to be the foundational international statement on refugees, the UNHCR has refined the evolving concept of refugees and their rights through formally adopted protocols and administrative handbooks.²⁰

¹⁷ *Id.* at 92.

¹⁸ GARCÍA, *supra* note 2, at 86, 92.

¹⁹ 1951 Convention, *supra* note 1, pmb1. The 1951 Convention was not the first international effort to codify refugee policies. *See id.* art. 1. Article I notes five pre-WWII attempts to define refugees and their rights. *See id.*

²⁰ *See, e.g.*, U.N. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [hereinafter 1967 Protocol]; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the*

The 1951 Convention defines the qualifications for refugee status, the duties of States that ratify the agreement, and the rights to which refugees are entitled.²¹ The 1951 Convention definition of a refugee includes a person with a well-founded fear of persecution based on personal identity traits or membership in particular groups based on events prior to January 1, 1951.²² It excludes any person for whom there are reasonable grounds for believing may have “committed a crime against peace, a war crime, or a crime against humanity,” “committed a serious non-political crime outside the country of refuge,” or “been guilty of acts contrary to the purposes and principles of the United Nations.”²³ Under the 1951 Convention, refugees’ rights regarding freedom of religion, freedom of association, ownership of real and intellectual property, and access to courts are protected.²⁴ Refugees are assured of the right to wage-earning employment, rations when the host State’s population is entitled to them, access to housing on par with other non-citizens, public education, and public relief.²⁵ Furthermore, States agree to allow refugees to choose a place of residence and

Status of Refugees, U.N. Doc. HCR/IP/Eng/4/Rev.1 (Jan. 1992); UNHCR, *UNHCR Advisory Regarding the Return of Iraqis* (Sept. 2005), <http://www.unhcr.org/news/NEWS/43395ed34.html> (follow “UNHCR Advisory Regarding the Return of Iraqis” hyperlink).

²¹ 1951 Convention, *supra* note 1. The 1951 Convention should be distinguished from other foundational documents of the United Nations that did not bind States to specific obligations. See, e.g., Eleanor Roosevelt, Chairperson of the United Nations Comm’n on Human Rights, Adoption of the Declaration of Human Rights (1948), available at <http://www.udhr.org/history/ergas48.htm>. For example, by supporting the Universal Declaration of Human Rights in 1948, countries pledged themselves to a “common standard of achievement” but did not become parties to an international agreement or accept any legal obligation. See *id.* In contrast, the 1951 Convention is an international agreement under which States accept specific obligations. See 1951 Convention, *supra* note 1, pmb1.

²² 1951 Convention, *supra* note 1, art. 1. The “well-founded fear of persecution” is a key phrase of the definition. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 20, at ¶ 37. The particular context of WWII, in which horrifying numbers of people were persecuted, murdered, and driven from their homes because of their race, religion, nationality, membership in particular social groups, and political opinion, shaped the post-war understanding of refugees and thus the 1951 Convention’s definition. See Matthew E. Price, *Persecution Complex: Justifying Asylum Law’s Preference for Persecuted People*, 47 HARV. INT’L L.J. 413, 419 (2006). As a result of this historic focus on persecution of specific groups, “people caught in the crossfire of civil war or generalized violence, starving people, people without the economic resources to subsist, people forced to flee their countries due to environmental catastrophe, people forcibly recruited by a rebel militia, and battered women unable to obtain protection from the police” have often been excluded from the benefits of refugee status. See *id.* at 417.

²³ 1951 Convention, *supra* note 1, art. 1.

²⁴ *Id.* arts. 4, 13–16.

²⁵ *Id.* arts. 17, 20–23.

to move freely within their territories.²⁶ The 1951 Convention prohibits States from expelling or returning a refugee “to the frontiers of territories where his life or freedom would be threatened.”²⁷ While each ratifying State retains the right to make reservations as to the terms of the agreement, the fundamental provisions concerning the definition of a refugee and the principle that no refugee will be returned to a territory where he or she fears persecution cannot be reserved.²⁸ In 1967, the United Nations expanded the scope of protection to include individuals who became refugees after 1951 by passing the Protocol Relating to the Status of Refugees (1967 Protocol).²⁹ Currently, one hundred and forty-three States have ratified each of the agreements.³⁰ Although the United States was not a signatory to the 1951 Convention, it eventually accepted its basic tenets when it signed the 1967 Protocol.³¹

For a nation made up almost entirely of immigrants, the United States has struggled throughout its legislative history to define consistent, fair immigration policies.³² In 1965, Congress passed a new Immigration Act that allowed widespread immigration by people from around the world which altered the composition and size of the immigrant population.³³ Three years after the passage of that Act, the United States signed the 1967 Protocol and, in doing so, accepted responsibility for refugees under the newly broadened definition.³⁴ Nations, like the United States, that had not ratified the 1951 Convention but signed the 1967 Protocol, accepted *de facto* the basic principles of the 1951 Convention.³⁵ By signing the 1967 Protocol, the United States assumed responsibility for coordinating with other nations in the protection of refugees throughout the world.³⁶ Congress essentially codified the internationally accepted definition of a refugee when it passed

²⁶ *Id.* art. 26.

²⁷ *Id.* art. 33.

²⁸ 1951 Convention, *supra* note 1, art. 42.

²⁹ 1967 Protocol, *supra* note 20, art. 1.

³⁰ UNCHR, *Parties to Convention*, *supra* note 12, at 1.

³¹ *Id.*; see 1967 Protocol, *supra* note 20, art. 1.

³² See PHILLIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 2* (2000); Theresa Sidebothom, *Immigration Policies and the War on Terrorism*, 32 *DENV. J. INT'L L. & POL'Y* 539, 542 (2004).

³³ GARCÍA, *supra* note 2, at 85.

³⁴ UNHCR, *Parties to Convention*, *supra* note 12, at 4.

³⁵ See 1967 Protocol, *supra* note 20, art. 1. Given that the 1967 Protocol incorporated the basic principles of the 1951 Convention, from this point forward all references to the 1967 Protocol are intended to be inclusive of the common principles between the agreements. Alternate usages will be noted as such.

³⁶ *Id.*

the Refugee Act of 1980.³⁷ The Act, as subsequently interpreted, changed the U.S. standard for accepting refugees from a “clear probability” of persecution to a “well-founded fear” of persecution in accordance with the language of the 1967 Protocol.³⁸

These expanded allowances for immigrants and refugees were followed by the election of President Reagan and economic recession.³⁹ During the 1980s and 1990s, new immigration statutes and policies were implemented that reflected these political and economic shifts.⁴⁰ Unequal implementation of refugee policies quietly eroded opportunities for the most vulnerable.⁴¹ As a result of these politically motivated policies, the United States failed to fully implement the provisions of the 1967 Protocol and the 1980 Refugee Act and, therefore, did not meet its obligations under international or domestic law.⁴²

B. U.S. Response to Central American Migrants

While facially neutral, U.S. refugee policy during the 1980s gave preference to applicants from Communist countries while denying protection to those fleeing regimes the United States was supporting.⁴³ For example, by 1987, nearly one million migrants from Guatemala, Nicaragua, and El Salvador had arrived in the United States in need of a safe

³⁷ Immigration & Naturalization Serv. v. Stevic, 467 U.S. 407, 420 (1984); GARCÍA, *supra* note 2, at 87.

³⁸ Francis Gabor & John B. Rosenquest, *The Unsettled Status of Economic Refugees from the American and International Legal Perspectives—A Proposal for Recognition Under Existing International Law*, 41 TEX. INT'L L.J. 275, 279 (2006); *see Stevic*, 467 U.S. at 424.

³⁹ GARCÍA, *supra* note 2, at 85–86.

⁴⁰ *Id.* at 86. For example, the Immigration Reform and Control Act of 1986 attempted to control illegal immigration by punishing employers who gave work to illegal immigrants. Gabor & Rosenquest, *supra* note 38, at 279.

⁴¹ *See* GARCÍA, *supra* note 2, at 89. The State Department has discretionary authority to grant a special, temporary status (Extended Voluntary Departure) to citizens of another country whose lives might be jeopardized by returning to their country of origin; this status was not assigned to Central Americans during the 1980s. *See id.* *See generally* Lynda J. Oswald, *Extended Voluntary Departure Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152 (1986) (examining the denial of Extended Voluntary Departure to Salvadorans). Extended Voluntary Departure has been granted to citizens of at least fourteen nations including Cubans, Vietnamese, Iranians, Ethiopians, Afghans, Ugandans, and Poles. GARCÍA, *supra* note 2, at 89. However, it was not assigned to Central Americans during the 1980s because the Reagan administration argued that the violence was not substantial enough, that there were sufficient avenues for refugees to seek protection, that the massive numbers of potential petitioners made it administratively impossible, and that providing a blanket protection would encourage additional unwanted migration. *See id.* at 89–90.

⁴² GARCÍA, *supra* note 2, at 87, 99.

⁴³ *See id.* at 88, 89.

haven from direct persecution and on-going violence in their home countries.⁴⁴ A very small percentage of these migrants were granted immigration visas or refugee status.⁴⁵ Generally, the United States viewed these and other migrants from Central America “as yet another drain” on a “fragile economy” and therefore treated them as unwelcome intruders.⁴⁶ Furthermore, the Reagan administration argued that containment of Communism in Central America required the establishment of economic stability and that discouraging migration from Central America, especially into the United States, would create stability and foster democracy.⁴⁷

U.S. foreign and humanitarian policies towards Central America were compromised by the primary objective of containing Communism and establishing democracy in the region.⁴⁸ Although the Refugee Act of 1980 formally adopted the 1967 Protocol’s definition of a refugee and attempted to standardize the process of applying for refugee status, the majority of those receiving refugee status throughout the 1980s continued to come from Communist countries.⁴⁹ The United States’

⁴⁴ See *id.* at 85.

⁴⁵ See *id.* This Book Review focuses primarily on those individuals with refugee status. However, there is a statutory distinction between those seeking an immigration visa and those seeking refugee status. See 8 U.S.C. § 1101 (a) (2000 & Supp. IV 2004). When an individual applies for an immigrant visa, he seeks permission to enter the United States with the intention of applying for permanent residence status. See *id.* § 1151(a). There are twenty categories of aliens who do not seek permanent resident status and are not defined as immigrants; they include representatives of other nations, those traveling temporarily for business or pleasure, and students. *Id.* § 1101 (a). All other aliens are considered immigrants. See *id.* In contrast, the definition of a refugee is based on the individual’s physical location and reason for being outside of their country. See *id.* A refugee becomes eligible to apply for permanent residence after being physically present in the United States for one year. *Id.* § 1159(a)(1).

⁴⁶ See GARCÍA, *supra* note 2, at 85–86.

⁴⁷ See *id.* at 86. In addition to denying refuge, the United States sought to discourage migration of any kind out of Central America by providing substantial development aid and funds to assist people in the region. See *id.* Between 1984 and 1989 the United States provided over \$5 billion in development aid to the Central American countries of Guatemala, El Salvador, Costa Rica, Belize, and Honduras. See *id.* In addition, the United States contributed over \$100 million to the UNHCR and the International Committee of the Red Cross for their work with displaced Central Americans. *Id.* at 86–87. The political purpose of these seemingly generous aid programs is clear in U.S. Coordinator for Refugee Affairs Jonathan Moore’s description of the purpose of the expenditures: “to support the return of economic stability to the region, to establish the foundation for broad-based sustained growth, and to encourage the growth of democracy and democratic institutions.” Jonathan Moore, *Developing Solutions for Central American Refugee Problems*, 89 DEP’T ST. BULL., Aug. 1989, at 87.

⁴⁸ See GARCÍA, *supra* note 2, at 1–2, 9.

⁴⁹ *Id.* at 87–88. By 1990, more than ninety percent of individuals granted refugee status were from Communist or Communist-dominated countries. *Id.* at 88.

political agenda led the country to condemn Communist countries known to persecute their citizens while failing to acknowledge that many of the regimes it supported were also persecuting their citizens.⁵⁰ The inconsistency of this policy was noted by activist William Sloane Coffin:

Were the U.S. government today forcibly returning Soviet Jews to the Soviet Union, or Poles to Poland, neither the Congress nor the American people would stand for it. . . . Why do they tolerate the forceful repatriation of Guatemalans to a government widely viewed as the most brutal in the entire Western hemisphere?⁵¹

Article III of the 1951 Convention requires that States not consider national origin in the granting of refugee status.⁵² The United States voluntarily accepted an obligation to uphold this Article by agreeing to the 1967 Protocol and adopting the Refugee Act of 1980.⁵³ Yet, to the detriment of thousands of Central Americans, the country disregarded its commitment under international law and regularly considered national origin in determining which persecuted people to protect.⁵⁴ In 1985, eighty religious and refugee assistance groups challenged this unwritten policy in a class action lawsuit that aimed to secure asylum for Guatemalans and Salvadorans.⁵⁵ Six years later, a settlement agreement with the federal government prohibited those making refugee decisions from considering a petitioner's country of origin or whether the United States supported or had a favorable relationship with that country in deciding whether the petitioner had a well-founded fear of per-

⁵⁰ See *id.* at 10. U.S. relations with Nicaragua in the mid-1980s provide a good example of simultaneous shifts in refugee and foreign policy. See *id.* at 114. In 1985, the United States increased support for the Contras' efforts against the Sandinista government as it began responding to the refugee needs of Nicaraguans. *Id.* As President Reagan asked Congress for more money for the Contras, the Director of the Immigration and Naturalization Service in southern Florida announced that he would no longer reject Nicaraguans' asylum claims: "It is agonizing to have to reject their applications because their asylum claims under present regulations are very hard to prove. Nicaraguans are fleeing Communism." *Id.*

⁵¹ See *id.* at 96 (quoting William Sloane Coffin, *The Task Ahead*, in *SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEE'S STRUGGLE* 177, 177 (Gary MacEoin ed., 1985)).

⁵² 1951 Convention, *supra* note 1, art. 3.

⁵³ *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 424 (1984); see 1967 Protocol, *supra* note 20, art. 1.

⁵⁴ See GARCÍA, *supra* note 2, at 162.

⁵⁵ See *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991); GARCÍA, *supra* note 2, at 111.

secution.⁵⁶ The specificity with which the settlement articulated this rule suggests that the court found the government's unwritten policy exceptionally problematic:

WHEREAS, under the new asylum regulations as well as the old: foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; whether or not the United States Government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities⁵⁷

As a result of this settlement, more than 150,000 Salvadorans and Guatemalans who were in the United States had the opportunity to reapply for refugee status.⁵⁸ Unfortunately, this decision could not protect the thousands of Salvadorans and Guatemalans who had been denied refugee status and were deported back to their country of origin.⁵⁹

That the United States did not provide refuge for these Central Americans was a humanitarian failure driven by foreign policy concerns.⁶⁰ The costs of these policies were borne by the overwhelming majority of refugees who sought and were not given safe haven.⁶¹ Despite pledging in the 1967 Protocol to protect those seeking refuge from well-founded fears of persecution, the United States instead

⁵⁶ *Am. Baptist Churches*, 760 F. Supp. at 799. In February 2005, the U.S. Commission on Religious Freedom reported that the probability of receiving asylum still depended heavily on the claimant's country of origin. See GARCÍA, *supra* note 2, at 162. For example, at that time a person seeking asylum from El Salvador had a six percent chance of being granted asylum while a Cuban had an eighty percent chance. *Id.*

⁵⁷ *Am. Baptist Churches*, 760 F. Supp. at 799.

⁵⁸ See GARCÍA, *supra* note 2, at 112.

⁵⁹ *Am. Baptist Churches*, 760 F. Supp. at 799. A mere 2.6% of Salvadoran and 1.8% of Guatemalan applications for asylum were accepted between 1983 and 1990. GARCÍA, *supra* note 2, at 113. In a telling contrast, 76.7% of those seeking asylum from the Soviet Union were accepted. See *id.*

⁶⁰ See GARCÍA, *supra* note 2, at 10, 88–89.

⁶¹ See *id.* at 90.

placed the burden of its foreign policy priorities directly upon the most vulnerable.⁶²

II. TAKING THE SAME PATH IN THE MIDDLE EAST?

*The American invasion and the lack of a coherent strategy to ensure the safety of Iraqi citizens and rebuild post-invasion Iraq are the root cause of Iraqi suffering. The United States is, therefore, to blame, and as Iraqis are obviously fleeing from political persecution, the honorable thing to do is for President Bush to grant these Iraqis asylum in the United States!*⁶³

The failure of U.S. policy towards Central America in the 1980s should serve as a warning of the risks of imposing democracy, supporting alternating regimes, and failing to provide adequate responses to humanitarian need.⁶⁴ Instead, the United States has taken a very similar path in Iraq and risks many of the same humanitarian failures.⁶⁵ As it did with Central America, the United States initially supported a regime that it later worked to dismantle.⁶⁶ The invasion of Iraq; the cap-

⁶² See *id.*; 1951 Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 20, art. 1.

⁶³ Brant Thomas, Letter to the Editor, *Asylum for Iraqis*, N.Y. TIMES, May 22, 2006, at A20.

⁶⁴ See GARCÍA, *supra* note 2, at 8, 14–15.

⁶⁵ See Robert Buzzanco, *How Did Iraq and the United States Become Enemies?*, GEORGE MASON U. HIST. NEWS NETWORK, Oct. 28, 2002, <http://hmn.us/articles/1066.html>; Refugees Int'l, *Iraqi Refugees in Syria: Silent Exodus Leaves 500,000 in Need of Protection and Aid*, Nov. 15, 2005, <http://www.refintl.org/content/article/detail/7297/> [hereinafter Refugees Int'l, *Iraqi Refugees in Syria*]; INT'L COMM. OF THE RED CROSS, ICRC ACTIVITIES IN IRAQ: APRIL TO JUNE 2006, June 30, 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/html/iraq-update-300606> ("Daily acts of violence that violate the basic rules of international humanitarian law have unfortunately become a feature of life in Iraq, with civilians continuing to die as a result of indiscriminate attacks, targeted assassinations and military operations."). Although the number of Iraqis who have sought refuge in the United States is small in comparison to the massive number of Central Americans who did so in the 1980s, U.S. responsibility under the 1967 Protocol to address the refugees' needs at home and abroad is just as imperative. See 1951 Convention, *supra* note 1, pmb1.; 1967 Protocol, *supra* note 20, art. 1.

⁶⁶ See Buzzanco, *supra* note 65. As early as 1955, the United States made strategic alliances with Iraq and other Middle Eastern countries in an effort to contain Communism through an agreement called the "Baghdad Pact," which set terms for coordinating regional affairs. *Id.* In 1958, a nationalist coup forced pro-American King Faisal out of power leading to the dissolution of the Baghdad Pact and a takeover over by Gen. Abdel Karim Kassim. *Id.* Repression of Saddam Hussein and other leaders of the Iraqi Left under Kassim ended when Kassim was assassinated in a coup led by the Ba'ath Party in 1963. *Id.* The Ba'ath party received intelligence support from the United States during the following five years, leading eventually to the Ba'aths, including member Saddam Hussein, taking power. *Id.* The United States brokered an agreement to harden the border between Iraq and Turkey in 1975 which led to the mass murder of Kurdish rebels in the northern region of

ture, trial, and execution of Saddam Hussein; and the attempts to establish interim democratic governments have all been accompanied by massive civilian death and displacement.⁶⁷ The primary justifications for the U.S.-led invasion of Iraq have been the pursuit of terrorists, the need for preventative warfare, and the belief that “democracy is a necessary and lacking institution in the Middle East that will keep the West safe from terrorism.”⁶⁸ The argument that forcing the establishment of democracy will create stability and stave off a contrary force, whether it be Communism or terrorism, is not new and has not been proven to be correct.⁶⁹ Between the March 2003 U.S.-led invasion and September 2006, as many as 600,000 Iraqi civilians were killed and nearly 900,000

Iraq. *Id.* During the 1980s, the United States and Iraq jointly opposed the Islamic Revolution in Iran. *Id.* In that decade, the United States provided Saddam Hussein’s government with over \$40 billion in weapons and technology intended for use in fighting Iran, in addition to significant economic aid. *Id.* In August 1990, Iraq invaded its neighboring country of Kuwait in an effort to control oil exports in the region. *See id.* Following a warning to retreat by the United States and Great Britain, U.S. troops initiated air and ground attacks and forced the retreat of the Iraqi military from Kuwait. *Id.* During the 1990s, the United States and United Nations placed sanctions on Iraq in order to instigate regime change which, according to some human rights groups, led to disastrous health conditions and close to one million deaths. *Id.* As it had done in Nicaragua, the United States then began supporting groups that opposed the leader it had previously helped to install. *See News-Hour: Opposing Saddam* (PBS television broadcast Aug. 8, 2002), available at http://www.pbs.org/newshour/bb/middle_east/july-dec02/opposition_8-8.html#. Following the attacks of September 11, 2001, the Bush administration began planning an invasion of Iraq as a key facet of the “War on Terror.” *See* Seymour M. Hersh, *The Stovepipe; How Conflicts Between the Bush Administration and the Intelligence Community Marred the Reporting on Iraq’s Weapons*, NEW YORKER, Oct. 27, 2003, at 77. In March 2003, U.S.-led forces invaded Iraq under the pretext of Iraq’s refusal to provide information about its presumptive development of weapons of mass destruction. *See* Kevin J. Fandl, *Recalibrating the War on Terror by Enhancing Development Practices in the Middle East*, 16 DUKE J. COMP. & INT’L L. 299, 300 (2006); President George W. Bush, President Bush Addresses the Nation (March 19, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>. In May 2003, President Bush declared that, “[i]n the battle of Iraq, the United States and our allies have prevailed. . . . [T]he tyrant has fallen, and Iraq is free.” President George W. Bush, President Bush Announces Major Combat Operations in Iraq Have Ended (May 1, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030501-15.html>.

⁶⁷ *See* Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 THE LANCET 1421, 1421 (2006), available at <http://www.thelancet.com/webfiles/images/journals/lancet/s0140673606694919.pdf>. The controversial Lancet study estimates that over 650,000 people may have died between March 2003 and September 2006 as a result of the war. *Id.* That figure includes approximately 100,000 people who died between March 2003 and September 2004. *Id.* As such, it is possible that as many as 550,000 people died between September 2004 and September 2006. *Id.*

⁶⁸ *See* Fandl, *supra* note 66, at 310, 324.

⁶⁹ *See id.* at 317–18.

sought refuge outside of Iraq.⁷⁰ The Iraq Study Group, a bi-partisan initiative to reassess the situation in Iraq, noted the risk of not addressing the refugee crisis: "The number of refugees and internally displaced persons within Iraq is increasing dramatically. If this situation is not addressed, Iraq and the region could be further destabilized, and the humanitarian suffering could be severe."⁷¹

These refugees have primarily sought safety in the neighboring countries of Syria and Jordan.⁷² Substantial numbers of Iraqi refugees have also gone to Australia, Denmark, Germany, Iran, the Netherlands, Norway, Sweden, the United Kingdom, and the United States.⁷³ All of these countries, save Norway, exceeded the United States in their acceptance of Iraqi refugees.⁷⁴ While geography and the ease of travel play a role in where persecuted peoples seek refuge, the relatively low number of Iraqi refugees in the United States can partially be attributed to an overall drop in the number of refugees accepted into the United States following the attacks of September 11, 2001.⁷⁵

⁷⁰ See Burnham, *supra* note 67, at 1421; Tavernise, *supra* note 3. Estimates of the number of Iraqis who have sought refuge outside of Iraq vary widely. See Burnham, *supra* note 67, at 1421; Tavernise, *supra* note 3; UNHCR, *Global Refugee Trends*, *supra* note 3, at tbl.2. Even conservative estimates, such as that of the UNHCR, suggest that by the end of 2005 there were approximately 260,000 Iraqi refugees. See UNHCR, *Global Refugee Trends*, *supra* note 3, at tbl.2. The disparity likely derives from the methods used to assess the number of refugees and the definition of refugee being applied. See Tavernise, *supra* note 3.

⁷¹ JAMES A. BAKER, III ET AL., THE IRAQ STUDY GROUP REPORT 58, 103 (2006).

⁷² See Tavernise, *supra* note 3. The U.S. Committee for Refugees and Immigrants estimated that there were 644,500 Iraqi refugees in Syria and Jordan at the end of 2005. *Id.* Syria has the most open border policies, granting Iraqis fleeing their home country permission to remain legally in Syria as a temporary resident for up to six months. See Refugees Int'l, *Iraqi Refugees in Syria*, *supra* note 65.

⁷³ See UNHCR, *Global Refugee Trends*, *supra* note 3, at tbl.5.

⁷⁴ *Id.* According to the UNHCR, the Iraqi refugee population in the United States as of June 2, 2006 was 9150, compared to 93,173 in Iran, 68,071 in Germany, 27,622 in the Netherlands, 22,763 in the United Kingdom, 22,028 in Sweden, 11,500 in Denmark, 11,471 in Australia, and 8265 in Norway. *Id.*

⁷⁵ Donald Kerwin, *The Use and Misuse of "National Security" Rationale in Crafting U.S. Refugee and Immigration Policies*, 17 INT'L J. REFUGEE L. 749, 756 (2005). Between 1999 and 2001 the United States admitted an average of just over 75,000 refugees per year; in contrast, the average during the following three years was approximately 36,000. See *id.* One post-September 11th reduction of refugee allowances occurred when the Bush administration immediately suspended refugee resettlement programs, leaving thousands of refugees in refugee camps. See Marisa Silenzi Cianciarulo, *The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in a Post-September 11 World*, 17 YALE J.L. & FEMINISM 459, 478 (2005). Historically, the United States has accepted more refugees for permanent resettlement than other countries. *Id.* at 471. This impetuous policy change is particularly alarming in light of the fact that no terrorist in U.S. history, including the September 11th terrorists, entered the country under the refugee resettlement program. See Marisa Silenzi

Congress made seeking refuge significantly more difficult by passing the REAL ID Act of 2005.⁷⁶ This Act made major changes in the proof an individual requesting refugee status must provide and the qualifications for refugee status.⁷⁷ The Act imposes a new burden of proof on an individual to demonstrate that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”⁷⁸ Instead of requiring that an applicant prove a well-founded fear of persecution, the Act now places an exceptionally high burden on refugee applicants to prove the actual reason for their persecution.⁷⁹ In effect, the Act changes the definition of a refugee from someone who can prove that they have a legitimate fear of persecution to someone who can prove the motives of their persecutors.⁸⁰ Changing the definition of a refugee or the statutory criteria for obtaining refugee status may be an alteration of an unreservable provision of the 1951 Convention.⁸¹ As such, the change stands in direct conflict with the United States’ commitment under the 1967 Protocol.⁸²

In addition, the Act prohibits those who know or should have known that their actions afforded material support to a terrorist or-

Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 104 (2006) [hereinafter Cianciarulo, *Terrorism and Asylum Seekers*].

⁷⁶ See 8 U.S.C.A. § 1158(b)(1)(B)(i) (West 2005) (changing the requirement from a “well-founded fear of persecution”); Kerwin, *supra* note 75, at 757.

⁷⁷ Cianciarulo, *Terrorism and Asylum Seekers*, *supra* note 75, at 115–16; see Eleanor Acer, *Refugee in an Insecure Time, Seeking Asylum in the Post 9/11 United States*, 28 FORDHAM INT’L L.J. 1361, 1393–94 (2005).

⁷⁸ 8 U.S.C.A. § 1158(b)(1)(B)(i). Cianciarulo has argued that interpretation of the REAL ID Act should preserve the Supreme Court’s declaration in *Immigration & Naturalization Service v. Elias-Zacarias* that eligibility for asylum should not depend on “direct proof of [the] persecutors’ motives.” See 502 U.S. 478, 483 (1992); Cianciarulo, *Terrorism and Asylum Seekers*, *supra* note 75, at 120.

⁷⁹ See Letter from American Bar Association Governmental Affairs Office to Congressional Representatives, (Feb. 9, 2005) available at <http://www.abanet.org/poladv/letters/109th/immigration020905.pdf> [hereinafter ABA Letter]. In opposing this provision of the Act, the ABA argued that it would “present nearly insurmountable obstacles for genuine refugees,” because “[p]lacing the additional burden on asylum seekers of not only having to establish why another person took certain actions, but the degree to which that person was motivated by a particular reason to the exclusion of others, is an extreme and unattainable standard of proof.” *Id.*

⁸⁰ See 8 U.S.C.A. § 1158(b)(1)(B)(i) (West 2005); 8 U.S.C. §§ 1101(a)(42), 1158(b) (2004).

⁸¹ See 1951 Convention, *supra* note 1, art. 42; UNHCR, INTRO. TO CONVENTION & PROTOCOL, *supra* note 1, at 5.

⁸² See 1951 Convention, *supra* note 1, art. 42; UNHCR, INTRO. TO CONVENTION & PROTOCOL, *supra* note 1, at 5.

ganization or its members from applying for refuge.⁸³ This requirement denies protection to those in the greatest need, particularly those people “who have taken up arms in resistance, in self-defense against such violent forces, as well as for those who have provided financial support, food, or clothing to others engaged in resistance.”⁸⁴ Supporters of the Act justify its hurdles by citing national security concerns; a justification that many have argued is invalid.⁸⁵ Even some organizations that generally support the REAL ID Act have objected strongly to this provision.⁸⁶ Gary Bauer, the president of the conservative public policy group American Values, described the enforcement of the REAL ID Act as having lapsed “into ludicrousness,” as he explained that “[t]he concept of material support is being distorted and even the definition of the term ‘terrorism’ is being turned on its ear.”⁸⁷

⁸³ See 8 U.S.C.A. §§ 1158(b)(2)(A)(v), 1182(a)(3)(B) (West 2005). Much has been written about the implications of these exclusions on refugee seekers who have been forced by terrorist groups to participate in or support terrorist activities and, therefore, to commit crimes against peace or humanity. See generally, e.g., Michele L. Lombardo et al., *Terrorism, Material Support, the Inherent Right to Self-Defense, and the U.S. Obligation to Protect Legitimate Asylum Seekers in a Post-9/11, Post-PATRIOT Act, Post-REAL ID Act World*, 4 REGENT J. INT’L L. 237 (2006). The Antiterrorism and Effective Death Penalty Act of 1996 was the first U.S. act to explicitly bar “providing material support or resources” to “foreign terrorist organizations.” See 18 U.S.C. § 2339A (1994 & Supp. II 1996); Lombardo et al., *supra*, at 239. This prohibition has been widely criticized for failing to provide an exception for refugees who have been forced to make payments to or provide shelter to terrorist groups. See Amnesty Int’l, USA: *Amnesty International Briefing to the Human Rights Committee on the Implementation of the International Covenant on Civil and Political Rights*, at 60, AI Index AMR 51/111/2006, July 2006, available at [http://web.amnesty.org/library/pdf/AMR511112006ENGLISH/\\$File/AMR51111106.pdf](http://web.amnesty.org/library/pdf/AMR511112006ENGLISH/$File/AMR51111106.pdf) [hereinafter Amnesty Int’l, *Civil and Political Rights*]. An example of the implementation of this provision is found in the unpublished decision in *Arias v. Gonzales*, 143 F. App’x 464, 468 (3d Cir. 2005). The Third Circuit Court of Appeals found that a Columbian man who fearfully made payments on his boss’s behalf to a violent paramilitary group had provided material support to a terrorist organization and was therefore inadmissible. See *id.*

⁸⁴ See Lombardo et al., *supra* note 83, at 238.

⁸⁵ See Cianciarulo, *Terrorism and Asylum Seekers*, *supra* note 75, at 101–02. While arguing for the passage of the REAL ID Act, Rep. James Sensenbrenner (R-Wis.), its author, referred to four non-citizen terrorists and stated that “[e]very one of these non-9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum applicant.” See *id.* In fact, all four of the men he referred to were denied asylum under a more permissive asylum policy. See *id.* at 105. Furthermore, the Act does not specifically target possible terrorists, but instead affects all refugee applicants. See *id.* at 103; see also Kerwin, *supra* note 75, at 757–58 (describing how post-9/11 legislation intended to increase national security has undermined refugee protections).

⁸⁶ Darryl Fears, *Conservatives Decry Terror Laws’ Impact on Refugees*, WASH. POST, Jan. 8, 2007, at A3.

⁸⁷ *Id.*

According to the American Bar Association, the possibility that the Act will deny protection to bona fide refugees is “inconsistent with America’s role as a champion of human rights and threatens [the country’s] longstanding commitment to the protection of those fleeing persecution throughout the world.”⁸⁸ By passing the REAL ID Act, Congress disregarded the country’s obligations under the 1967 Protocol.⁸⁹

III. SUGGESTIONS FOR FULFILLING INTERNATIONAL REFUGEE OBLIGATIONS

In the 1980s, activists opposed to U.S. involvement in Central America and to the unequal application of statutory protections for refugees argued that humanitarian policy needed to align more closely to foreign policy to ensure the safety of millions of persecuted migrants.⁹⁰ They identified an inconsistency in contributing to violence and upheaval that drove millions from their homes without providing sufficient refuge for dislocated victims of persecution.⁹¹ The same argument has been made regarding the U.S. involvement in Iraq, perhaps with even greater force due to the fact that the United States has invaded and occupied Iraq.⁹² Sen. Edward Kennedy (D-Mass.) expressed this sense of responsibility: “The refugees are witnesses to the cruelty that stains our age, and they cannot be overlooked. America bears heavy responsibility for their plight. We have a clear obligation to stop ignoring it and help chart a sensible course to ease the refugee crisis. Time is not on our side.”⁹³

However, the United States’ obligation to provide humanitarian relief for Iraqis should not and does not depend upon its role in the war.⁹⁴ Under the 1967 Protocol, the United States agreed to work with other States to provide refuge for persons with a “well-founded fear of

⁸⁸ ABA Letter, *supra* note 79, at 4.

⁸⁹ See Amnesty Int’l, *Civil and Political Rights*, *supra* note 83, at 60. Amnesty International has also raised concerns that other pending legislation will further undermine the United States’ commitment to international obligations because it would “erode due process for non-citizens” and “criminalize all violations of immigration law.” *See id.*

⁹⁰ See GARCÍA, *supra* note 2, at 92.

⁹¹ *See id.*

⁹² See Thomas, *supra* note 63; Refugees Int’l, *U.S. Unprepared for Humanitarian Obligations of Iraq Occupation*, Mar. 10, 2003, available at <http://www.refintl.org/content/article/detail/845> (explaining that under the Fourth Geneva Convention a country that invades and conquers another takes on specific humanitarian obligations for the civilian population).

⁹³ Edward M. Kennedy, Editorial, *We Can’t Ignore Iraq’s Refugees*, WASH. POST, Dec. 30, 2006, at A21.

⁹⁴ See 1951 Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 20, art. 1.

persecution.”⁹⁵ Article III of the 1967 Protocol requires that States inform the United Nations of the “laws and regulations they may adopt to ensure the application” of the agreement.⁹⁶ The Refugee Act of 1980 should have ensured the application of the 1967 Protocol; instead, it was implemented in a discriminatory manner when distinctions based on national origin affected the acceptance of refugee applications.⁹⁷ As a result, the United States failed to meet the standards established by the 1967 Protocol.⁹⁸

While the federal courts addressed and attempted to remedy this situation in the 1980s, the passage of the REAL ID Act of 2005 codified the United States’ defiance of its obligations under the 1967 Protocol.⁹⁹ The United States should acknowledge and act upon its voluntarily accepted obligation by immediately amending the portions of the REAL ID Act that distort the definition of a refugee.¹⁰⁰ Congress should repeal the new burden of proof placed on a refugee applicant to prove the reason for his or her persecution.¹⁰¹ In addition, the material support provision of the REAL ID Act should be amended to clarify that the bar only applies to those individuals who pose a danger to the United States and that having provided support under duress or oppression is a defense against this bar.¹⁰²

In order to fulfill its commitment under the 1967 Protocol, the United States must not only reform the REAL ID Act, but also must adopt policies that conform to international law and provide resources to respond to the urgent needs of persecuted Iraqis.¹⁰³ Although the

⁹⁵ See 1951 Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 20, art.1.

⁹⁶ See 1951 Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 20, art.1.

⁹⁷ See GARCÍA, *supra* note 2, at 11–12.

⁹⁸ See 1951 Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 20, art.1.

⁹⁹ See *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991); ABA Letter, *supra* note 79.

¹⁰⁰ See Cianciarulo, *Terrorism and Asylum Seekers*, *supra* note 75, at 120; ABA Letter, *supra* note 79.

¹⁰¹ See Cianciarulo, *Terrorism and Asylum Seekers*, *supra* note 75, at 120; ABA Letter, *supra* note 79.

¹⁰² ELEANOR ACER ET AL., HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM & OPPRESSION BARRED FROM ASYLUM 11–12 (2006), <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf>. In January 2007, the Bush administration announced that it would no longer apply the material support bar to individuals with connections to specific terrorist groups in Burma, Cuba, Tibet, and Myanmar. See Press Release, Dep’t of Homeland Security, Intention to Use Discretionary Authority for Material Support to Terrorism (Jan. 19, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm; HUMAN RIGHTS FIRST, MATERIAL SUPPORT UPDATE 1 (2007), <http://www.humanrightsfirst.info/pdf/07125-asy-matl-sup-update.pdf>.

¹⁰³ See 1951 Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 20, art.1.

number of Iraqi refugees in the United States may remain relatively low, the country has an obligation to work with other States to protect refugees.¹⁰⁴ The preamble to the 1951 Convention explained that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem [with an] international scope and nature cannot therefore be achieved without international co-operation.”¹⁰⁵ As such, the United States should continue to increase contributions to refugee organizations such as the UNHCR and the International Committee of the Red Cross to provide for the basic health, shelter, and education needs of Iraqi refugees throughout the world.¹⁰⁶ In 2006, the United States contributed approximately \$8 million to the UNHCR’s efforts in Iraq, which constituted more than half of the total contributions worldwide.¹⁰⁷ The UNHCR has stated that it will need almost \$60 million to help Iraqi refugees in 2007.¹⁰⁸ In February 2007, the United States agreed to provide \$18 million of the needed \$60 million.¹⁰⁹ While this is a significant increase in actual funds, it does not represent an increase that is proportional to the expected need.¹¹⁰

Additional steps the United States could take include using diplomatic force to influence the actions of other countries in augmenting

¹⁰⁴ See 1951 Convention, *supra* note 1, art. 1; 1967 Protocol, *supra* note 20, art.1.; UNHCR, *Global Refugee Trends*, *supra* note 3, at tbl.5. In February 2007, the Bush administration announced that it will allow 7000 Iraqi refugees to resettle in the United States. Nora Boustany & Joshua Partlow, *U.S. Agrees to Resettle Refugees from Iraq*, WASH. POST, Feb. 15, 2007, at A22. This will be a fourteen-fold increase over the number of Iraqi refugees currently resettled in the United States. *See id.*

¹⁰⁵ See 1951 Convention, *supra* note 1, pmb1.

¹⁰⁶ See Refugees Int’l, *Iraqi Refugees in Syria*, *supra* note 65, at 2. Similar emergency humanitarian funds were allocated by President Bush for the protection of Afghan refugees in September 2001. *See* Exec. Determination No. 2001-30, 66 Fed. Reg. 51,291 (Oct. 9, 2001). There is a telling contrast between the \$250 billion the United States had spent in Iraq by April 2006 and the mere \$5 billion that the U.S. Agency for International Development had spent there as of November 2006. *Paying for Iraq: Blood and Treasure*, ECONOMIST, Apr. 8, 2006, at 81; U.S. AGENCY FOR INT’L DEV., SUMMARY IRAQ HUMANITARIAN AND RECONSTRUCTION ASSISTANCE FINANCIAL SUMMARY 3 (2006), http://www.usaid.gov/iraq/updates/nov06/iraq_sum01_110106.pdf.

¹⁰⁷ UNHCR, SUPPLEMENTARY APPEAL IRAQ SITUATION RESPONSE 12 (Jan. 2007), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=45a4a2472>. The total cost of UNHCR expenses in 2006 totaled approximately \$30 million, about \$9 million of this was covered by funds carried over from 2005. *Id.*

¹⁰⁸ *Id.* at 11.

¹⁰⁹ Boustany & Partlow, *supra* note 104.

¹¹⁰ *See id.*; UNHCR, SUPPLEMENTARY APPEAL IRAQ SITUATION RESPONSE, *supra* note 107, at 12.

the protected statuses available to Iraqis.¹¹¹ The United States should use its diplomatic power to condemn countries that force Iraqi refugees to return to Iraq before “sufficient guarantees are in place to ensure that their return is safe and dignified.”¹¹² By doing so, the United States will uphold the 1951 Convention’s prohibition against the return of refugees if their lives or freedom will be threatened.¹¹³ Looking beyond the basic requirements of the 1967 Protocol, the United States might follow the lead of many European countries by creating alternative protections for Iraqis who have not qualified for refugee status.¹¹⁴ For example, Norway, Sweden, Switzerland, and Belgium have all granted subsidiary forms of protection or indefinitely extended deportation deadlines for Iraqis whose refugee applications have been denied.¹¹⁵

CONCLUSION

In *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada*, María Cristina García articulates the 1980s activist argument that the United States had a moral and legal obligation to provide refuge for Central American refugees.¹¹⁶ The country’s legal obligation originated in its joining the 1967 Protocol and was codified in domestic law through the passage and interpretation of the Refugee Act of 1980.¹¹⁷ Without addressing the moral issue of whether involvement in the upheaval that led to mass migration from Central America created an additional moral obligation, this Book Review argues that the international legal obligation alone demanded consistent, fair application of refugee policy. Through their protest, civil disobedience, lobbying, and legal efforts, activists drew attention to the fact that unof-

¹¹¹ See European Council on Refugees and Exiles, *Guidelines on the Treatment of Iraqi Asylum Seekers and Refugees in Europe*, 18 INT’L J. REFUGEE L. 452, 453 (2006); 1951 Convention, *supra* note 1, art. 33.

¹¹² See 1951 Convention, *supra* note 1, art. 33; Amnesty Int’l, *United Kingdom: Forcible Return to Iraq Would Be Unlawful*, AI Index: EUR 45/034/2005, Aug. 28, 2005, available at <http://web.amnesty.org/library/print/ENGEUR450342005>; *supra* note 27 and accompanying text.

¹¹³ 1951 Convention, *supra* note 1, art. 33.

¹¹⁴ European Council on Refugees and Exiles, *supra* note 111, at 463. The legal means for providing such protections exist in Extended Voluntary Departure as discussed earlier. See *supra* note 41.

¹¹⁵ *Id.* President Bush could exercise his authority under existing law to expand refugee protections in the case of “an unforeseen emergency refugee situation” that is “justified by grave humanitarian concerns.” 8 U.S.C.A. § 1157(b) (West 2005).

¹¹⁶ GARCÍA, *supra* note 2, at 92.

¹¹⁷ *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991); 1967 Protocol, *supra* note 20, art. 1; GARCÍA, *supra* note 2, at 87.

ficial U.S. policy failed to comply with international and domestic law.¹¹⁸

The U.S.-led war in Iraq has created hundreds of thousands of refugees.¹¹⁹ As it was in the 1980s, the United States is now faced with responding to a refugee crisis that it had a hand in creating. In the 1980s the country discriminatorily implemented laws that complied with international law; the United States has now gone beyond its past abrogation by passing the REAL ID Act of 2005, which substantially negates the essential principle that a person with a “well-founded fear of persecution” will be protected as a refugee.¹²⁰ In order to fulfill its legal duty under the 1967 Protocol, the United States must amend the portions of the REAL ID Act that contradict its international obligations and act definitively to provide the resources and support that Iraqi refugees require.

¹¹⁸ GARCÍA, *supra* note 2, at 86.

¹¹⁹ See Tavernise, *supra* note 3.

¹²⁰ 8 U.S.C.A § 1158(b)(1)(B)(i).

