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# REFUGEES, *REFOULEMENT*, AND FREEDOM OF MOVEMENT: ASYLUM SEEKERS' RIGHT TO ADMISSION AND TERRITORIAL ASYLUM

TIMOTHY E. LYNCH\*

## ABSTRACT

*Despite the assertions by many, including eminent refugee scholars, UNHCR, and other refugee advocates, and except within the contexts of the regional regimes of Africa and Latin America, international law, including the 1951 Refugee Convention (and its 1967 Protocol) and the customary international law of non-refoulement, does not obligate States to admit into their territories asylum seekers or refugees, including those who appear at their frontiers seeking territorial asylum. This Article establishes this claim, considers this absence as a normative incoherency within international refugee law, and then concludes by urging States to consent to an obligation to admit asylum seekers who appear at their frontiers and provide them territorial asylum, at least on a temporary basis.*

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#### INTRODUCTION

In 1939, the ocean liner *MS St. Louis* sailed from Germany with over 900 Jewish passengers. They were fleeing Nazi persecution. The ship sailed for Cuba, where the passengers expected to find refuge. However, Cuba admitted only twenty-eight passengers and refused to admit the rest. The ship then set

sail for Florida in the hopes of finding refuge in the United States. The ship came within sight of Miami's palm trees, and several of Miami's citizens boated out to the *St. Louis* and delivered fresh food. But the U.S. government refused to allow the ship to dock and categorically refused to accept any passengers. In fact, in order to ensure the captain of the ship would not purposefully run aground on U.S. territory, the *St. Louis* was escorted out of U.S. territorial waters by Coast Guard vessels. Canada immediately thereafter made it clear that it, too, would refuse to admit any of the refugees. With conditions on the ship deteriorating and seemingly nowhere else to go, the ship returned to Europe.<sup>1</sup> Approximately thirty percent of those passengers were later murdered in the Holocaust.<sup>2</sup>

In 2012, the U.S. Department of State formally acknowledged that the United States was “wrong” to reject the refugees,<sup>3</sup> and in 2018, Canadian Prime Minister Justin Trudeau formally apologized to the survivors.<sup>4</sup> But the memory of those who suffered and died in the Holocaust is a painful reminder of what a lack of generosity toward people suffering foreign persecution can mean. “We were not wanted,” a *St. Louis* survivor told a *Miami Herald* reporter in 1989. “[We were] abandoned by the world.”<sup>5</sup>

Eighty years ago, in 1939, no provision of international law required any State to admit these refugees or to provide them protection from persecution, even the kind of persecution inflicted by the Nazis. In 2021, aside from a couple of regional exceptions, there is still no such law.

The international community has often declared its intention to never repeat such shameful decisions as the refusal to admit the passengers of the *St. Louis*. In the immediate aftermath of World War II, there was a great deal of enthusiasm to create an international legal governance system that would better promote international peace and security and protect human rights, including providing greater international protections for people fleeing persecution in their home countries.

A close examination of international refugee law and asylum law, however, shows that only African and Latin American states have committed themselves to an international obligation to admit and protect people persecuted abroad. And even those States have only committed themselves to admit a limited class of people: those who appear at their frontiers and request asylum. African states have made such a commitment pursuant to the Organisation for African Unity's Convention Governing the Specific Aspects

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1. Sara J. Bloomfield, *Museum Director's Foreword* to SARAH A. OGILVIE & SCOTT MILLER, *REFUGE DENIED: THE ST. LOUIS PASSENGERS AND THE HOLOCAUST* at x (2006).

2. *Id.*

3. William J. Burns, Deputy Secretary, U.S. Dep't of State, Remarks on the Legacy of the M.S. Saint Louis (Sept. 24, 2012), <https://perma.cc/8Z7M-HSLL>.

4. Justin Trudeau, Statement of Apology on Behalf of the Government of Canada to the Passengers of the M.S. St. Louis (Nov. 7, 2018), <https://perma.cc/QAY7-VEEJ>.

5. Dan Froomkin, *Talking to Survivors of the SS Louis*, MEDIUM (Jan. 27, 2017), <https://perma.cc/7HE9-JU37>.

of Refugee Problems in Africa,<sup>6</sup> and there appears to be a regional customary law in Latin America that similarly obligates Latin American states.<sup>7</sup> Otherwise, no other State has an international obligation to admit and protect people persecuted abroad. Every other State is free to ignore all pleas for asylum from people outside its territory and to keep its borders sealed to any and all refugees.

For years the community of States has touted the need to provide international protection to refugees while knowing they bear no legal responsibility to contribute to such protection. Indeed, outside Africa and Latin America, States have assiduously avoided incurring such an obligation. Without legal entitlement to protection, asylum seekers can only rely on the generosity of individual States—generosity that is not only unsecured by international law, but which ebbs and flows depending on the political will of the moment.

However, further analysis of international law also reveals that refugees do, in fact, have a whole host of other rights. Most States around the world have consented to be bound by a myriad of rules to protect and provide for refugees. Crucial lessons were learned from the horrors and mistakes of World War II, and many States have responded in admirable ways to bind themselves to rules that enhance the welfare of refugees and other persecuted people. For example, States have repeatedly asserted that people have the right to seek asylum. And the world's central refugee convention, the 1951 Refugee Convention (along with its 1967 Protocol), provides that refugees have extensive rights vis-à-vis their host countries, including the right not to be forcibly deported to a country where their life or liberty will be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion.<sup>8</sup> This so-called right of *non-refoulement* is also understood to be part of customary international law binding all States, not merely those that are parties to that convention.

This bundle of rights enjoyed by refugees under international law, and in particular the right of *non-refoulement*, suggests that the right to flee into a foreign State and the right to be considered for at least temporary territorial asylum are necessarily implied.<sup>9</sup> In fact, States have come tantalizingly close to obligating themselves to admit asylum seekers into their territories and to grant persecuted people the right to receive asylum—so close, in fact, that it is tempting to make a small leap and infer that States have indeed so obligated themselves, at least with regard to people who appear at their frontiers. In fact, several refugee scholars, UNHCR, and other refugee advocates have argued that States are indeed bound under the Refugee Convention and the

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6. See *infra* notes 100–02 and accompanying text; Part III.B.

7. See *infra* notes 255–57 and accompanying text.

8. United Nations Convention relating to the Status of Refugees art. 33.1, Jul. 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention, Refugee Convention, or Global Refugee Convention].

9. See *infra* Part III.A.iv and notes 255–90 and accompanying text for presentations of scholars, States, and organizations that argue that international law obligates States to admit into their territories all asylum seekers who reach the States' frontiers.

customary international law of *non-refoulement* to admit asylum seekers who appear at their frontiers and to provide some level of territorial protection.<sup>10</sup> But these arguments are not correct. The more accurate perspective of the current state of international refugee law is that States are not so bound, as they have assiduously avoided binding themselves to any international obligation to allow asylum seekers to enter their territories or to grant asylum to qualified asylum seekers. States have been willing to walk right up to that line, but they dare not cross it. As a result, the disconnect between the international refugee laws to which the community of States have bound themselves and the absence of the right that is arguably most fundamental—the right to admission and the right to receive asylum when needed—is jarring. It undermines the legal regime of refugee protection.<sup>11</sup>

Only States have the power to change this situation, as only they can consent to such obligations.

After establishing that there is no international legal obligation for States to admit refugees or asylum seekers or provide any degree of territorial asylum to them (except as within the contexts of the regional regimes of Africa and Latin America), this Article urges States to consent to such obligations and, as a result, close this rather maddening gap in international law and, in doing so, bring greater coherence (and humanity) to this branch of human rights law. In particular, this Article urges the international community of States to consent to the obligation to admit into their territories people who appear at their frontiers applying for asylum, entertain their asylum requests in good faith, and grant long-term asylum to those who qualify for it. Collectively, this Article will refer to this set of rights (as many have before) as the “right to receive territorial asylum” or the “right of territorial asylum.” As just observed, the body of international refugee law, in particular the right of *non-refoulement*, points strongly in the direction of such obligations. Indeed, many States already behave in this manner.<sup>12</sup>

Part I of this Article discusses what constitutes a “refugee” under international law and the rights refugees have. Part II discusses asylum, the right to seek asylum under international law, and the rights of asylum seekers generally. Part III discusses a particular right of refugees and others, the so-called

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10. See *infra* Part III.A.iv and notes 281–84 and accompanying text.

11. This gap or disconnect exists in part because the law of asylum and the rights of refugees have roots in centuries of history in which, until the last century, borders were largely ill-defined, unmarked and unguarded. This meant that crossing frontiers from one country to another was easy. People could easily flee across a border from any threat. Asylum and refugee law, therefore, did not develop around the issue of admission and territoriality. See also Paul Weis, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT’L L. 92, 120–21 (1969) (“The problem of admission hardly arose as it was easy to cross frontiers.”); SASKIA SASSEN, GUESTS AND ALIENS 1–50 (1999). Another factor that has led to this gap in refugee and asylum law is the fact that asylum law developed in an age where people were seen as belonging to their nation and nations had certain rights over their people. Granting a foreign national asylum risked interfering with the home State’s prerogatives with regard to him. Additionally, the roots of asylum and refugee law developed during the pre-human rights era, a time when people were not afforded rights under international law and only States were the subjects of international law.

12. See *infra* note 254.

right of *non-refoulement*. The laws this Article is advocating for rely mostly on the right of *non-refoulement* for their normative force. Part IV ties these issues together to demonstrate the humanitarian value and legal coherence that the right to be admitted and a right to receive territorial asylum would bring to international law. Part IV also anticipates and responds to several possible objections that might make the community of States hesitant to consent to the right of territorial asylum, such as the perceived threat of being overrun by asylum seekers and the difficulty of successfully engaging burden-sharing among States. In conclusion, this Article suggests, among other things, reviving the attempt to adopt a convention on territorial asylum.

## I. REFUGEE STATUS

Refugees have rights under international law. But before identifying what those rights are, it is necessary to understand who qualifies as a “refugee.” For only a person who is a refugee has refugee rights. However, there is no single definition of “refugee” in international law. There are several.<sup>13</sup>

Definitions are found in two different treaty regimes: the 1951 Convention Relating to the Status of Refugees<sup>14</sup> (and its 1967 Protocol<sup>15</sup>) and the Organisation for African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>16</sup> Definitions are also found in at least two different non-binding regional declarations: the Organization of American States’ Cartagena Declaration on Refugees<sup>17</sup> and the Asian-African Legal Consultative Organization’s Bangkok Principles on Status and Treatment of Refugees.<sup>18</sup> Additionally, there may be a definition implied by international customary law, the exact contours of which are difficult to determine. Further still, the term “refugee” is colloquially used to refer to any person anywhere in the world forced to move, across an international boundary or not, in search of protection or security.

### A. *The 1951 Refugee Convention and the 1967 Refugee Protocol*

The 1951 Convention Relating to the Status of Refugees (the “1951 Refugee Convention”),<sup>19</sup> as amended<sup>20</sup> by the 1967 Protocol Relating to the

13. And there are several different interpretations of each of those definitions. See *infra* Part I.A–D.

14. 1951 Refugee Convention, *supra* note 8.

15. 1967 Protocol to the United Nations Convention relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Refugee Protocol].

16. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter African Refugee Convention].

17. Organization of American States, Cartagena Declaration on Refugees, *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, Nov. 22, 1984, OAS/Ser. L/V/II.66, doc. 10, rev. 1, at 190–93, <https://perma.cc/U7AA-GG39> [hereinafter Cartagena Declaration].

18. Asian-African Legal Consultative Organization [AALCO] Bangkok Principles on the Status and Treatment of Refugees (Dec. 31, 1966), <https://perma.cc/LL2A-3VRT> [hereinafter Bangkok Principles].

19. 1951 Refugee Convention, *supra* note 8.

20. The 1967 Refugee Protocol incorporates most of the substantive refugee protection provisions of the 1951 Refugee Convention, and it is not necessary to be a party to the 1951 Refugee Convention in order to be a party to the 1967 Refugee Protocol.

Status of Refugees (the “1967 Refugee Protocol,”<sup>21</sup> and collectively, the “Refugee Convention” or the “Global Refugee Convention”) is the world’s only global refugee-specific treaty regime. Except for several countries in the Middle East, South Asia, and South-East Asia, nearly every country in the world is a party to the Refugee Convention.<sup>22</sup> The Refugee Convention defines a “refugee” as any 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; 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.<sup>23</sup>

However, the Refugee Convention does not define any of the words that make up the definition of “refugee,” including rather ambiguous ones such as “well-founded,” “persecution,” and “particular social group.” Nor is there any dedicated body tasked with authoritatively interpreting such words.<sup>24</sup> Additionally, the Refugee Convention says nothing about the process for formally identifying who qualifies as a refugee. As a result, States parties are left with a wide degree of latitude in determining who is and who is not a “refugee” for purposes of the Refugee Convention. Some States interpret quite generously and others much less so.<sup>25</sup>

It is beyond the scope of this Article to thoroughly discuss how and when a person qualifies as a “refugee” under the Refugee Convention. There are

21. 1967 Refugee Protocol, *supra* note 15.

22. 1951 *Refugee Convention, Accession, Succession, Ratification Table*, UNITED NATIONS TREATY COLLECTION, <https://perma.cc/4XVE-PD28>; 1967 *Refugee Protocol, Accession, Succession, Ratification Table*, UNITED NATIONS TREATY COLLECTION, <https://perma.cc/CWU9-NTED>.

23. 1951 *Refugee Convention*, *supra* note 8, at art. 1.A(2), read in tandem with the 1967 *Refugee Protocol*, *supra* note 15, at art. I. Certain people who would otherwise meet this definition are expressly excluded from the definition or from the scope of the *Refugee Convention*. 1951 *Refugee Convention*, *supra* note 8, at arts. 1.B–F.

24. The United Nations High Commissioner for Refugees (UNHCR) is not accorded that authority. UNHCR acts under the authority of the UN General Assembly to coordinate the international protection of refugees who come within its mandate. UNHCR’s scope of competence includes people (refugees) beyond those covered by the *Refugee Convention and Protocol*, including internally displaced people, returnees, and stateless persons. The Executive Committee of the High Commissioner’s Programme (“UNHCR Executive Committee” or “ExCom”) is an intergovernmental organization consisting of interested United Nations members that largely serves as an advisory committee to the High Commissioner and has certain authority to determine UNHCR’s fiscal policies. *See* G.A. Res. 428 (V), Statute of the UNHCR (Dec. 14, 1950); G.A. Res. 1166 (XII), ¶¶ 5–9 (Nov. 26, 1957); Economic and Social Council Res. 672 (XXV) (Apr. 30, 1958).

25. Much of the negotiation about the text of the 1951 *Refugee Convention* was focused on how to determine who was a bona fide refugee and thus how to define “refugee.” In the end, terms were left deliberately vague in order to provide individual States parties some leeway in determining who is a “refugee.” THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 335 (Andreas Zimmermann ed., 2011); *see also* Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 240 (observing, among others, that “the elasticity of [the word] persecution depends upon the political will of member States implementing the Convention.”).



several factors to consider, and the unsettled issues, including those noted in the previous paragraph, are numerous.<sup>26</sup> Nevertheless, all “refugees” under the Refugee Convention are entitled to a whole host of rights pursuant to that convention, and each State party to the Refugee Convention is obligated to respect those rights with respect to refugees within its territory. Some of the more notable rights include various rights to national treatment (e.g., in the practice of religion,<sup>27</sup> in regard to access to elementary education<sup>28</sup>), most favored “alien” rights (e.g., with regard to the acquisition of property<sup>29</sup> and to employment<sup>30</sup>), the right to be treated as legally-present within the host country regardless of the method of entry,<sup>31</sup> and the right of *non-refoulement*<sup>32</sup> (which will be discussed at more length in Part III).

It is understood that a refugee is entitled to refugee rights—such internationally obligatory protections—because they *are* a refugee, i.e., because they meet the definition of a “refugee.” Such rights do not attach only after having been conferred with refugee status by a host State or having been formally identified as a refugee by a host State.<sup>33</sup> But this raises a serious problem. How can a State determine if it must provide international protection (refugee rights) to a person if the State has not formally determined that that the person is in fact a refugee? States generally do not want to cater to imposters. Although the Refugee Convention does not expressly obligate States parties to take any steps to formally identify people who qualify for refugee status or to evaluate their refugee status applications, it does so implicitly, because treating a refugee contrary to the Convention’s requirements is a violation of the Convention whether the State actor realizes a person is a refugee or not.<sup>34</sup>

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26. For a more thorough discussion of what constitutes a “refugee” and the law of refugee status, particularly pursuant the Refugee Convention, see, e.g., JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* (2d ed. 2014); GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW 15–50* (3d ed. 2011); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/1P/4/ENG/REV. 4 (2019), <https://perma.cc/7QE8-Q3FY>.

27. 1951 Refugee Convention, *supra* note 8, at art. 4.

28. *Id.* at art. 22.

29. *Id.* at art. 13.

30. *Id.* at art. 17.

31. *Id.* at art. 31(1).

32. *Id.* at art. 33(1).

33. In fact, the UNHCR Executive Committee often discusses rights that are owed to “refugees, whether they have been formally identified as such or not (asylum-seekers)” or “whether or not they have formally been granted refugee status.” *E.g.*, U.N. High Commissioner of Refugees Executive Committee [UNHCR Exec. Comm.], Conclusion No. 58 (XL), ¶ (a), U.N. Doc. A/44/12/Add.1 (Oct. 13, 1989); UNHCR Exec. Comm., Conclusion No. 79 (XLVII), ¶ (j), U.N. Doc. A/AC.96/878 (Oct. 11, 1996); UNHCR Exec. Comm., Conclusion No. 81 (XLVII), ¶ (i), U.N. Doc. A/52/12/Add.1 (Oct. 17, 1997).

34. See GOODWIN-GILL & MCADAM, *supra* note 26, at 412 (arguing that the Refugee Convention does indeed impose upon States parties the obligation to consider asylum applications in good faith on their merits); Exec. Comm. Conclusion No. 71 (XLIV), ¶ (i), U.N. Doc. A/48/12/Add.1 (Oct. 8, 1993) (stressing “the importance of establishing and ensuring access . . . for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection”); John R. Stevenson, *Contemporary Practice of the United States Relating to International Law*, 65 AM. J. INT’L L.

As provided in the definition above, one of the criteria a person must meet to qualify as a “refugee” is that the person must be “outside the country of his nationality,”<sup>35</sup> or, in the case of a stateless person, “outside the country of his former habitual residence.”<sup>36</sup> One of the principles that underlies this requirement is the principle that States owe basic human rights protections to people within their own jurisdictions. Under this principle, then, a person who is in their home State has the right to be treated according to international human rights law and, therefore, should have no need for refugee protections from a third State or, more generally, for international protection from the international community. This would be all well and good if States always had the will and the resources to ensure that their nationals and residents were so protected. But that is not the case. Not all States are so inclined or so resource-endowed. And despite the prohibition to engage in persecution and the obligation to provide basic human rights protections, not all comply. Nevertheless, unless persecuted people leave their home countries, they do not qualify for refugee protection under the Refugee Convention since a person may only be deemed a “refugee” if they leave their country.<sup>37</sup>

This issue rears its head any time a persecuted person tries to flee their country to seek refuge (asylum) in a neighboring State. Such a person may approach the border between their country and a neighboring country or may try to exit their own country through a port of departure such as an international airport. But unless a person actually exits their country, they cannot be deemed a “refugee” pursuant to the Refugee Convention and, therefore, by definition, that person has no refugee rights.<sup>38</sup> They have no international protections of the kind provided by the Refugee Convention.<sup>39</sup> It is curious indeed that persons who may be in most need of international protection are not qualified to receive it.

In response to this problem, some intergovernmental organizations and many refugee NGOs argue that asylum seekers have admission rights—in particular, rights they argue are implicit in the Convention’s *non-refoulement* provision. And in practice, many States do admit asylum seekers who appear at their frontiers and provide at least some level of temporary protection to them, at least to assess whether or not they meet the criteria for being a refugee or otherwise merit protection. However, such States do not do so on the

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388, 390 (1971) (“It is implicit in the Convention and Protocol that a reasonable inquiry be made to determine whether the defector [who had boarded a U.S. warship in U.S. territorial waters] is entitled to refugee status under the Convention and Protocol. If such an inquiry was not made . . . , serious questions under the Convention and Protocol would be raised.”).

35. 1951 Refugee Convention, *supra* note 8, at art. 1.A(2).

36. *Id.*

37. See also HATHAWAY & FOSTER, *supra* note 26, at 17–30.

38. Asylum seekers in international waters or in *terra nullius* merit additional analysis.

39. See *infra* Part III.A.iii (discussing judicial determinations).

basis of any international legal obligation contained in the express terms of the Refugee Convention.<sup>40</sup>

### B. *Regional Refugee Instruments*

There are three regional, refugee-specific instruments that define what constitutes a “refugee.” One is a treaty: the Organisation for African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention).<sup>41</sup> The other two are non-legally binding regional declarations: the Organization of American States’ Cartagena Declaration on Refugees (Cartagena Declaration)<sup>42</sup> and the Asian-African Legal Consultative Organization’s Bangkok Principles on Status and Treatment of Refugees (Bangkok Principles).<sup>43</sup> All three of these instruments mirror the definition of “refugee” adopted by the Refugee Convention,<sup>44</sup> but each expands the scope of the term to include people who have fled their home countries for reasons not included in the Convention.<sup>45</sup>

More specifically, under the African Refugee Convention the term “refugee” also includes “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.”<sup>46</sup>

The Cartagena Declaration recommends that the countries of Latin America include within their municipal definitions of “refugee” persons “who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have

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40. For a thorough analysis of the Refugee Convention’s non-refoulement provision, *see infra* Part III.A.

41. African Refugee Convention, *supra* note 16.

42. Cartagena Declaration, *supra* note 17.

43. Bangkok Principles, *supra* note 18. The Asian-African Legal Consultative Organization (AALCO) is an intergovernmental organization composed of 48 African and Asian states as of September 2021 and 43 members as of June 24, 2001, the date these Bangkok Principles were last revised. List of Member States, AALCO, <https://perma.cc/37BD-55BU>. The Bangkok Principles are explicitly non-legally binding. Bangkok Principles, *supra* note 18, at Notes, Comments and Reservations Made by the Member States of AALCO, Introductory Remarks, ¶ 2.

44. African Refugee Convention, *supra* note 16, at art. I.1; Cartagena Declaration, *supra* note 17, at part III, ¶ 3; Bangkok Principles, *supra* note 18, at art. I.1. All three of these refugee instruments also largely mirror exceptions contained in the Global Refugee Convention. African Refugee Convention, *supra* note 16, at arts. I.4–5; Cartagena Declaration, *supra* note 17, at part III, ¶ 3; Bangkok Principles, *supra* note 18, at arts. I.6–7.

45. People captured within these expanded categories are provided what is often called “subsidiary,” “complementary,” or “expanded” protection. *See, e.g., infra* note 60. Such protection is often labeled as such since this class of people is framed relative to the narrower class of people afforded protection pursuant to the Refugee Convention. Nevertheless, the international protections they receive under each respective instrument is similar to those received by people who would be captured by the narrower Refugee Convention definition of “refugee.”

46. African Refugee Convention, *supra* note 16, at art. I.2.

seriously disturbed public order.”<sup>47</sup> Even though the Cartagena Declaration is not legally binding itself, there are reasons to conclude that the Declaration’s expanded definition of “refugee” has attained the status of regional customary international law in Latin America.<sup>48</sup> The countries of Latin America have repeatedly reiterated the principle that any person who meets the expanded definition is entitled to international protections,<sup>49</sup> and most Latin American countries have indeed implemented such a definition into their municipal law.<sup>50</sup>

The Bangkok Principles provide the greatest expansion of the term “refugee,” including within its scope the same expanded category of people included in the African Refugee Convention,<sup>51</sup> plus people who have fled ethnic or gender persecution<sup>52</sup> and lawful dependents of any refugee.<sup>53</sup>

Like the term “refugee” under the Global Refugee Convention, these regional definitions present a myriad of ambiguities. And given the expanded scopes of their definitions, the interpretative ambiguities may be more numerous. Nevertheless, like “refugees” under the Global Refugee Convention, “refugees” under these instruments enjoy a certain set of rights in their host countries.<sup>54</sup> And, like the Global Refugee Convention, to qualify as a “refugee” one must be “outside his country of nationality” (or, in the case of stateless persons, “outside the country of his former habitual residence”). As such, someone seeking asylum from their own country would seem to have no rights under these instruments, including no right to be admitted into a foreign country and be given asylum. However, the *non-refoulement* provisions of each of these three regional instruments are more expansive than that contained in the Global Refugee Convention,<sup>55</sup> and these *non-refoulement* provisions may provide for a right of admission and a right to asylum. The principle of *non-refoulement*, including *non-refoulement* pursuant to these regional instruments, will be taken up in detail in Part III.

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47. Cartagena Declaration, *supra* note 17, at part III, ¶ 3.

48. For a discussion on discerning customary international law, *see infra* note 200 and the accompanying text.

49. The countries of Latin America have repeatedly confirmed their dedication to all the principles contained in the Cartagena Declaration on Refugees. *See, e.g.*, San José Declaration on Refugees and Displaced Persons, Dec. 7, 1994, <https://perma.cc/W65K-SUFW>; Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin American, Nov. 16, 2004, <https://perma.cc/Q33B-7A9F>; Brasilia Declaration on the Protection of Refugee and Stateless Persons in America, Nov. 11, 2010, <https://perma.cc/8U67-3RPX>; Brazil Declaration, A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, Dec. 3, 2014, <https://perma.cc/VJD5-FHYG>.

50. *Id.*

51. Bangkok Principles, *supra* note 18, at art. I.2.

52. *Id.* at art. I.1.

53. *Id.* at art. I.4. Notably, Singapore and India expressly objected to “the expanded definition of refugees.” *Id.* at Comments and Reservations by the Member Governments.

54. *E.g.*, African Refugee Convention, *supra* note 16, at arts. IV–VI; Bangkok Principles, *supra* note 18, at arts. III–VI. The Cartagena Declaration incorporates the terms of the Global Refugee Convention by reference and encourages nations to ratify it. Cartagena Declaration, *supra* note 17, at part III, ¶¶ 1, 8.

55. *See infra* Parts III.A–B, E.

### C. “Refugee” under Customary International Law

It is possible that there is a definition of the concept of a “refugee” that has attained the status of customary international law or a general principle of law and that under such law such refugees have certain rights—perhaps rights similar to those listed in the Refugee Convention. However, there appears to be no comprehensive scholarly survey on the practice and motivation of States in this regard. Nevertheless, outside the Latin American context,<sup>56</sup> indirect evidence strongly suggests that there is no such definition of “refugee.” Indirect evidence also strongly suggests that, with the exception of the principle of *non-refoulement*, there are no refugee rights under customary international law. There appear to be almost no assertions by States, scholars, courts, or intergovernmental organizations that such a definition exists under international customary law or general principles of law or that any refugee-like person is entitled to refugee-like protections under customary international law other than the right of *non-refoulement*.<sup>57</sup>

Indeed, as will be discussed below, there is robust discussion by States, scholars, courts, and intergovernmental organizations about the customary international legal status of the principle of *non-refoulement*. The abundance of such discussions and the apparent consensus that some form of the principle of *non-refoulement* exists within the corpus of international customary law stand in stark contrast to the absence of such discussions and assertions about any other ostensible rights refugee-like persons might enjoy under customary international law. This absence serves to undermine any assertion that there is a definition of “refugee” within customary international law or that there are refugee rights under customary international law beyond the right of *non-refoulement*.

### D. Other Categories of “Refugees”

As highlighted by the regional instruments discussed above, people flee their home countries for reasons other than racial, religious, nationality, social group, or political viewpoint persecution (the reasons contained within the scope of the Refugee Convention). Some flee war and other civil conflict. Some flee because of natural or ecological disasters. Some flee abusive spouses or threats from gangs. Some flee conditions of extreme poverty and

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56. See *infra* notes 103–06, 255–57 and accompanying text.

57. The Bangkok Principles might appear to be an exception, but the member States of the Asian-African Legal Consultative Organization, the organization that adopted the Bangkok Principles, explicitly declared the principles to be non-binding and merely inspirational, and otherwise the Bangkok Principles never make any assertion about the customary international legal status of the principles included within. Bangkok Principles, *supra* note 18, at Notes, Comments and Reservations Made by the Member States of AALCO, ¶ 2; see also D. W. Greig, *The Protection of Refugees and Customary International Law*, 8 AUSTL. Y.B. OF INT’L L. 108, 128 (1978–80) (arguing for the possibility that “there is a concept of refugee under customary international law,” one that “create[s] rights against a non-signatory State to the 1951 Convention”); *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., at 62–63 (Feb. 23, 2012) (Pinto de Albuquerque, J., concurring) (asserting seemingly the same point).

economic desperation. Often, we colloquially refer to all such persons as “refugees.”<sup>58</sup> However, whether a person fleeing for any of these other reasons is entitled to international refugee protections pursuant to international refugee law depends on whether they are captured by the definition of “refugee” in any applicable refugee treaty and/or any applicable customary international law (if any).<sup>59</sup>

This is not to say that people who have fled their countries for reasons that do not qualify them as “refugees” under the applicable international refugee instruments are necessarily without international legal protections. Other international instruments may grant them international legal protections. For example, the European Union grants international protections to third country nationals who would face “a real risk of suffering serious harm” for reasons beyond those that qualify someone as a refugee if they were returned to their home countries.<sup>60</sup> Such international protection is referred to as “subsidiary” protection in order to distinguish it from formal refugee protection.

The point here is that any discussion of what rights “refugees” might have—including whether they have a right to be admitted into a foreign State, whether they have a right to have their asylum requests considered, and whether, if otherwise qualified, they are entitled territorial asylum—is confounded by the range of inconsistent definitions of what constitutes a “refugee.” Although there are multiple definitions of “refugee” under various international instruments,<sup>61</sup> unless required and otherwise indicated, the remainder of this Article will use the word “refugee” in a colloquial, non-legally precise way.

Additionally, people often leave their homes for one or more of the reasons listed above but do not leave their own countries. They simply flee to a different region of their own countries. The definitions of “refugee” provided in all the international instruments discussed above limit the category of “refugee” to people who are outside their home countries, and, as a result, such people who have not left their home countries are sometimes referred to as “internally displaced” people in order to distinguish their international legal status from “refugees.” But colloquially we often refer to such internally displaced people as “refugees” too. To the extent such people are seeking international protection, including asylum in foreign countries, this Article will refer to such people as “asylum seekers.” Asylum seekers may be within their home countries or outside them. Some may be at the frontier of foreign countries,

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58. Such people are sometimes referred to as “de facto refugees.” See also Eur. Parl. Ass., *Situation of de facto refugees*, 27th Sess., Doc. No. 773 (1976).

59. It is necessary to note that there is a unique international protection regime for Palestinian refugees. Palestinian refugees are excluded from the scope of the Refugee Convention. 1951 Refugee Convention, *supra* note 8, at art. 1.D.

60. Council Directive 2004/83, art. 2(e), 2004 O.J. (L 304) (EC) (defining “person eligible for subsidiary protection”); Directive 2011/95, of the European Parliament and of the Council of 13 December 2011, art. 2(f) (defining the same).

61. See also *Frequently Asked Questions*, UNRWA, <https://perma.cc/FR46-HUB9> (defining “Palestinian refugees”).

knocking at their doors asking for admission and protection. This set of observations, then, raises the independent question of what rights people have to seek, enjoy and/or receive asylum in foreign countries, and, relatedly, what rights asylum seekers have to be admitted to foreign countries and to receive territorial asylum.

## II. RIGHTS REGARDING ASYLUM

International instruments and diplomatic and scholarly discussions are rife with several different rights associated with asylum. You can read about the “right of asylum,” the “right to asylum,” the “right to seek asylum,” the “right to enjoy asylum,” the “right to be granted asylum,” the “right to obtain asylum,” and others. This section attempts to identify and tease meaning out of this kaleidoscope of so-called rights and to determine if there are any asylum-related rights that include the right to be admitted into a foreign country and/or the right to receive territorial asylum.

Asylum can be defined as “sanctuary,” “shelter,” or “protection from . . . a foreign jurisdiction.”<sup>62</sup> It does not otherwise appear to have a narrower or more specific meaning within international law. The International Court of Justice has referred to asylum as “a state of protection.”<sup>63</sup> The UN High Commissioner for Refugees has defined “territorial asylum” as “an umbrella term for the sum total of protection provided by a State . . . to refugees on its territory.”<sup>64</sup> Someone who seeks or requests asylum is an asylum seeker, and someone who receives asylum is an asylee.<sup>65</sup> Therefore, someone seeking refugee designation and thus refugee protection under the international refugee protection scheme is an asylum seeker. Asylum seekers may also include people who are requesting asylum for reasons which would not qualify them as “refugees.”

As will be explored below, people have a right to seek asylum, and States have a right to grant asylum, but, except in certain contexts, no one has a right to receive asylum, and, correlatively, no State is obligated to grant asylum.

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62. *Asylum*, BLACK'S LAW DICTIONARY (2d ed. 1910); see also U.N. Conference on Territorial Asylum, ¶ 5, U.N. Doc. A/Conf.78/SR.1 (Jan. 11, 1977) (quoting the UN High Commissioner for Refugees, Prince Sadruddin Aga Khan, noting that there is no agreed universal definition of the term ‘asylum’ but the notion of asylum was “almost as old as recorded human history”).

63. *Asylum Case (Colombia v. Peru)*, Judgment, 1950 I.C.J. Rep. 266, 281 (Nov. 20).

64. U.N. High Commissioner for Refugees [UNHCR], *Note on International Protection*, ¶ 8, U.N. Doc. A/AC.96/728 (Aug. 2, 1989).

65. For a discussion of the effect of the lack of a precise definition of the term “asylum” in the context of international law, see *infra* notes 112–14 and accompanying text. Individual countries, however, may, pursuant to their own municipal law, use such terms in different ways. See, e.g., 8 U.S.C. §1101(a)(42) (providing the definition of “refugee”); 8 U.S.C. § 1158(b)(1)(A) (providing that to qualify for asylum in the United States, an “alien” physically present in or having arrived to the United States must meet the definition of “refugee” provided in §1101).

### A. *Right to Seek Asylum*

Everyone has the right to seek asylum from foreign persecution. This right appears to exist in customary international law and is declared in many multilateral human rights declarations<sup>66</sup> and regional ones.<sup>67</sup> Indeed, the Universal Declaration of Human Rights (UDHR) itself states that “everyone has the right to seek. . . in other countries asylum from persecution.”<sup>68</sup> It is not uncommon to find scholars and international organizations who assert the existence of such a customary international law.<sup>69</sup> Such a right is also explicit in many treaties.<sup>70</sup>

One seeks asylum by petitioning a foreign State for it. Often, asylum seekers’ requests are predicated upon a claim that they are “refugees,” and, indeed, receiving asylum and being a refugee are often seen as congruent. However, a country can grant asylum to anyone it wants (except as otherwise limited by treaty<sup>71</sup>), including people it does not consider refugees.

Nevertheless, as will be explored below, unless international protection is demanded by a treaty, international law rarely obligates specific States to grant asylum to people applying from abroad, even for the most aggressively persecuted people. In other words, the right to seek asylum is not necessarily coupled with any right to *receive* asylum. As a result, a “right” to seek asylum

66. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”); G.A. Res. 2312 (XXII), Declaration on Territorial Asylum, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967), preamble [hereinafter Declaration on Territorial Asylum] (reaffirming Article 14 of the UDHR); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 23, U.N. Doc. A/CONF.157/23 (June 25, 1993) [hereinafter Vienna Declaration] (“The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one’s own country.”).

67. *E.g.*, Organization of American States, American Declaration of the Rights and Duties of Man, May 2, 1948, at art. XXVII (“Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.”); Organization of Islamic Cooperation, Cairo Declaration on Human Rights in Islam art. 12 (Aug. 5, 1990) (“Every man . . . is entitled to seek asylum in another country.”); Ass’n of Southeast Asian Nations [ASEAN] ASEAN Human Rights Declaration ¶ 16 (Nov. 19, 2012) (“Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.”); Bangkok Principles, *supra* note 18, at art. II.1 (“Everyone without any distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution.”).

68. UDHR, *supra* note 66, at art. 14.

69. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 336–41 (1991). The UNHCR Executive Committee regularly refers to and affirms the “right” to seek asylum. *E.g.*, UNHCR Exec. Comm., Conclusion No. 82 (XLVIII), ¶ (b), U.N. Doc. A/52/12/Add.1 (Oct. 17, 1997); UNHCR Exec. Comm. Conclusion No. 108 (LIX), at preamble, U.N. Doc. A/AC.96/1063 (Oct. 10, 2008).

70. *E.g.*, Org. of African Unity, African Charter on Human and Peoples’ Rights art. 12.3 (Jun. 27, 1981) (“Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.”); Organization of American States, American Convention on Human Rights art. 22.7, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”); League of Arab States, Arab Charter on Human Rights art. 28 (May 23, 2004) (“Everyone shall have the right to seek political asylum in other countries in order to escape persecution.”).

71. *E.g.*, Organization of American States, Havana Convention on Asylum, May 21, 1929, OEA/Ser. X/L. Treaty Series 34.



under customary international law seems largely empty of any real substance.<sup>72</sup>

### B. *The Right to Enjoy Asylum*

Everyone also seems to have the right to “enjoy” asylum under customary international law. This right is articulated in the UDHR as follows: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>73</sup> This right has been reaffirmed or rearticulated in identical or very similar terms in several other international declarations including the UN General Assembly’s Declaration on Territorial Asylum,<sup>74</sup> the Vienna Declaration and Programme of Action,<sup>75</sup> and the Bangkok Principles.<sup>76</sup>

The substantive content of this so-called “right to enjoy” asylum, however, is so vague as to be empty. It is difficult to discern an ordinary meaning of a “right to enjoy” something, especially considering that if there was a right to that very thing, it would be more efficient and clearer to assert the right to the thing itself—here, the “right to asylum,” or the “right to receive asylum.” In fact, the UDHR’s articulation was a compromise that resulted from considerable State resistance to including a right to receive asylum. The “right to enjoy” formula certainly seems to avoid burdening States to grant asylum. This formulation also seems to do little to burden States that have been willing to grant asylum, for if a State chooses to grant asylum, then certainly it must be prepared to let the asylee enjoy it. And if a person has been granted asylum, there seems to be no point in asserting his right to enjoy it. Seen in this light, the articulation of a “right to enjoy” asylum seems to be empty. Or, in the words of Professor Hersch Lauterpacht, who, it seems, would have preferred to see the articulation of a more substantive right in the UDHR, the “right to seek and enjoy” formula is “artificial to the point of flippancy.”<sup>77</sup>

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72. *But see* GOODWIN-GILL & MCADAM, *supra* note 26, at 383 (suggesting that the correlative State duty of the individual’s right to seek asylum is merely the duty “not to frustrate the exercise of that right in such a way as to leave individuals exposed to persecution or other violations of their human rights”). *See also*, U.N. General Assembly, *Draft Declaration on the Right of Asylum Report of the Sixth Committee*, ¶ 27, U.N. Doc. A/6570 (Dec. 12, 1966) (demonstrating that the States negotiating the Declaration on Territorial Asylum considered the “right” to seek and enjoy asylum to be a “moral right” not a “legal” one). One can imagine that the right to seek asylum imposes on persecuting States the obligation to permit the people they are persecuting to seek asylum from foreign countries. However, one can expect that such an obligation would be wholly unfulfilled by any persecuting State or would not be necessary at all if the persecuting State is eager to rid the State of such people. Either way, imposing such an obligation on persecuting States seems fatuous.

73. UDHR, *supra* note 66, at art. 14.

74. Declaration on Territorial Asylum, *supra* note 66, at preamble (reaffirming Article 14 of the UDHR).

75. Vienna Declaration, *supra* note 66, at ¶ 23.

76. Bangkok Principles, *supra* note 18, at art. II.1 (“Everyone without any distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution.”).

77. Hersch Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT’L 354, 373–74 (1948).

There is an alternative interpretation of the “right to enjoy” asylum, however, one that places a correlative obligation on States and therefore frames it as a substantive right. This interpretation refers to the obligation of third-party States, e.g., any State that had been persecuting an asylee, to respect the decisions of asylum-granting States to have granted asylum. In this sense, the asylee has the right to enjoy asylum free from interference by other States. Relatedly, it is said that States, then, enjoy the “right of asylum,” that is to say, the right to grant asylum to anyone they choose (except as otherwise limited by treaty)<sup>78</sup> and to have that grant be respected by other States including asylees’ home States.<sup>79</sup>

In either sense, though, the so-called right to enjoy asylum would not seem to include any right of an individual to receive asylum or to be admitted into any foreign country.

### C. *The Ostensible Right to Receive Asylum*

#### 1. *The Non-Existence of a Right to Receive Asylum*

Although everyone seems to have the right to *seek* asylum under customary international law, and everyone seems to have the right to *enjoy* asylum once given, there appears to be no right to *receive* or *be granted* asylum,<sup>80</sup> except to the extent that meritorious persons are already within the jurisdiction or control of a foreign State and to the extent required pursuant to the African Refugee Convention or perhaps pursuant to regional customary international law in Latin America. More generally speaking, except in these limited circumstances, no State is under any international legal obligation to grant asylum to anyone who is outside their territory or jurisdictional control. That is to say, there is no right *to* asylum, and, therefore, no State is under any obligation to admit asylum seekers into their territories.

This is true even though a few international human rights instruments proclaim an ostensible right to “receive” or “be granted” asylum. For example, the American Declaration of the Rights and Duties of Man states that “[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with

78. *E.g.*, Organization of American States, Convention on Territorial Asylum art. I, Mar. 28, 1954, O.A.S.T.S. No. 19.

79. *See* Weis, *supra* note 11, at 95, 96–97, 135; *see also*, Rep. of the 6th Comm., Draft Declaration on Territorial Asylum, ¶¶ 32–33, 41 U.N. Doc. A/6912 (November 30, 1967); Committee of Ministers of the Council of Europe Declaration on Territorial Asylum (Nov. 18, 1977) (affirming the members States’ right to grant asylum to any person they consider worthy and the obligation on the part of other States to respect such grants); Organization of American States, Convention on Territorial Asylum, *supra* note 78, at art. I; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) HCA 55 (Ausl.) ¶ 137 (1996) (“[T]he right of asylum is a right of States, not of the individual . . . [A] State is free to admit anyone it chooses to admit, even at the risk of inviting the displeasure of another State. . . .”); Alice Edwards, *Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum*, 17 INT’L J. REFUGEE L. 293 (2005) (presenting a vision wherein the “right to enjoy asylum” refers to the right to receive all applicable refugee rights and human rights from host States).

80. Sometimes the right to receive asylum is elliptically referred to as the “right *to* asylum.”

the laws of each country and with international agreements.”<sup>81</sup> A similar articulation of this so-called “right” is proclaimed in the ASEAN Human Rights Declaration.<sup>82</sup> Although neither of these regional human rights declarations is itself legally binding,<sup>83</sup> they might seem to suggest the existence of regional customary international law on the matter. Similar articulations are provided in two regional human rights treaties: the American Convention on Human Rights<sup>84</sup> and the African Charter on Human and People’s Rights.<sup>85</sup>

However, each of these four instruments caveat the so-called right in a way that renders it empty. Each restricts the availability of the so-called right to whatever is otherwise demanded by applicable international and municipal law.<sup>86</sup> For example, the American Declaration of the Rights and Duties of Man states that people have the right to receive asylum “in accordance with the laws of each country and with international agreements.”<sup>87</sup> If there is otherwise no right to asylum within international or municipal law, there is no right to asylum.

Similarly, the Charter of Fundamental Rights of the European Union provides that the “right to asylum shall be guaranteed with due respect for the rules of the [Global Refugee Convention] and in accordance with the Treaty on European Union [TEU] and the Treaty on the Functioning of the European Union [TFEU].”<sup>88</sup> This articulation less clearly limits the Charter’s right to asylum to those rights that otherwise exist in international law, ambiguously “guaranteeing” the right to asylum “with due respect for” the Global Refugee Convention and “in accordance with” the TEU and the TFEU. However, there is nothing in the explicit language of the Charter or in the jurisprudence surrounding the interpretation and application of the provision that indicates that it extends beyond what is required by the Global

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81. American Declaration of the Rights and Duties of Man, *supra* note 67, at art. XXVII.

82. ASEAN Human Rights Declaration, *supra* note 67, ¶ 16.

83. *But see* Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, 1989 Inter-Am. Ct. H.R. (ser. A) 10, ¶ 45 (July 14) (noting that for member States of the Organization of American States, the American Declaration is “a source of international obligations related to the Charter of the Organization”). Very generally speaking, international instruments executed among States are binding to the extent the State parties consent to be bound under international law. Admittedly, there are ambiguous situations, both with regard to individual instruments and individual provisions within instruments.

84. American Convention on Human Rights, *supra* note 70, at art. 22.7.

85. African Charter on Human and Peoples’ Rights, *supra* note 70, at art. 12.3.

86. *See supra* notes 81, 82, 84, 85.

87. American Declaration of the Rights and Duties of Man, *supra* note 67, at art. XXVII. The Inter-American Court of Human Rights has stated that the “right to seek and to be granted asylum” contained in the American Convention on Human Rights does not ensure that refugee status must be granted to the applicant, but rather means that “his application must be processed with the due guarantees.” Preliminary Objections, Merits, Reparations and Costs (Pacheco Tineo Family v. Bolivia), Judgment, 2013 Inter-Am. Ct. H.R. (ser. C) 272, ¶ 197 (Nov. 25).

88. Charter of Fundamental Rights of the European Union art. 18, Oct. 26, 2012, 2012 O.J. (C 326) 2 [hereinafter, EU Charter of Fundamental Rights]. The EU Charter of Fundamental Rights became legally binding when the Treaty of Lisbon entered into force on December 1, 2009, as the Treaty of Lisbon confers on the Charter the same legal value as the constitutive treaties of the European Union. *See Consolidated Version of the Treaty on European Union* art. 6.1, May 9, 2008, 2008 O.J. (C 115) 01 [hereinafter TEU].

Refugee Convention, or, in other words, beyond providing asylum to refugees (as defined by the Global Refugee Convention) who are already within one's territory.<sup>89</sup>

Other than this handful of international human rights instruments, few, if any, international instruments expressly articulate any kind of right to "receive" or "be granted" or "obtain" asylum. Indeed, a survey of international instruments on asylum, refugee rights, and other human rights demonstrates that States assiduously avoid consenting to any obligation to grant asylum to anyone. For example, the conference that adopted the Global Refugee Convention merely "recommended that" States "continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum . . . ."<sup>90</sup> Otherwise there is nothing in the Global Refugee Convention that explicitly addresses admission. There is no discussion of procedures for assessing asylum requests from abroad, let alone any obligation to actually grant asylum to anyone abroad. In fact, attempts to include such provisions were vigorously opposed during the drafting of the Convention.<sup>91</sup> And, aside from an immaterial reference in its preamble, the Global Refugee Convention never even uses the word "asylum."<sup>92</sup> So although refugees have rights pursuant to the Refugee Convention, mere asylum seekers *qua* asylum seekers have no rights; they are simply not within the scope of the Refugee Convention.

There is also no mention of asylum rights in the International Covenant on Civil and Political Rights.<sup>93</sup> As observed above, the UDHR's articulation of

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89. Reference to the TEU in Article 18 of the EU Charter of Fundamental Rights would seem primarily to concern Article 3.2 of the TEU, which provides that "[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls . . . [and] asylum . . . ." TEU *supra* note 88, at art. 3.2. Reference to the TFEU in Article 18 of the EU Charter of Fundamental Rights would seem primarily to concern Article 78 and Protocol 24 of the TFEU, which provide, respectively, that the EU shall have a uniform asylum system, one that respects the international obligations of *non-refoulement* and is in accordance with the Global Refugee Convention, and that member States are restricted in their ability to grant asylum to nationals of other member States. See Consolidated Version of the Treaty on the Functioning of the European Union art. 78, Protocol 24, Oct. 26, 2012, O.J. (C 326) 47 [hereinafter TFEU].

90. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, § IV.D, July 25, 1951, 189 U.N.T.S. 137.

91. GOODWIN-GILL & MCADAM, *supra* note 26, at 206–07.

92. Some have argued that the Refugee Convention imposes upon member States the obligation not to obstruct an individual's right to seek asylum and an obligation to consider asylum applications in good faith on their merits. *E.g.*, GOODWIN-GILL & MCADAM, *supra* note 26, at 358–68. For a history of the negotiation of the 1951 Refugee Convention and its 1967 Protocol, see UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (1990), <https://perma.cc/2WEG-QFFN>; THE COLLECTED TRAVAUX PRÉPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES (Alex Takkenberg & Christopher C. Tahbaz, eds., 2nd ed. 1990); Gilad Ben-Nun, *The British-Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention*, 28 J. REFUGEE STUD. 93 (2015).

93. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. There is also no right to receive asylum articulated in the International Covenant on Economic, Social and Cultural Rights. See International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3. The European Court of Human Rights has made it clear that "a right to political asylum is not contained" in the European Convention on Human Rights and

the “right to seek and enjoy” asylum should not be interpreted to include a right to receive asylum.<sup>94</sup> And in 1967, the UN General Assembly adopted a Declaration on Territorial Asylum, a declaration that one might predict would provide for a right to asylum, but it does not. Instead, it states that a grant of asylum is something that a State does “in the exercise of its sovereignty.”<sup>95</sup> Other statements made in other treaties and other intergovernmental declarations, including declarations and statements by various UN bodies (e.g., UNHCR), demonstrate quite clearly that States do not believe they have an obligation pursuant to customary international law to grant asylum to anyone.<sup>96</sup> And many courts and scholars have concurred.<sup>97</sup>

This dynamic in which all people have the right to seek (and enjoy) asylum and all refugees are entitled to international protection, while simultaneously imposing no obligation on States to actually grant asylum to anyone outside their own territories (with the exceptions noted below), is notably reflected in the Bangkok Principles. The Bangkok Principles articulate a “right to seek and to enjoy in other countries asylum from persecution” but then immediately thereafter state, “A State has the sovereign right to grant or to refuse asylum in its territory to a refugee in accordance with its international obligations and national legislation”<sup>98</sup> and “States shall . . . use their *best endeavours* consistent

Fundamental Freedoms. *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Eur. Ct. H.R., ¶ 125 (Nov. 21, 2019).

94. See *supra* notes 66–79 and accompanying text.

95. Declaration on Territorial Asylum, *supra* note 66, at art. 1.1. It does state, however, that “[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.” *Id.* at art. 1.3; see also Draft Declaration on the Right of Asylum, *supra* note 72, ¶ 23 (reporting that during the negotiations of the text of the Declaration that “[i]t was stressed . . . that there was no rule of international law making it mandatory for a State to grant asylum”).

96. See, e.g., UNHCR Exec. Comm., General Conclusion on International Protection No. 77 (XLVI), ¶ (o), U.N. Doc. A/AC.96/860 (Oct. 20, 1995) (encouraging States to “maintain generous asylum policies”); UNHCR Exec. Comm., Conclusion No. 81, *supra* note 33, ¶ (m) (appreciating that some non-States parties to the Refugee Convention “maintain a generous approach to asylum,” thus suggesting that there is no customary international law obligating States to grant asylum); Cartagena Declaration, *supra* note 17, at parts I, IV (noting how many Latin America have made “generous efforts” to receive refugees and the “generous tradition of asylum and refuge” practiced by Colombia, thus suggesting that granting asylum is not legally obligatory); Committee of Ministers of the Council of Europe, Declaration on Territorial Asylum, *supra* note 79, ¶ 1 (affirming the members States’ “intention to maintain . . . their liberal attitude with regard to persons seeking asylum on their territory”).

97. See, e.g., JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 300–02 (1st ed. 2005); GOODWIN-GILL & MCADAM, *supra* note 26, at 383–84; Kay Hailbronner, Comments on: *The Right to Leave, the Right to Return and the Question of the Right to Remain*, in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 109, 109–18, (Vera Gowland-Debbas ed., 1996). The House of Lords in *European Roma Rights Centre* states, “[t]hose who drafted the [UDHR] provision rejected a proposal that a right to asylum should be granted.” Regina ex parte Eur. Roma Rts. Ctr. v. Immigr. Officer at Prague Airport [2005] 2 AC 1 (HL) ¶ 14 (appeal taken from Eng.); see also Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y. B. INT’L L. 327, 336–37 (1949); Grahl-Madsen, *infra* note 137, ¶ 179(ii); John Hucker, *Migration and Resettlement under International Law*, in THE INTERNATIONAL LAW AND POLICY ON HUMAN WELFARE 327, 337 (Ronald St. John McDonald et al. eds. 1978) (“[T]he 1951 convention does not confer upon refugees the right of initial admission to contracting states . . . . The [UDHR] speaks of the individual’s right to seek and enjoy asylum from persecution but does not purport to impose a duty to grant it, and efforts to chip away at the exclusive competence of receiving states to decide who shall be admitted have had only limited success.”).

98. Bangkok Principles, *supra* note 18, at art. II.2.

with their respective legislation to receive refugees.”<sup>99</sup>

## 2. *Two Regional Exceptions: Africa and Latin America*

An exception to the assertion that people do not have the right to receive asylum from countries in which they are not already present can be found in the African Refugee Convention, and another exception might exist within the regional customary international law of Latin America. The African Refugee Convention is the world’s only regional refugee-specific treaty. Like the Global Refugee Convention, it does not expressly articulate anything about any “right to seek” asylum or any “right to obtain” it from States. In fact, the African Refugee Convention states that States parties should “use their *best endeavours* . . . to receive refugees and to secure the settlement of those refugees who . . . are unwilling to return to their country of origin or nationality.”<sup>100</sup> The African Refugee Convention, like the Global Refugee Convention, does not expressly grant international protection rights (i.e., asylum) to people outside their own countries. But unlike the Global Refugee Convention, the African convention demands that States parties admit asylum seekers who arrive at their frontiers.<sup>101</sup> This non-rejection-at-the-frontier rule is, therefore, one of the few exceptions to the general rule that States are not obligated to grant asylum (at least temporarily) to anyone outside their territories and is a subject that will be explored in more depth below.<sup>102</sup>

The Cartagena Declaration on Refugees, like the Global Refugee Convention, makes no express statements at all regarding a right to asylum.<sup>103</sup> However, like the African Refugee Convention, the Cartagena Declaration seems to require States to admit asylum seekers who appear at their frontiers,<sup>104</sup> an obligation Latin American States have reiterated several times over the last several decades.<sup>105</sup> As a result, it seems to be the case that pursuant to Latin American (regional) customary international law there is a right to asylum for people who appear at the frontiers of Latin American countries and ask for it. Again, this subject will be explored in more depth in Part III.<sup>106</sup>

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99. *Id.* at art. II.4 (emphasis added). India officially objected to the language, “in accordance with its international obligations and national legislation,” and wanted to simply declare, “[a] State has the sovereign right to grant or to refuse asylum in its territory to a refugee.” *Id.* at Comments and Reservations by the Member Governments, ¶ 4.

100. African Refugee Convention, *supra* note 16, at art. II.1 (emphasis added).

101. *See id.* at art. II.3; *see infra* Part III.B (discussing the African Refugee Convention in depth).

102. *See infra* Part III.

103. Except that the Cartagena Declaration on Refugees urges countries to “[take] into consideration the conclusions of the UNHCR Executive Committee, particularly No. 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx.” Cartagena Declaration, *supra* note 17, at part III, ¶ 8.

104. *See infra* notes 255–57 and accompanying text.

105. *Supra* note 49.

106. *See infra* Part III. These observations about the African Refugee Convention and the customary international law of Latin America serve to provide some substance to the ostensible rights to receive asylum that are expressly articulated in the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and the African Charter on Human and People’s Rights, discussed above. *See supra* notes 80–87 and accompanying text.

### 3. *Reasons for the Incoherency*

Aside from these two exceptions, then, we are confronted with a rather incoherent tangle of international asylum law. It seems inconsistent to provide a right to *seek* asylum and a right to *enjoy* asylum while expressly rejecting any obligation of a State to grant asylum to meritorious persons.<sup>107</sup> The basic source of this incoherency or inconsistency is that, unlike international human rights law, international refugee and asylum law does not assign responsibility to any particular State or States to protect particular sets of refugees or asylum seekers. International human rights law burdens each State with a set of obligations to an identified set of people (i.e., those people within its jurisdiction). The responsibility to protect persecuted people and other asylum seekers, on the other hand, is given to the international community as a whole, and each State may choose to ignore the plight of asylum seekers and free-ride on the generosity of other States. In other words, no State has consented to be specifically and individually obliged to every single refugee and asylum seeker in the world. As a result, the community of nations has been quite happy to declare that *of course* people have the right to seek asylum and to enjoy it once given, and any refugee found within the territory of a State has protection rights vis-à-vis that State under applicable refugee conventions. But the community of nations has been unwilling to assume any particular burden on themselves, individually and severally, to grant asylum to meritorious people generally. States have reserved for themselves the right to grant asylum only at their discretion.<sup>108</sup>

This observation itself is a function of something even more fundamental. States do not readily grant foreigners a right to enter the State's territory without the express consent of the State.<sup>109</sup> And States do not readily grant

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107. See *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) HCA 55 (Austl.) ¶¶ 137-38 (1996) (“[N]o individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national. . . . [T]his right ‘to seek’ asylum was not accompanied by any assurance that the quest would be successful.”); GOODWIN-GILL & MCADAM, *supra* note 26, at 383-84 (“[T]he right of asylum . . . falls short of imposing an obligation on States to grant asylum to anyone seeking it . . .”).

108. Of course, it is not fair to merely assert that States have resisted obligating themselves to grant asylum without acknowledging that many States have accepted millions of refugees, either as States of first asylum or pursuant to resettlement programs. See UNITED NATIONS HIGH COMM’R FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 2016, <https://perma.cc/6EXN-X4F4>.

109. This is true even in human rights contexts. See, e.g., International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 79, Dec. 18, 1990, 2220 U.N.T.S. 3 (“Nothing in this present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.”); G.A. Res. 71/1, New York Declaration for Refugees and Migrants, ¶¶ 24, 42 (Sep. 19, 2016) [hereinafter New York Declaration] (recognizing that “States have rights and responsibilities to manage and control their borders” and acknowledging that “States are entitled to take measures to prevent irregular border crossings” and recalling that “each State has a sovereign right to determine whom to admit to its territory, subject to that State’s international obligations”); Global Compact for Safe, Orderly and Regular Migration ¶ 15 (Jul. 13, 2018) (“The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status . . . taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law.”); *Id.* at ¶ 27 (committing to

foreigners the right to live permanently within the State's territory without the express consent of the State. States prefer to control movement across their borders.<sup>110</sup> If States were to consent to the obligation to grant asylum to (deserving) foreigners, they would effectively be granting permission to a whole class of foreigners, the identities of whom States cannot know in advance, the right to cross their frontiers and enter their territory and, perhaps, stay indefinitely. This is an imposition on sovereignty that States have been more than reluctant to allow.<sup>111</sup>

The incoherent nature of asylum law is also a function of the fact that the word "asylum" is used to mean different things depending on the context, thus making it difficult to declare rules on "asylum" per se. Sometimes "asylum" is used to refer to State permission to enter, remain, and reside in a country on a long-term, durable, or permanent basis, as distinguished from a short-term, temporary, conditional, or provisional basis.<sup>112</sup> And, as discussed, States have resisted consenting to any obligation to grant long-term asylum, and thus they have largely refused to obligate themselves to grant *any* kind of "asylum" at all to persecuted people abroad. States protect their sovereign rights to determine which foreign nationals enter the country. However, pursuant to the Global Refugee Convention and other treaties, States have agreed to give certain people shorter term, less permanent, or more informal or provisional permission to remain in their territories pending an assessment of their asylum request or refugee status application or after the State determines such an applicant is deserving.<sup>113</sup> And, as introduced above, at least the States parties to the African Refugee Convention and perhaps the Latin American states have consented to allow certain asylum

"prevent[] irregular migration" and to "implement border management policies that respect national sovereignty").

110. And furthermore, a grant of asylum is often a tool of foreign affairs and a function of the State's political values. See Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747, Section III (1993).

111. It is not a coincidence that any articulation of an ostensible right to enjoy asylum or to receive asylum is always articulated from the point of view of the asylum-seeker (e.g., "Every person shall have . . ."), not from the point of view of the State (e.g., "Each State Party shall grant asylum to . . ."). I have yet to find a treaty or an international declaration that articulates the right to enjoy or receive asylum from the point of view of State obligation.

112. See UN General Assembly, *supra* note 64, at ¶ 8 (acknowledging the tension between understanding "asylum" as a long-term durable state and understanding "asylum" as including even short-term or temporary states); Greig, *supra* note 57, at 128–29 (discussing the lack of a consistent definition across contexts); G.J.L. Coles, *Temporary Refuge and the Large Scale Influx of Refugees*, 8 AUSTL. Y.B. INT'L L. 189, 200–02 (1983) (discussing the "uncertainty over the meaning of the term 'asylum'" and the transformation of the understanding of the word over the course of 1950–1980 from one that was quite general in scope to a more narrow one effectively entailing permanent residency); Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations*, 35 VA. J. INT'L L. 13 (1994) (discussing the transformation of the understanding of the word "asylum" within the developed countries over the course of the 1980s and 1990s from one that effectively meant permanent residency to one that included temporary protection); Savitri Taylor & Jodie Boyd, *The Temporary Refugee Initiative: A Close Look at Australia's Attempt to Reshape International Refugee Law*, 42 SYDNEY L. REV. 251 (2020) (discussing the same as the previous citation).

113. See, e.g., 1951 Refugee Convention, *supra* note 8, at art. 31.1 (restricting States from imposing penalties on refugees who have entered their territories unlawfully).



seekers to enter their countries for the purpose of assessing their eligibility for longer-term protection.

This kind of short term, temporary or conditional protection is still very much “asylum” in the sense that asylum seekers are allowed to enter and/or remain in safe countries protected from their foreign persecutors. And, indeed, this Article uses the word “asylum” to include such short-term, interim, temporary, or conditional protection. But in regard to such a short-term protection context, the word “asylum” is not regularly used in the broader literature of traditional asylum law, and the phrase “right to asylum” seems to never be used.<sup>114</sup> Instead, such discourse typically centers around other language, especially the language of international refugee law. As such, international rights to cross-border movement, if any, are not to be found in the traditional (narrow) language or understanding of international asylum law, but instead in international refugee law, and in particular, the principle of *non-refoulement*.

### III. NON-REFOULEMENT

“*Refoulement*” is, generally speaking, the act of forcibly sending a person to a country in which he would be in danger of persecution or would face a threat to their life or liberty. One of the rights that refugees enjoy under all the refugee instruments discussed thus far is a right to not be *refouled*, i.e., the right of *non-refoulement*.

Articulations of a principle of *non-refoulement* are found in the refugee-specific instruments, the Convention against Torture, and various extradition treaties. The principle has also been implied to exist in certain other treaties, most notably human rights treaties, and it is widely understood that the principle of *non-refoulement* has come to be part of customary international law. The exact scope of the principle, however, is often unclear—somewhat so within its treaty contexts, but particularly so within the context of customary international law.

This section will establish that the principal of *non-refoulement* clearly prohibits deportation of certain people who have entered a State’s territory, but there is reason to conclude that, with two regional exceptions, the principle does not obligate countries to permit people to enter their territories in the first place. As previously mentioned and expanded upon below, one exception exists within the context of the African Refugee Convention. Another exception seems to exist in Latin America, where the principle of non-rejection at the frontier appears to be enshrined in regional customary international law.

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114. *But see supra* notes 88–89 and accompanying text (discussing the EU Charter of Fundamental Rights’ use of the phrase “right to asylum”).

### A. 1951 Refugee Convention and 1967 Protocol

The *non-refoulement* provision of the 1951 Refugee Convention is as follows: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>115</sup> This provision does not provide for a right of admission, even for people who appear at the frontier asking for asylum.

#### 1. The Text

A few initial observations about the Refugee Convention’s *non-refoulement* provision are appropriate. First, the right of *non-refoulement* under the Refugee Convention is a right held only by refugees, as defined by the Refugee Convention. Second, the scope of this principle is not limited to refugees who have been given *permission* to be within the territory of a foreign State; all refugees within a State, documented and undocumented, are entitled to this right.<sup>116</sup> Third, the threats that a refugee might face that would trigger this principle are limited to those that are on account of their race, religion, nationality, political opinion, or membership in a particular social group (i.e., the same categories included in the definition of “refugee” under the Refugee Convention). Other threats (e.g., from generalized civil violence, natural disasters) do not trigger this principle. Fourth, the Refugee Convention provides an exception to the principle of *non-refoulement* in the case of any refugee who is “a danger” to the security or community of the host country.<sup>117</sup>

Additionally, the Refugee Convention does not have a provision that explicitly prohibits States from rejecting asylum seekers at the border even though they may be fleeing persecution in the bordering country. In other words, the Convention does not contain an explicit provision that obligates States to admit all asylum seekers, even if they would qualify as refugees if they were outside their home countries. Such an obligation is commonly referred to as the rule of “non-rejection at the frontier.”

Furthermore, the ordinary meaning of the Convention’s *non-refoulement* provision does not easily accommodate an interpretation that would include a non-rejection-at-the-frontier obligation.<sup>118</sup> The ordinary meaning of this

115. 1951 Refugee Convention, *supra* note 8, at art. 33.1.

116. The Refugee Convention often distinguishes between refugees “lawfully” staying within the territory of a host State and those who are not “lawfully” within. In fact, the Convention provides that only refugees “lawfully” staying within the territory of the host State have certain rights. *E.g.*, *id.* at art. 17 (regarding rights to employment); *id.* at art. 18 (providing rights of self-employment); *id.* at art. 21 (regarding rights related to housing); *id.* at art. 23 (regarding rights to public assistance); *id.* at art. 26 (regarding rights to move freely within the country); *id.* at art. 28 (right to be issued travel documents); *id.* at art. 32 (right not to be expelled except under certain circumstances).

117. *Id.* at art. 33.2.

118. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (describing the process of interpreting treaties); *see also* Hucker, *supra* note 97, at 333 (“The regime established by the [Refugee Convention] and [P]rotocol does not require states to grant entry to

language prohibits only the forced movement of people who have already entered the territory of a State party to the frontier of that same State; it does not include a requirement that a State permit the entry of asylum seekers in the first place. The text speaks of the “expulsion or return” of persons “to” the frontiers of threatening territories. If someone is at such a frontier and has not yet entered or been admitted to the destination country, they cannot be “expelled or returned” “to” that frontier, for they are already there. The language of the Convention prohibits moving a person to that frontier; it does not obligate a State to rescue a person who is already at that frontier.<sup>119</sup>

Additionally, since the Convention’s *non-refoulement* provision is only enjoyed by “refugees” as defined in the Convention, that is to say, by people who are at least outside their home countries, the Convention’s *non-refoulement* provision would expressly not apply to nationals of a bordering State who appear at that border asking for asylum but have not actually left their country. In other words, not only does the *non-refoulement* provision not expressly provide for a right of entry or admission, it does not even easily accommodate such a right for people trying to flee persecution in their home States.

## 2. *The Negotiation History*

Indeed, the initial draft of the *non-refoulement* provision was written to purposefully avoid requiring (or even implying) that States parties would have to admit any asylum seekers, and over the course of the rest of the negotiating process, negotiating States expressed only reluctance to commit to admitting anyone, and never expressed any commitment otherwise.<sup>120</sup>

In fact, the notion of non-rejection at the border was understood as an issue well before the adoption of the Refugee Convention, yet the explicit recognition of such a notion is conspicuously absent from the Convention. The

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refugees, but once lawfully admitted a refugee will benefit from a number of guarantees aimed at facilitating his resettlement in the receiving state.”); Nehemiah Robinson, *Convention Relating to the Status of Refugees*, INST. JEWISH AFFS., WORLD JEWISH CONG. 163 (1953), <https://perma.cc/9BBE-93UX>. (“Art.33 [of the Refugee Convention] concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into this territory.”).

119. Of course, countries’ external border security operations are normally either just within their borders or in an airport transit zone. That is to say, people who arrive at a country’s external borders and apply to enter a country are normally already within the territory of the destination country when they actually face border security personnel, often just slightly so. This on-the-ground reality is a function of the logistical and operational requirements of establishing and managing border control systems. Borders have no thickness (and *terra nullius* are rare), and countries normally situate such operations within their own territory, not within their neighbors’ territories. Although it may be the case that internationally legally mandated *non-refoulement* rights are not triggered at ports of entry until someone passes through this security and inspection (or “transit” or “international”) zone, this Article does not assert this view and is otherwise agnostic to this assertion.

120. Louis Henkin, Comment, *An Agenda for the Next Century: The Myth and Mantra of State Sovereignty*, 35 VA. J. INT’L L. 115, 117 (1994) (“At the time of the Convention’s drafting, states were not prepared to accept any obligation to admit refugees; they were prepared only to promise some economic and social benefits to some non-citizens whom they had voluntarily admitted, provided they met the refugee definition. . . . Indeed, I suspect the non-refoulement provision was seen as not likely to be invoked again.”); Fitzpatrick, *supra* note 25, at 235 (“Article 33 . . . may pertain only to those who manage to reach the territory of an obligated state . . .”).

United Nations ad hoc committee tasked with drafting the initial version of what came to be the Refugee Convention reported to the UN membership that in drafting the Convention they “gave special consideration to the provisions of previous international agreements,” particularly the 1933 Convention on the International Status of Refugees.<sup>121</sup> The 1933 Refugee Convention contained the following provision:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly. . . . It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.<sup>122</sup>

The drafting committee chose to omit the principle of non-rejection at the frontier in its *non-refoulement* provision<sup>123</sup> and reported that their draft of that provision “does not imply that a refugee must in all cases be admitted to the country where he seeks entry.”<sup>124</sup> In fact, a representative of the International Committee of the Red Cross invited to observe the negotiations lamented that the draft convention did not include a provision that required States to admit “all persons compelled by force of circumstances to seek asylum outside their usual country of residence.”<sup>125</sup> And during the early negotiations among the members of the ad hoc committee tasked with developing the language that would eventually be adopted as the text of the Refugee Convention, those members clearly considered the concept of admission and non-admission at the frontier,<sup>126</sup> but the adopted text did not contain any explicit language addressing admission or non-rejection at the frontier.

In the course of later negotiations,<sup>127</sup> States never pushed to include an explicit obligation to admit asylum seekers, and, in fact, only expressed

121. U.N. Econ. and Soc. Council, Rep. of the Ad Hoc Committee on Statelessness and Related Problems, 37, U.N. Doc. E/AC.32/5 (Feb. 17, 1950).

122. League of Nations Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, vol. 159 L.N.T.S. 3663.

123. The drafting committee’s version of the *non-refoulement* provision was as follows: “No Contracting State shall expel or return, in any manner whatsoever, a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.” U.N. Doc. E/AC.32/5, *supra* note 121, at 23.

124. *Id.* at 61.

125. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 24, U.N. Doc. A/CONF.2/SR.2 (July 20, 1951). It might be that the reference to a failure to require States to admit “all” persons is in fact reflective of State reluctance to admit persecuted people who might be threats to national security or be otherwise unacceptably disruptive or reflective of the fact that the original 1951 Refugee Convention defined “refugees” to include only people who were outside of their home countries as a result of events that occurred before January 1, 1951, and, for some States parties, only people in Europe.

126. *E.g.*, U.N., Econ. and Soc. Council, Ad Hoc Comm. on Statelessness and Related Problems, U.N. Doc. E/AC.32/SR.20, ¶ 64 (Feb. 10, 1950); U.N., Econ. and Soc. Council, Ad Hoc Comm. on Statelessness and Related Problems, ¶¶ 11–25, U.N. Doc. E/AC.32/SR.21 (Feb. 9, 1950).

127. *See* VCLT, *supra* note 118, at art. 32 (permitting reference to preparatory works as a supplementary means of treaty interpretation).

concern that they might be burdened with such an obligation.<sup>128</sup> As a result, the Convention is wholly silent on the issue of admission.

It is, however, necessary to make a few comments about the inclusion of the parenthetical “*refouler*” after the word “return” in the English text. No doubt it is a curious inclusion, and, in fact, it was not a word that was used in the English drafts until it was inserted only moments before the final text of the provision was adopted and only an hour or two before the final text of the entire Convention was adopted.

In 1951, a Conference of Plenipotentiaries negotiated and eventually adopted the final text of the Convention. The English draft of the Convention from which the Conference of Plenipotentiaries initially worked did not include the French word “*refouler*” in its *non-refoulement* provision. At one point, midway through the conference, while discussing the text of the *non-refoulement* provision, the Swiss representative referred to the term “*refoulement*” and asserted that the term “could not be applied to a refugee who had not yet entered the territory of the country.”<sup>129</sup> Later, in the afternoon of the last day of negotiations after three straight weeks of negotiating the final text of the Convention, the representative from the United Kingdom asserted that he considered the word “return” in Article 33.1 to have no wider meaning than the French word “*refoulement*,” as that term had been explained by the Swiss representative. Then immediately thereafter, it was decided at the suggestion of the conference president that the French verb “*refouler*” would be inserted in parentheses in the English version of Article 33.1 after the word “return” “in accordance with the practice of previous Conventions.”<sup>130</sup> There was no other discussion or debate about the significance of the insertion.

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128. During the 1951 Conference of Plenipotentiaries, the conference that adopted the final text of the Convention, the Swiss representative expressed concern that the phrase “expel or return” was ambiguous enough that it perhaps “left room” for an interpretation that could possibly include an obligation to admit asylum seekers. The Swiss representative was particularly worried that Convention parties would thus be obligated to admit large numbers of people in times of mass migration. He asserted that his understanding of the terms “expulsion” and “return” could only apply to refugees who had already been admitted to or entered the territory of a host country. He equated the English word “return” to the French word “*refoulement*.” In order to distinguish the word “expel” from the word “return,” he asserted that the word “return” would apply to refugees “who had already entered a country but were not yet resident there,” thus reserving the word “expel” for refugees who had not only entered the country but were residents there. He asked the other conference parties if they shared his interpretation, for if they did not, Switzerland would be unwilling to accept the provision as drafted. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 6, U.N. Doc. A/CONF.2/SR.16 (Nov. 23, 1951). France, the Netherlands, Italy, and Sweden all expressed agreement with the Swiss interpretation, and no State expressed disagreement. *Id.* at 6–11. West Germany and Belgium also expressed concern about large migrations, and Belgium suggested that in addition to refusing admission, a State would be permitted to return large groups of people from its territory. *Id.* at 12. The Netherlands objected at a later meeting of the Conference to making any commitment related to mass migrations. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 21, U.N. Doc. A/CONF.2/SR.35 (Dec. 3, 1951). Otherwise, the Convention is wholly silent on the issue of admission. See Fitzpatrick, *supra* note 25, at 232, 245–48 (acknowledging the “critical substantive lacunae or ambiguities” with regard to a right of admission and a right to receive asylum).

129. U.N. Doc. A/CONF.2/SR.16, *supra* note 128, at 6 (emphasis added).

130. U.N. Doc. A/CONF.2/SR.35, *supra* note 128, at 21–22.

It is challenging to understand the minds of the various plenipotentiaries and the conference president regarding this last-minute insertion by reading the summary of their negotiations.<sup>131</sup> However, despite the clear articulation of the Swiss interpretation, and the fact that the French word “*refouler*” was inserted to limit the scope of the English word “return,” later commentators have often made the argument that these exchanges among the plenipotentiaries leads to the conclusion that the Convention’s *non-refoulement* provision contains a non-rejection-at-the-frontier element for individual refugees but not for large numbers of refugees.<sup>132</sup> The records of these negotiations do not support such a conclusion. Indeed, it is impossible to read into the plain language of Article 33.1 any allowance for affording different treatment to individuals within a mass influx compared to individuals without a mass influx. The text does not support such a conclusion. There is simply no reference at all to mass influxes or other large groups of refugees in Article 33.1. Instead, these negotiations strongly suggest that there is no non-rejection element at all and that the negotiating States were particularly concerned with ensuring they avoided incurring any obligations regarding mass migrations.<sup>133</sup>

The word “*refouler*” is also used in the French text of Article 33.1. The French and English versions of the Refugee Convention are “equally authentic.”<sup>134</sup> The negotiation and the decision to include the word “*refouler*” in the French text occurred a year and a half before the Conference of Plenipotentiaries made the final edits to and adopted the Refugee Convention. The French version of Article 33.1 begins as follows: “*Aucun des Etats Contractants n’expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée. . .*” Again, the negotiating history does not provide particular clarity but does seem to indicate somewhat clearly that the insertion of “*ou ne refoulera*” in Article 33.1 of the French text was intended only to capture the non-judicial removal processes that existed in France and Belgium and which would not have been captured by the term “*expulser*” alone, which was a term used only for judicial removal processes.<sup>135</sup>

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131. Indeed, one gets the sense reading the summary proceedings of the three-week conference that by the end the plenipotentiaries were tired and eager to finish their task, adopt a final text, and conclude their weeks of negotiation and get out of Geneva.

132. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 26, at 206–07; UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007), <https://perma.cc/SE3M-DMF8> [hereinafter UNHCR, Advisory Opinion].

133. See *supra* note 128 (discussing the plenipotentiaries’ concerns about admitting mass influxes of people). See also U.N. Doc. A/CONF.2/SR.35, *supra* note 128, at 23 (reporting France’s understanding that the Convention’s *non-refoulement* provision of Article 33 was only applicable to refugees who had entered the territory of a contracting State); Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. A/CONF.2/SR.3, at 5–6, 9–10, 16 (Nov. 19, 1951) (summarizing statements by Italy, Switzerland, and the United States highlighting their prerogative to choose (and to refuse) to admit foreign nationals into their territories); Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 (Articles 2-11, 13-37)*, UNHCR, at 135–38 (1963), <https://perma.cc/7TSG-X2K5>.

134. Refugee Convention, *supra* note 8, at final paragraph.

135. See U.N. Doc. E/AC.32/SR.21, *supra* note 126, ¶¶ 12–21.

At that same time, however, the French and Belgian French-speaking delegates explained that their concept of “*refoulement*” also included rejection at the border by executive (i.e., non-judicial) authorities. However, during these early negotiations when “*ou refoulé*” was first added to the French version, both the U.K. and U.S. committee members agreed that there was no such concept as “*refoulement*” in their countries. But of course, the United States and the United Kingdom may reject people who arrive at their frontiers. The American member, Louis Henkin, even said that the English word “*expel*” covered all the cases being considered, suggesting that non-admission at the frontier was not the aspect of “*refoulement*” that the French and Belgian delegates wanted to ensure was included in the French text of the Convention.<sup>136</sup> Instead, the feature that was intended to be included was the non-judicial expulsion from the territory of the State. This particular exchange hardly lends itself to clear interpretation, but coupled with the concerns expressed at the Conference of Plenipotentiaries a year and a half later, and considering the plain meaning of the English words actually used in Article 33.1, the most consistent and reasonable interpretation of these negotiations that harmonizes the French and English texts is that Article 33.1 does not prohibit rejection at the frontier.<sup>137</sup>

### 3. *Judicial Interpretations*

Furthermore, at least three national courts have refused to interpret the Global Refugee Convention’s *non-refoulement* provision in a way that would obligate States parties to grant rights to people outside their territories. The U.S. Supreme Court in *Sale v. Haitian Centers Council* stated that intercepting Haitians on the high seas and sending them back to Haiti, including those who claimed to be refugees fleeing persecution by the Haitian government, did not violate the *non-refoulement* provision of the Refugee Convention.<sup>138</sup>

136. *Id.* at ¶¶ 16, 18, 21.

137. *See* VCLT, *supra* note 118, at art. 33 (regarding the interpretation of treaties authenticated in two or more languages); *see also* ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW § 179(i) (1972) (arguing that the word *refouler* in the authoritative French text was not used to mean “refuse entry” but “return,” “reconduct,” or “send back” and the provision did not refer to the admission of refugees but only to the treatment of refugees who were already in a contracting State).

138. *Sale v. Haitian Centers Council*, 509 U.S. 155, 179–88 (1993); *see also* Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 840–41 (D.C. Cir. 1987) (“Article 33 in and of itself provides no rights to aliens outside a host country’s borders. . . . The other best evidence of the meaning of the Protocol [to the Global Refugee Convention] may be found in the United States’ understanding of it at the time of accession. There can be no doubt that the Executive and the Senate decisions to adhere were made in the belief that the Protocol worked no substantive change in existing immigration law. At that time ‘[t]he relief authorized by § 243(h) [of the Immigration and Nationality Act] was not . . . available to aliens at the border seeking refuge in the United States due to persecution.’” (quoting *INS v. Stevic*, 467 U.S. 407, 415 (1984) and quoted in *Haitian Centers Council*, 509 U.S. at 161 n.10)); SPARKMAN, PROTOCOL RELATING TO REFUGEES, S. EXEC. REP., at 6, 19 (2d Sess. 1968) (recording the assurances given by the U.S. Department of State to the Senate that it was “absolutely clear” that ratifying the Refugee Protocol would not require the United States “to admit new categories or numbers of aliens”); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (“The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees . . . to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the

The UK House of Lords in *European Roma Rights Centre*<sup>139</sup> concluded that interdicting asylum seekers and would-be refugee applicants from boarding London-bound airplanes at foreign airports, thus preventing them from reaching U.K. territory, did not violate the Convention's *non-refoulement* principle.<sup>140</sup> More generally, the House of Lords concluded that the Convention did not provide for any right of admission.<sup>141</sup> And the Australian High Court in *Minister for Immigration and Multicultural Affairs v. Ibrahim* stated that the provisions of the Refugee Convention "assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting State . . . [It] was not designed to confer any general right of asylum upon classes or groups of persons suffering hardship and was deliberately confined in its scope."<sup>142</sup>

It should be acknowledged, however, that none of the court opinions cited above address situations where any asylum seekers were at the literal frontier of a destination country seeking admission. The Haitians in *Haitian Centers Council* were interdicted by U.S. Coast Guard vessels on the high seas.<sup>143</sup>

United States."). See generally U.S. DEP'T OF STATE, *U.S. Observations on UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations* (Dec. 28, 2007), <https://perma.cc/5EKS-W9RD> (rejecting the conclusion that Article 33 of the Refugee Convention applies extraterritorially).

139. *Regina ex parte Eur. Roma Rts. Ctr. v. Immigr. Officer at Prague Airport* [2005] 2 AC 1 (HL) (appeal taken from Eng.).

140. *Id.* at ¶¶ 15–20.

141. *Id.*; see also *id.* at ¶ 12 (noting that the right of the State to grant asylum to "aliens" was "not matched by recognition in domestic law of any right in the alien to require admission to the receiving state or by any common law duty in the receiving state to give it").

142. *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) HCA 55 (Austl.) ¶¶ 136, 143 (1996) (quoting in part Fitzpatrick, *supra* note 25, at 245); see also *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, ¶ 42, 44 (Austl.) ("The [Refugee] Convention does not impose an obligation upon Contracting States to grant asylum or a right to settle in those States to refugees arriving at their borders. Nor does the Convention specify what constitutes entry into the territory of a Contracting State so as then to be in a position to have the benefits conferred by the Convention. Rather, the protection obligations imposed by the Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States . . . [N]one of the provisions in [the Refugee Convention] gives to refugees a right to enter the territory of a Contracting State . . ."); *Minister for Immigration and Multicultural Affairs v Vadarlis* [2001] FCA 1329, ¶ 203 (Austl.) (asserting, although conclusorily, that the Australian government's rejection of asylum seekers who had entered Australian territorial waters did not breach Article 33 of the Refugee Convention); *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1, ¶ 169 (Austl.) (ruling that Australia was not required to admit asylum seekers intercepted at sea).

143. See generally *Haitian Centers Council*, 509 U.S. at 158–67. However, the *Haitian Centers Council* court, in dicta, did briefly entertain the possibility that the Convention's *non-refoulement* principle should be interpreted to include a non-rejection-at-the-border element. *Haitian Centers Council*, 509 U.S. at 181–83. None of these courts, however, made any such conclusion or, indeed, were faced with having to make such an interpretation one way or the other. Although the *Haitian Centers Council* court was not faced with a scenario where asylum seekers were rejected at the border without being paroled or otherwise admitted into the country or without having their asylum applications entertained, and indeed the Haitian plaintiffs were not even demanding to be admitted into the United States, reading *Haitian Centers Council* for indications of how the Court would apply the Convention's *non-refoulement* provision in such a case yields ambiguous and seemingly contradictory results. On the one hand, the Court makes it clear that the Convention has no extraterritorial application, that it does not govern a State party's behavior outside its borders, and suggests the Convention would apply only to refugees "already admitted into a country" and those who are "already within the territory but not yet resident there." On the other hand, the *Haitian Centers Council* court suggests that Convention's Article 33 prohibition against "returning" (or "refouling") a refugee to a State where his or her life or liberty would be threatened might include a prohibition against "defensive acts of resistance or exclusion at a border." *Id.* However, even



The Roma in *European Roma Rights Center* were prevented from boarding U.K.-bound flights by U.K. immigration officers stationed at Prague's international airport.<sup>144</sup> And the asylum seeker in *Ibrahim* had already entered Australia.<sup>145</sup>

#### 4. *Contrary Scholarly Interpretations*

Despite all the analysis above, some scholars and refugee advocates frequently argue that the scope of the Refugee Convention's *non-refoulement* principle extends to people who have arrived at a country's frontiers (or are in international waters). These arguments are quite reasonable and find strength in the normative value of protecting people fleeing persecution. For example, UNHCR, in a 2007 Advisory Opinion on the Extraterritorial Application of the Refugee Convention, stated, "As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States *will be required to grant individuals* seeking international protection *access to the territory* and to fair and efficient asylum procedures."<sup>146</sup> As logical as that might sound, UNHCR gives very little plausible

after suggesting that returning (or refouling) might include exclusion at the border, the court approvingly cites scholars who seem to reject that interpretation. *Id.* at 182 n.40, 183 n.41 (citing (i) Nehemiah Robinson, *supra* note 118 (defining "returning" (and "refoulement") as "the mere physical act of ejecting from the national territory a person residing therein who has gained entry or is residing regularly or irregularly" and asserting that Refugee Convention's *non-refoulement* provisions "concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into [the] territory"); (ii) A. GRAHL-MADSEN, *supra* note 133 (stating that *non-refoulement* "may only be invoked in respect of persons who are already present—lawfully or unlawfully—in the territory of a Contracting State," and asserting that the Convention's *non-refoulement* provisions does "not obligate the Contracting State to admit any person who has not already set foot on their respective territories"); and (iii) GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 74–76, 87 (1st ed. 1983) (describing both "expel" and "return" as terms referring to one nation's transportation of an alien out of its own territory and into another and stating that "a categorical refusal of disembarkation cannot be equated with breach of the principle of *non-refoulement*, even though it may result in serious consequences for asylum-seekers.")). Since the U.S. government actively returned fleeing Haitians to Haiti without always conducting refugee status determinations, *Haitian Centers Council* is much maligned. See e.g., *Haitian Centers Council*, 509 U.S. at 155 (Blackmun, J., dissenting); *Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1997). Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994); Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT'L J. REFUGEE L. 103, 109 (1994) (accusing the Supreme Court of being a party to a breach of international law); *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., at 67 (Feb. 23, 2012) (Pinto de Albuquerque, J., concurring).

144. *Regina ex parte Eur. Roma Rts. Ctr. v. Immigr. Officer at Prague Airport* [2005] 2 AC 1 (HL) ¶ 4 (appeal taken from Eng.).

145. *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) HCA 55 (Austl.) ¶ 46 (1996).

146. UNHCR, Advisory Opinion, *supra* note 132, ¶ 8 (emphasis added). UNHCR presented a similar set of arguments in an amicus brief to the U.S. Supreme Court concerning a case addressing the legality of a high seas interdiction and return program. UNHCR, *The Haitian Interdiction Case 1993: Brief amicus curiae*, 6 INT'L J. REFUGEE L. 85 (1994) [hereinafter UNHCR *Haitian Centers* Amicus Brief]. Interestingly, this amicus brief states that the United States "could close its borders without forcing the return of refugees to Haiti," suggesting that rejection at the frontier is not necessarily a violation of the Refugee Convention. *Id.* at 101. And in its amicus brief to the House of Lords concerning *European Roma Rights Centre*, UNHCR included a curious footnote that states, "Even [the Refugee Convention] principle of *non-refoulement* does not itself require admission, although admission may be required by force of circumstances, for example, if no other non-persecuting State is willing to accept the refugee."

justification for interpreting the Refugee Convention this way. Setting aside the question of the extraterritorial application of the treaty's *non-refoulement* provision, the treaty is otherwise entirely focused on State obligations towards refugees within the territory of the State. Thus, it makes little sense to argue that "in order to give effect to their obligations" under the treaty, States would be obligated to admit people from outside their territories.

UNHCR's Advisory Opinion also asserts that the ordinary meaning of the *non-refoulement* provision "clearly" imposes an extraterritorial obligation. Although it may be "clear" that a contracting party cannot *refoule* someone to certain foreign States, it is not clear that a State must admit all asylum seekers, or, at minimum, those who appear at the frontiers of the State. Indeed, as discussed above, the ordinary meaning of the words in the *non-refoulement* provision point in the other direction; those who are already at the frontier of a contracting State cannot come within the scope of the Convention's *non-refoulement* provision with regard to the bordering State since they are already at the frontier, and, indeed, the right of *non-refoulement* is one only enjoyed by "refugees," i.e., only people outside their home countries.<sup>147</sup> Again, this strongly suggests that the Convention does not impose an obligation to admit.

UNHCR's Advisory Opinion goes on to insist that the object and purpose of the Refugee Convention is a "humanitarian" one, and as a result, the humanitarian interpretation is that the Convention has extraterritorial effect and presumably requires States parties to admit all asylum seekers who appear at the frontier.<sup>148</sup> But the humanitarian nature of the Convention cannot serve to obligate States parties to behave in ways that they did not consent to under the terms of the Convention. The ordinary meaning of words used to prescribe the Convention's *non-refoulement* provision are clear enough such that the *pro homine* principle of treaty interpretation is inapplicable.<sup>149</sup> Indeed, under UNHCR's humanitarian analysis, an asylum seeker who applies for asylum at the embassy of a contracting State or otherwise at a long distance from the frontier (e.g., by telephone call) would have to be admitted into the territory of the contracting State. Clearly the Convention does not require this.<sup>150</sup>

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Written Case on Behalf of the Intervener UNHCR, ¶ 14 n.2, *Regina ex parte Eur. Roma Rts. Ctr. v. Immigr. Officer at Prague Airport* [2005] 2 AC 1 (HL) [hereinafter *UNHCR Roma Rights Amicus Brief*], <https://perma.cc/H5KV-UZUD>. In this seemingly contradictory and confusing mix of comments and assertions, one senses an ongoing, but good faith, struggle to impart into Article 33.1 a prohibition against rejection at the frontier that simply does not exist.

147. *Supra* notes 35–37, 116–17 and accompanying text.

148. UNHCR, Advisory Opinion, *supra* note 132, ¶ 29.

149. The *pro homine* principle encourages the interpretation of human rights treaties in a manner that increases the protection of the human person as opposed to interpretations that protect State sovereignty. Valerio de Oliveira Mazzouli & Dilton Riberio, *The Pro Homine Principle as an Enshrined Feature of International Human Rights Law*, 3 *INDON. J. INT'L & COMP. L.* 77 (2016).

150. UNHCR also asserts that the treaty drafters regularly made it clear when certain rights provided in the Convention pertained only to people within the territory of the contracting State and thus their failure to clearly limit the right of *non-refoulement* to people within the territory of the State suggests that the

At any rate, after asserting in this Advisory Opinion that the Convention requires States “to grant individuals seeking international protection access to the territory,” UNHCR later narrows this assertion by stating that the principle of *non-refoulement* “applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State,”<sup>151</sup> and then, even more narrowly, that the principle applies whenever an asylum seeker comes within the “effective control and authority” of a contracting State, even if that is not within the territory of the State.<sup>152</sup> Certainly a State would exercise effective control and authority, for example, when State vessels intercept asylum seekers at sea, but it would not exercise effective control and authority immediately across a border with another State, thus calling into question the assertion that asylum seekers must not be rejected at the frontier or must be admitted into the State.<sup>153</sup>

Two distinct issues regularly get conflated in this discussion. The first is the question of whether the treaty has extraterritorial effect, and if so, when. The second is whether States are prohibited from rejecting asylum seekers at the border, or, in other words, whether States must admit all asylum seekers who appear at their frontiers. These are two different questions. The UNHCR Advisory Opinion conflates the two, jumping between one idea and the other. UNHCR makes a persuasive argument that the Convention’s *non-refoulement* provision applies when a State has effective control and authority over asylum seekers even when that control and authority is being exercised extraterritorially, e.g., at sea on a Coast Guard vessel.<sup>154</sup> But UNHCR does not make a persuasive argument that the Convention’s *non-refoulement* provision prohibits a State from rejecting asylum seekers at the frontier or requires a State to admit them (even if after being intercepted at sea).<sup>155</sup>

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non-refoulement provision applies to people without the territory of the State. UNHCR, Advisory Opinion, *supra* note 132, ¶ 28 (citing to Convention articles 2, 4, 18, 26, and 27 among others). However, the provisions cited by UNHCR really only serve to distinguish the rights of refugees who are *lawfully* within the territory of a State from the rights of those who are *unlawfully* within the territory of the State. These provisions hardly give any insight into the extraterritorial application of the *non-refoulement* provision or into any ostensible obligation to admit asylum seekers.

151. *Id.* at ¶¶ 8, 24.

152. *Id.* at ¶¶ 34–43.

153. *See supra* note 119 (discussing port of entry inspection and transit areas).

154. *See also* UNHCR *Haitian Centers* Amicus Brief, *supra* note 146 (making the same argument).

155. Under this interpretation, a State that intercepts asylum seekers at sea cannot *refoule* them to a country where they would be under threat but would have no obligation to return home with the asylum seekers and admit them. The State can send the intercepted asylum seekers to any willing safe country. *See Haitian Centers Council*, 509 U.S. at 188–208 (Blackmun, J., dissenting) (interpreting the Convention largely in this way); *Minister for Immigration and Multicultural Affairs v Vadarlis* [2001] FCA 1329 (Austl.) (same); *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., at 59–82 (Feb. 23, 2012) (Pinto de Albuquerque, J., concurring). (same); Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, *supra* note 145, at 106, 109 (emphasizing that “*non-refoulement* is not so much about admission to a State, as about not returning refugees to where their lives or freedom may be endangered” and “[t]he guarantee of *non-refoulement* . . . is . . . independent from the question of admission or the grant of asylum”). Arguably, mere maritime pushback operations without an associated boarding would not constitute *refoulement* since no one would be directed necessarily to an unsafe country. However, depending on the sea worthiness and provisioning of a pushed-back vessel, maritime push back operations may violate the law of the sea’s obligation to rescue people at sea.

### B. *The African Refugee Convention*

The African Refugee Convention articulates the principle of *non-refoulement* as follows: “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons [that qualifies someone as a refugee pursuant to this treaty].”<sup>156</sup>

Notably, this articulation, unlike that of the Global Refugee Convention, provides that the right to *non-refoulement* is one enjoyed by “persons,” not just “refugees.” This subtle difference makes it evident that one need not qualify or be recognized as a refugee pursuant to the African Refugee Convention before he enjoys the right of *non-refoulement*. So, for example, such a person need not be outside his or her home country. Further, the principle of *non-refoulement* is explicitly enjoyed by people who present themselves “at the frontier” of a State party if such rejection would result in the asylum seekers “remaining” in a persecuting country. Therefore, such people cannot be denied entry (“rejected”) if that frontier is with a country that is persecuting them or that threatens to send them to a persecuting country.

The practical significance of this obligation is that States parties must admit everyone who reaches their frontiers and requests asylum to ensure they do not violate the principle of *non-refoulement*. Every asylum seeker must be admitted because otherwise a State would not know if the rejection at the frontier of a person would result in a violation of the Convention’s rule against *refoulement*. To better ensure it avoids such a violation, the State must undertake a good faith examination of the person’s situation. The first step in any such examination is admitting the asylum seeker so the examination may begin.

### C. *Other Human Rights Conventions*

Principles of *non-refoulement* find further expression in several other human rights treaties, including the Convention against Torture, the International Covenant on Civil and Political Rights (ICCPR), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Of these, only the Convention against Torture, a convention whose aim is to eliminate and otherwise criminalize State-sanctioned torture, contains an express articulation of the principle of *non-refoulement*. However, several courts and human rights bodies have interpreted certain provisions of the ICCPR, the ECHR, and other human rights treaties to contain implied principles of *non-refoulement*.

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156. African Refugee Convention, *supra* note 16, at art. II.3.

### 1. *Convention against Torture*

The Convention against Torture provides that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>157</sup> Unlike the *non-refoulement* rule contained in the Refugee Convention, which allows for exceptions in regard to dangerous individuals,<sup>158</sup> the Convention against Torture contains no exceptions at all.<sup>159</sup> Further, everyone subject to a State party’s jurisdiction enjoys the Convention’s right of *non-refoulement*, not just those who qualify as “refugees.” And, unlike *non-refoulement* under the Refugee Convention, in which the motive underlying the threat to life and freedom is relevant (on account of race, religion, etc.), pursuant to the Convention against Torture the motive that underlies the threatened torture is irrelevant.

Most importantly for this Article’s purposes, however, the Convention against Torture, like the Refugee Convention, does not expressly include non-rejection at the frontier as coming within the scope of its *non-refoulement* provision. This is particularly notable since the question of whether “rejection at the frontier” was or should be included within the scope of *non-refoulement* was a debated issue at the time. In fact, the African Refugee Convention, a treaty that expressly includes non-rejection at the frontier, was adopted ten years before the adoption of the Convention against Torture. And a convention on territorial asylum was being negotiated under the auspices of the United Nations when the United Nations undertook the first drafts of the Convention against Torture, and it too contained a non-rejection at the frontier provision in its draft *non-refoulement* provision.<sup>160</sup> In other words, the States that negotiated and adopted the text of the Convention against Torture knew about the possibility of expressly including rejection-at-the-frontier language within the scope of the Convention’s *non-refoulement* principle but chose not to do so.<sup>161</sup>

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157. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3.1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

158. See *supra* note 117 and accompanying text (describing exceptions to the Refugee Convention’s *non-refoulement* rule).

159. It is evident that there is no explicit set of exceptions to the *non-refoulement* principle, but it also appears that there are no implicit set of exceptions either. The Committee against Torture, in many of its formal communications, has pronounced that there are no exceptions. *E.g.*, Committee against Torture, Decision of the Committee Against Torture Under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Forty-Eighth Session) Concerning Communication No. 444/2010, Abdussamatov v. Kazakhstan, ¶ 13.7, U.N. Doc. CAT/C/48/D/444/2010, annex (June 1, 2012). And indeed, the Torture Convention itself emphasizes that there are no exceptions that would permit State-sanctioned torture. , *supra* note 157, at art. 2.2.

160. See *infra* notes 239–44 and accompanying text (describing the draft Convention on Territorial Asylum).

161. See, *e.g.*, Nina Sibal (Chariman-Rapporteur), U.N. Econ. and Sec. Council, Rep. of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 42, UN. Doc. E/CN.4/L.1470 (Mar. 12, 1979); see also *supra* notes 121–26 and accompanying text (discussing the existence of the 1933 treaty).

Despite the absence of an explicit non-rejection clause, the Committee against Torture has interpreted the Convention against Torture's *non-refoulement* to include "rejection at the frontier and pushback operations (including at sea)."<sup>162</sup>

## 2. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights does not contain an explicit prohibition against *refoulement*, but it has been interpreted to contain an implicit *non-refoulement* rule. For example, the Human Rights Committee has proclaimed:

the Article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant [asserting a right to life and prohibiting torture, inhuman treatment, and non-consensual medical experimentation, respectively], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>163</sup>

The Human Rights Committee has reiterated this implicit *non-refoulement* rule in several of its official communications,<sup>164</sup> and numerous

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162. Committee against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶¶ 4, 11, 12, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018) (defining "deportation" to include such acts).

163. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). The relevant part of Article 2 of the ICCPR reads, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." ICCPR, *supra* note 93, at art. 2.1. See also *Human Rights Committee*, General Comment No. 35: Article 9 (Liberty and Security of Person), ¶ 57, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) ("Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant.").

164. *E.g.*, Human Rights Committee, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Forty-eighth session) Concerning Communication No. 470/1991, *Kindler v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991, annex (July 30, 1993); Human Rights Committee, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Forty-ninth session) Concerning Communication No. 469/1991, *Ng v. Canada*, U.N. Doc. CCPR/C/49/D/469/1991, annex (Nov. 5, 1993); Human Rights Committee, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Ninety-third session) Concerning Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov v. Kyrgyzstan*, U.N. Doc. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006, annex (July 16, 2008); Human Rights Committee, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Ninety-eighth session) Concerning Communication No. 1544/2007, *Hamida v. Canada*,

scholars have agreed with such analysis.<sup>165</sup>

The Human Rights Committee has also asserted that this *non-refoulement* rule has no exceptions, even for the sake of national security or the public interest, if, in a country into which a person would be *refouled*, that person's life would be at risk, or if that person would be subject to torture or cruel, inhuman or degrading treatment.<sup>166</sup>

It is not clear, however, to what extent the ICCPR's implicit principle of *non-refoulement* applies to other ICCPR rights. The Human Rights Committee has stated that its rule of *non-refoulement* is triggered whenever there is a risk of "irreparable harm" in the destination country, but it has not defined "irreparable harm." The Human Rights Committee has also stated that the principle of *non-refoulement* is triggered only in the face of "the most serious breaches of fundamental rights,"<sup>167</sup> such as the right to life and the right to be free from torture and inhuman treatment. If the principle of *non-refoulement* were triggered in the face of less serious human rights breaches, it would, according to the Human Rights Committee, "deny a state's sovereignty over removal of foreigners from its territory."<sup>168</sup> Curiously, such a denial is exactly what the principle of *non-refoulement*, however limited, is supposed to do. So, the principle of State sovereignty regarding the decision of which foreigners a State admits into its territory and which foreigners are allowed to stay in its territory is hardly a reliable test of when the principle of *non-refoulement* exists and when it does not. We would need to judge when a breach of a human right is not only one that constitutes a breach of a fundamental right but is serious enough to warrant an impingement on the traditional right of States to exclude and expel foreigners as they wish.

All in all, although there is some doubt about the exact scope of the ICCPR's implied *non-refoulement* rule and, relatedly, the extent the ICCPR applies extraterritorially,<sup>169</sup> it is not necessarily the case that the ICCPR implies a right to admission for asylum seekers who appear at the frontiers of ICCPR parties.

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U.N. Doc. CCPR/C/98/D/1544/2007, annex (Mar. 18, 2010); Human Rights Committee, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Hundred-Ninth session) Concerning Communication No. 1898/2009, Choudhary v. Canada, ¶ 9.2, U.N. Doc. CCPR/C/109/D/1898/2009, annex (Oct. 28, 2013) [hereinafter Choudhary].

165. *E.g.*, GOODWIN-GILL & MCADAM, *supra* note 26, at 305–09; JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* (2007).

166. Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Canada, ¶ 15, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006).

167. Choudhary, *supra* note 164, at ¶ 4.15.

168. *Id.*

169. Compare the above-cited Human Rights Committee communications to the U.S. Dep't of State, Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the ICCPR, Annex 1 (Oct. 21, 2005) <https://perma.cc/2GPF-8SD6> (arguing that the obligations of the ICCPR apply only within the territory of a State party).

### 3. *European Treaties*

At least three European treaties are relevant to this discussion: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),<sup>170</sup> the Charter of Fundamental Rights of the European Union (“European Charter”),<sup>171</sup> and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“Istanbul Convention”).<sup>172</sup>

The ECHR does not contain an explicit *non-refoulement* provision but has been interpreted to contain an implicit *non-refoulement* provision pursuant to a few of its provisions, including its prohibition against torture and inhuman or degrading treatment or punishment.<sup>173</sup> Both the European Court of Human Rights and the European Commission of Human Rights have interpreted that prohibition as one that prohibits the member States from sending someone to another country where there is a real chance he or she might be subject to such treatment.<sup>174</sup> There are no national security or public interest exceptions to this implied *non-refoulement* provision.<sup>175</sup> The European Court of Human Rights has also interpreted the ECHR’s provisions guaranteeing a right to life, a right to liberty and security, a right to a fair trial, and a right to a family life to contain implicit *non-refoulement* provisions.<sup>176</sup> Not only are the ECHR’s *non-refoulement* provisions merely implied, Article 1 of the convention demands that the States parties “secure to everyone within their jurisdiction” the rights and freedoms provided in it. It would be difficult, therefore, to read into the ECHR a non-rejection-at-the-frontier obligation. Indeed,

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170. Council of Europe, European Convention on Human Rights, Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR].

171. EU Charter of Fundamental Rights, *supra* note 88.

172. Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011, E.T.S. 210 [hereinafter Istanbul Convention].

173. ECHR, *supra* note 170, at art. 3.

174. *E.g.*, *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R., ¶ 111 (July 7, 1989); *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., ¶ 123 (Feb. 23, 2012); *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Eur. Ct. H.R., ¶ 126 (Nov. 21, 2019); *X v. Federal Republic of Germany*, App. No. 4162/69, Eur. Ct. H.R. (1969); *Sheekh v. Netherlands*, App. No. 1948/04, Eur. Ct. H.R., ¶ 148 (2007). In *Hirsi Jamaa*, the European Court of Human Rights also interpreted Article 4 of Protocol 4 to the ECHR prohibiting the collective expulsion of “aliens” as having extraterritorial effect, at least in the context of intercepting migrants on the high seas by State authorities. *Hirsi Jamaa*, App. No. 27765/09, ¶¶ 166–81.

175. *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R., ¶ 75–82 (1996) (concluding that a State is prohibited from sending people to other States if they “would face a real risk of being subjected to treatment contrary to Article 3” and that such prohibition exists “irrespective of the victim’s conduct” and “even in the event of a public emergency threatening the life of the nation”); *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R., ¶ 117 (2008). Protocol No. 7 to the ECHR otherwise allows States to expel “aliens” without certain procedural safeguards “when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.” Council of Europe, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, ¶ 2, Nov. 22, 1984, E.T.S. 117.

176. *E.g.*, *Kaboulov v. Ukraine*, App. No. 41015/04, Eur. Ct. H.R. (2009); *Othman (Abu Qatada) v. United Kingdom*, App. No. 8139/09, Eur. Ct. H.R., ¶¶ 233, 258, 287 (2012) (addressing the right to liberty and security and the right to a fair trial); *Paposhvili v. Belgium*, App. No. 41738/10, Eur. Ct. H.R., ¶¶ 221–26 (2008) (addressing the right to a family life in the context of a non-citizen father with deteriorating health).



neither the European Court of Human Rights nor the Court of Justice of the European Union has interpreted the ECHR to imply such an obligation.

Both the European Charter and the Istanbul Convention contain explicit *non-refoulement* provisions, but they do not include non-rejection-at-the-frontier within their scopes. The European Charter states, “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”<sup>177</sup> The Istanbul Convention states, “Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.”<sup>178</sup> Both of these treaties conspicuously fail to include any reference to “non-rejection at the frontier.” They also refrain from using the somewhat ambiguous word “*refouler*.”<sup>179</sup>

#### 4. *Other Human Rights Treaties*

The principle of *non-refoulement* is expressly provided in several other human rights treaties, including the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED),<sup>180</sup> the Inter-American Convention to Prevent and Punish Torture,<sup>181</sup> and the American Convention on Human Rights.<sup>182</sup> None of these treaties, however, contains an explicit non-rejection-at-the-frontier provision. This is true for the ICPPED even though it was adopted quite recently (2006). The American Convention on Human Rights has been interpreted by the Inter-American Commission of Human Rights to contain an implicit non-rejection-at-the-frontier element.<sup>183</sup> However, the Commission merely conclusorily asserts

177. EU Charter of Fundamental Rights, *supra* note 88, at art. 19, ¶ 2.

178. Istanbul Convention, *supra* note 172, at art. 61, ¶ 2.

179. Nor is the word “*refouler*” used in the French version of the European Charter. The French version of Article 19.2 of the Charter reads as follows: “Nul ne peut être éloigné, expulsé ou extradé vers un Etat où il existe un risque sérieux qu’il soit soumis à la peine de mort, à la torture ou à d’autres peines ou traitements inhumains ou dégradant.” EU Charter of Fundamental Rights, *supra* note 88, at art. 19, ¶ 2.

180. International Convention for the Protection of All Persons from Enforced Disappearance, art. 16, ¶ 1, Dec. 20, 2006, 2716 U.N.T.S. 3 (“No State Party shall expel, return (“*refouler*”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”).

181. Organization of American States, Inter-American Convention to Prevent and Punish Torture, art. 13, ¶ 4, Dec. 9, 1985, O.A.S.T.S. No. 67 (“Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.”).

182. American Convention on Human Rights, *supra* note 70, at art. 22.8 (“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”).

183. *E.g.*, Inter-Am. Comm’n H.R., Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-

that the obligation of non-return “necessarily” includes non-rejection at the border and otherwise makes no additional analysis or argument.<sup>184</sup>

The principal of *non-refoulement*, although not expressly provided, has been found to be implied in several other human rights treaties besides the ICCPR and the ECHR, such as the Convention on the Elimination on All Forms of Discrimination against Women,<sup>185</sup> the Convention on the Rights of the Child,<sup>186</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>187</sup> and the Convention on the Rights of Persons with Disabilities.<sup>188</sup> The rights of *non-refoulement* implied in these treaties are not rights that only apply to refugees, but to all people in the case of the Convention on the Elimination of Racial Discrimination,<sup>189</sup> to all children in the case of the Convention on the Rights of the Child,<sup>190</sup> to all women in the

American Human Rights System, ¶ 437, OEA/Ser.L/V/II.Doc.46/15 (Dec. 31, 2015) [hereinafter IACHR Norms and Standards]; Inter-Am. Comm’n H.R., Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, ¶ 25, OEA/Ser.L/V/II.106.Doc.40/rev. (Feb. 28, 2000) [hereinafter IACHR Canadian Situation].

184. IACHR Canadian Situation, *supra* note 183, ¶ 25 (asserting merely conclusorily that the obligation of non-return “necessarily” includes non-rejection at the border); IACHR Norms and Standards, *supra* note 183, ¶ 437 (asserting the implication of non-rejection-at-the-border without further analysis or argumentation).

185. *E.g.*, Committee on the Elimination of Discrimination against Women [CEDAW Committee], General Recommendation No. 32 on Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, ¶¶ 17–23, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014) (“The Committee is . . . of the view that States parties have an obligation to ensure that no woman will be expelled or returned to another State where her life, physical integrity, liberty and security of person would be threatened, or where she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence.”); CEDAW Committee, Views Adopted by the Committee Under Article 7(3) of the Optional Protocol, Concerning Communication No. 86/2015, R.S.A. A. v. Denmark, ¶ 7.8, U.N. Doc. CEDAW/C/73/D/86/2015 (July 15, 2019) (“A State party would . . . violate [CEDAW] if it returned a person to another State where it was foreseeable that serious gender-based violence would occur. Such a violation would also occur when no protection against the identified gender-based violence can be expected from the authorities of the State to which the person is to be returned.”).

186. *E.g.*, Committee on the Rights of the Child [CRC Committee], General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) (“[I]n fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention [concerning the right to life; the right to liberty; and the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment] . . . .”); CRC Committee, Views Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child, Concerning Communication No. 3/2016, K.Y.M. v. Denmark, ¶ 11.3, U.N. Doc. CRC/C/77/D/3/2016 (Jan. 25, 2018).

187. *E.g.*, Committee on the Elimination of Racial Discrimination, General recommendation XXX on discrimination against non-citizens, ¶ 27 (Oct. 1, 2002) <https://perma.cc/53ZN-Y8WJ> (recommending that States parties “[e]nsure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment”).

188. *E.g.*, Committee on the Rights of Persons with Disabilities, Decision Adopted by the Committee Under Article 2 of the Optional Protocol, Concerning Communication No. 28/2015, O.O.J. v Sweden, ¶ 10.3, UN. Doc. CRPD/C/18/D/28/2015 (Aug. 18, 2017) (“The Committee is of the view that the removal by a State party of an individual to a jurisdiction where he or she would risk facing violations of the Convention may, under certain circumstances, engage the responsibility of the removing State under the Convention which has no territorial restriction clause.”).

189. *See supra* note 187.

190. *See supra* note 186.

case of the Convention on the Elimination of All Forms of Discrimination against Women,<sup>191</sup> and to all people with disabilities in the case of the Convention on the Rights of Persons with Disabilities.<sup>192</sup> It has also been suggested that a right of *non-refoulement* is implied by provisions of the Geneva Convention.<sup>193</sup> And, of course, since the right of *non-refoulement* in each of these treaties is implied, there is no language explicitly including, within the scope of *non-refoulement*, a prohibition against rejection at the border.<sup>194</sup>

#### D. *Extradition and Anti-Terrorism Treaties*

The principle of *non-refoulement* is expressly provided in several other treaties as well: in particular, extradition treaties and anti-terrorism treaties, including the 1957 European Convention on Extradition,<sup>195</sup> the 1981 Inter-American Convention on Extradition,<sup>196</sup> the 1979 International Convention against the Taking of Hostages,<sup>197</sup> the 1997 International Convention for the Suppression of Terrorist Bombings,<sup>198</sup> and the 2002 Inter-American Convention against Terrorism.<sup>199</sup> These treaties all restrict extradition if the request for extradition has been made to punish someone for their race, religion, nationality, ethnic origins, political opinions and the like. Although none of the *non-refoulement* provisions in these treaties have an express non-rejection-at-the-frontier clause, such a clause would not be appropriate, as people who are extradited are people over whom the extraditing State has jurisdiction and full control, not people who have appeared at the frontier or are otherwise applying for admission.

191. See *supra* note 185.

192. See *supra* note 188.

193. See, e.g., *Orelie v. Canada (Minister of Emp. & Immigr.)* (1991), [1992] 1 F.C. 592 (Can. C.A.).

194. In 2019, the CRC Committee concluded that Spain violated various provisions of the Convention on the Rights of the Child, including its prohibition against cruel, inhuman and degrading treatment, when it returned a Malian citizen who may have been a minor back to Morocco summarily and without assessing the risk of harm to him immediately after he jumped the border fence into Melilla. In doing so, the Committee, without going into great analytical depth, referred to the “principle of *non-refoulement*” and asserted that “in the context of best interest [of the child] assessments and within best interest determination procedures, children should be guaranteed the right to . . . access the territory [of foreign countries].” CRC Committee, Views Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child, Concerning Communication No. 4/2016, D.D. v. Spain, ¶¶ 14.1–9, U.N. Doc. CRC/C/80/D/4/2016 (views adopted Feb. 1, 2019) (citing Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, ¶ 17, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017)).

195. European Convention on Extradition, art. 3, ¶ 2, Dec. 13, 1957, E.T.S. 24.

196. Inter-American Convention on Extradition, art. 4, ¶ 5, Feb. 25, 1981, O.A.S.T.S. 60.

197. International Convention Against the Taking of Hostages, art. 9, ¶ 1, Dec. 17, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205.

198. International Convention for the Suppression of Terrorist Bombings, art. 12, Dec. 15, 1997, S. TREATY DOC. No. 106-6, 2149 U.N.T.S. 256.

199. Inter-American Convention against Terrorism, art. 14, June 3, 2002, S. TREATY DOC. No. 107-18.

### E. Customary International Law

The principle of *non-refoulement* appears to have attained the status of customary international law. Many scholars and institutions have asserted such a conclusion. Even so, there are many questions regarding the exact contours of such a law. And it is doubtful that the customary law of *non-refoulement* obligates nations to admit people into their territories, including anyone who reaches the nations' external borders and requests asylum.

#### 1. Assertions that Non-Refoulement Is Customary International Law

A norm or rule can be said to exist as a customary law—that is to say, as a legally binding restriction on the behavior of States that exists independently of any treaty obligation—if we can discern that both (i) the behavior the rule or norm requires is reflected in the general practice of the States of the world, and (ii) such behavior is motivated by a sense of legal obligation. In such a situation we can discern consent to be bound by such a norm or rule, and such a law then binds all nations.<sup>200</sup> The principle of *non-refoulement* appears indeed to be customary international law.

It is beyond the scope of this Article to conduct such a survey of the world's practices and motivations with regard to *non-refoulement*, and the Author is not aware of any comprehensive study that does so. However, many States have declared the principle of *non-refoulement* to be a part of customary international law. In 1984, the Committee of Ministers of the Council of Europe recognized the principle of *non-refoulement* as “a general principle applicable to all persons.”<sup>201</sup> The State signatories to the Cartagena Declaration and those that have re-affirmed it since<sup>202</sup> have asserted that the principle of *non-refoulement* is not only a customary international law but a *jus cogens* norm.<sup>203</sup> The UN General Assembly has declared that the

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200. International Law Commission, Identification of Customary International Law: Text of the Draft Conclusions as Adopted by the Drafting Committee on Second Reading, U.N. Doc. A/CN.4/L.908 (May 17, 2018); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. L. INST. 1987). But see *infra* note 328 (challenging the notion that *opinio juris* is a required element of customary international law).

201. Council of Europe, *Recommendation No. R (84) 1 of the Committee of Ministers to the Member States on Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees* (Jan. 25, 1984), <https://perma.cc/2UEW-H9C5>. Although stopping short of declaring the principle of *non-refoulement* a customary international law, the Committee of Ministers of the Council of Europe in 1967 recommended that European governments should be guided by certain principles, including, “act[ing] in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory” and, “in the same spirit, ensur[ing] that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution.” Council of Europe, *Resolution (67) 14: Asylum to Persons in Danger of Persecution* (June 29, 1967), <https://perma.cc/84KR-NDV3>.

202. *Supra* note 49.

203. Cartagena Declaration, *supra* note 18, at part III, ¶ 5 (describing the principle of *non-refoulement* as described in the Global Refugee Convention as “a corner-stone of the international protection of refugees” and asserting that it “should be acknowledged and observed as a rule of *jus cogens*” in international law). A *jus cogens* norm is understood by many to be an international law of utmost importance.

principle of *non-refoulement* was “a fundamental principle. . . which is not subject to derogation.”<sup>204</sup> Most dramatically and persuasively, in 2001, diplomatic representatives of the States parties to the Global Refugee Convention described the principle of *non-refoulement* as one “whose applicability is embedded in customary international law.”<sup>205</sup> Other such statements by individual States exist.<sup>206</sup>

The assertion that the principle of *non-refoulement* is a part of customary international law has also been made, or at least suggested, by several courts, international law scholars, and international and intergovernmental institutions. The list of courts includes the British House of Lords (in its capacity as the United Kingdom’s court of last resort),<sup>207</sup> the European Court of Human Rights,<sup>208</sup> the New Zealand Court of Appeal,<sup>209</sup> and the Hong Kong Court of First Instance.<sup>210</sup> The list of scholars includes Sir Elihu Lauterpacht,<sup>211</sup> Daniel Bethlehem,<sup>212</sup> Guy Goodwin-Gill,<sup>213</sup> Jane McAdams,<sup>214</sup> Paul Weis,<sup>215</sup> James Hathaway,<sup>216</sup> and others.<sup>217</sup> The list of international and intergovernmental

Practically speaking, a customary international law that qualifies as *jus cogens* is one that cannot be contracted around via treaty. See VCLT, *supra* note 118, at arts. 53, 64.

204. *E.g.*, G.A. Res. 51/75, ¶ 3 (Feb. 12, 1997); see also G.A. Res. 52/132, at 3 (Feb. 27, 1998) (asserting that the principle of *non-refoulement* is “not subject to derogation”).

205. U.N. High Comm’r for Refugees, Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol Relating to the Status of Refugees, at 1, HCR/MMSP/2001/09 (Jan. 16, 2002). The UN Conference of Plenipotentiaries that adopted the Convention relating to the Status of Stateless Persons asserted that the Global Refugee Convention’s articulation of the principle of *non-refoulement* is a “generally accepted principle.”

206. *E.g.*, U.N. GAOR, 48<sup>th</sup> Sess., 522d mtg. ¶ 65, U.N. Doc. A/AC.96/SR.522 (Oct. 23, 1997) (comments by Mr. Lunding, the representative from Denmark); U.N. GAOR, 52d Sess., 552d mtg. ¶ 50, U.N. Doc. A/AC.96/SR.552 (Oct. 5, 2001) (comments by Mr. Noifalisse, the representative from Belgium); see also Regional Conference on Refugee Protection and International Migration in Central Asia, Almaty Declaration, ¶ 2 (Mar. 16, 2011) (noting the importance of implementing border security measures “in a manner which preserves the asylum space and is consistent with international law, notably the principle of *non-refoulement*”). The Almaty Declaration was made by Kyrgyzstan, Tajikistan, Kazakhstan, and Uzbekistan. *But see, e.g.*, U.S. Dep’t of State, *supra* note 138 (rejecting the conclusion that the principle of *non-refoulement* is a part of customary international law).

207. *Regina ex parte Eur. Roma Rts. Ctr. v. Immigr. Officer at Prague Airport* [2005] 2 AC 1 (HL), ¶¶ 24–26.

208. *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., ¶ 23 (Feb. 23, 2012).

209. *Attorney-General v. Zaoui* [2004] 1 NZLR 690 at [34, 136] (CA).

210. *C v. Director of Immigration*, [2008] 2 H.K.C 165, 199 (C.F.I.).

211. See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 87, 149 (Erika Feller et al. eds., 2003).

212. *See id.*

213. *E.g.*, GOODWIN-GILL & MCADAM, *supra* note 26, at 346; UNHCR *Roma Rights* Amicus Brief, *supra* note 146, ¶ 57.

214. GOODWIN-GILL & MCADAM, *supra* note 26, at 346.

215. Weis, *supra* note 11, at 143–44, 148 (suggesting that the principle of *non-refoulement* “may by now – at least in its narrow sense, that is to say, in relation to persons within the territory of the state – have acquired the character of a rule of international law”).

216. HATHAWAY & FOSTER, *supra* note 26, at 27 n.64 (acknowledging the possibility).

217. *E.g.*, Greig, *supra* note 57, at 135; Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533, 538 (2001); Savitri Taylor, *Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?*, in FORCED MIGRATION, HUMAN RIGHTS AND SECURITY, 93, 116 (Jane McAdam ed., 2008); *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., at 64 (Feb. 23, 2012) (Pinto de Albuquerque, J., concurring).

institutions includes the International Law Commission,<sup>218</sup> the United Nations High Commissioner for Refugees,<sup>219</sup> the Executive Committee of UNHCR,<sup>220</sup> the Red Cross,<sup>221</sup> the International Law Association,<sup>222</sup> the International Institute of Humanitarian Law,<sup>223</sup> and the Asian-African Legal Consultative Organization.<sup>224</sup>

The principle of *non-refoulement* appears to exist within the body of customary international law. The repeated and explicit assertions that it exists from a large number of States alone would seem to justify this conclusion,<sup>225</sup> and this Article will proceed as if this is the case. But the scope of the obligation is fuzzy, and there is little reason to believe that it includes the principle of non-rejection at the border.

## 2. *The Scope of the Customary Law of Non-Refoulement and Non-Rejection at the Border*

Although customary international law appears to include the principle of *non-refoulement*, there are many questions about its exact scope.<sup>226</sup> Indeed,

218. Int'l Law Commission, *infra* note 229, at 10–12, 34–38.

219. E.g., UNHCR, Advisory Opinion, *supra* note 132, ¶¶ 6, 15; UNHCR, *The Principles of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (Jan. 31, 1994), <https://perma.cc/DX7H-PBDW>.

220. Exec. Comm. of the UNHCR, Addendum to the Report of the United Nations High Commissioner for Refugees, ¶ 70, U.N. Doc. A/37/12/Add.1 (Nov. 10, 1982) (referring to the principle of *non-refoulement* as “progressively acquiring the character of a peremptory rule of international law”); Exec. Comm. of the UNHCR, Agenda for Protection Addendum, ¶ 4, U.N. Doc. A/AC.96/965/Add.1 (June 26, 2002) (referring to the principle of *non-refoulement* as being “embedded in customary international law”).

221. *Note on Migration and the Principle of Non-Refoulement: ICRC, 2018*, 99 INT'L REV. RED CROSS 345, 346 (2017).

222. INT'L L. ASS'N, *Resolution 6/2002 on Refugee Procedures (Declaration on International Minimum Standards for Refugee Procedures)* (Apr. 6, 2002), <https://perma.cc/8B7A-PT62> (referring to the principle of *non-refoulement* as a “fundamental obligation of States”).

223. Int'l Inst. of Humanitarian Law, *San Remo Declaration on the Principle of Non-Refoulement* (2001), <https://perma.cc/JH4T-JDQD>.

224. Bangkok Principles, *supra* note 18. Curiously, although the Bangkok Principles explicitly defines “refugee” to include people persecuted on the basis of “gender,” it does not list threats on account of “gender” as triggering its *non-refoulement* principle. *Id.* at arts. I.1, III.1, V.3.

225. See Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 149 (1987) (“[A] clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing [of State practice] . . .”). But see James C. Hathaway, *Leveraging Asylum*, 45 TEX. INT'L L.J. 503 (2010) [hereinafter Hathaway, *Leveraging*] (challenging the assertion that the principle of *non-refoulement* is part of customary international law).

226. See Weis, *supra* note 11, at 143 (explaining how, with regard to the customary international law of *non-refoulement*,

[i]t is difficult to assess its precise legal character. While the principle is widely accepted, the question whether it constitutes a rule of customary law depends upon whether it is accepted as law, upon the *opinio juris sive necessitatis*. It is in general difficult to determine, in the absence of judicial decisions, whether any particular rules, apart from certain basic rules of traditional international law, form part of customary international law in its present stage of development which is characterized by the vast increase in the number of states forming the international community. It is all the more difficult to express a view where humanitarian principles are concerned, considering the fairly recent nature of the efforts to provide the human rights of the individual with the safeguards of international law.

with few exceptions, all the assertions cited above that the principle of *non-refoulement* exists within customary international law are made without any attempt to clearly articulate the outer bounds of its scope.<sup>227</sup> Generally speaking, there are questions about which persons enjoy the right of *non-refoulement*, what kinds of threats qualify to trigger the *non-refoulement* principle, how serious must those threats be, and whether there are any exceptions to the principle.<sup>228</sup> It seems possible that the scope of customary international law's *non-refoulement* principle extends at least as far as the scope of the Refugee Convention's *non-refoulement* principle, that is to say, that it is a right enjoyed by "refugees" (as defined in the Refugee Convention) who would face threats to their lives or freedom on account of their race, religion, nationality, membership of particular social group, or political opinion in any country to which they were expelled or returned.<sup>229</sup> Recall that the *non-refoulement* principle under the Refugee Convention is subject to exceptions<sup>230</sup> and appears not to include non-rejection at the border.<sup>231</sup>

But perhaps the principle on *non-refoulement* under customary international law extends beyond that of the Refugee Convention. Perhaps it is a right enjoyed by every person, regardless of whether they qualify as a "refugee" or whether they have been recognized formally as such by a host nation. Perhaps the principle is triggered even in the face of threats beyond those to life and freedom on account of race, religion, nationality, membership in a particular social group, or political opinion. Perhaps it extends to threats on account of civil unrest, foreign aggression, and natural disasters.<sup>232</sup> Or perhaps it is triggered whenever there would be a threat of a "serious breach of a fundamental right."<sup>233</sup> Perhaps there are no exceptions to the principle under customary international law, or perhaps the exceptions are narrower than those available under the Refugee Convention.

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227. *But see, e.g.,* Lauterpacht & Bethlehem, *supra* note 211 (making such an attempt).

228. *See supra* notes 112–14 and accompanying text (discussing the potential value of the principle of *non-refoulement* given the incoherency of asylum law).

229. *See supra* Part I.A (discussing who constitutes a "refugee" under the Refugee Convention); *see also* Int'l Law Comm'n, *Draft Articles on the expulsion of aliens, with commentaries*, arts. 6, 23.1 (2014), <https://perma.cc/JY2H-J7H4> ("No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law").

230. *See supra* Parts III.A–D (discussing exceptions to the *non-refoulement* principle in the context of treaties).

231. *See supra* Part III.A.

232. Recall that pursuant to the African Refugee Convention, one may qualify as a "refugee" based on threats from "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality." African Refugee Convention, *supra* note 16, at art. I.2.

233. Recall that the Human Rights Committee has asserted that the ICCPR's implied *non-refoulement* principle is triggered whenever there would be threats of "the most serious breaches of fundamental rights," whereas the Global Refugee Convention's *non-refoulement* principle is triggered only upon threats to "life or freedom." *Supra* notes 115, 163–69 and accompanying text.

These questions are raised here only rhetorically.<sup>234</sup> The most relevant question for our purposes, though, is the question of whether, under customary international law, people who appear at the frontiers of countries enjoy the right of *non-refoulement*. More specifically, does a person who appears at the frontier of a country and asks for asylum have the right to be admitted into the territory of that country and then have their asylum application examined?<sup>235</sup> Or, alternatively, may countries reject asylum seekers at the border and refuse to admit them without further consideration? Or, more broadly, do asylum seekers have the right to admission and therefore a right to territorial asylum?

It is beyond the scope of this Article to assess whether non-rejection at the frontier is practiced by States on a widespread basis and, if so, whether they do so out of a sense of legal obligation (*opinion juris*). However, indirect evidence strongly indicates that the customary international law of *non-refoulement* does not include non-rejection at the border. In other words, it seems apparent that States have generally not consented to give foreign nationals who approach their borders the automatic right to enter their territories simply because they ask for asylum. There are several reasons that support this conclusion.

First, if non-rejection at the frontier were a part of customary international law, we would expect the rule to be explicitly included in every treaty articulation of *non-refoulement*, but it is not. As discussed above, this very narrow question of whether or not asylum seekers have a right to cross international boundaries merely on the basis that they are seeking asylum is one that has been identified for decades yet is rarely answered clearly in refugee or human rights treaties. It is as if States prefer to maintain a purposeful ambiguity, probably because they are not interested in binding themselves to such an obligation. Indeed, recall that Article 3 of the 1933 Convention on the International Status of Refugees, a convention adopted under the auspices of the League of Nations, provided that:

[e]ach of the Contracting Parties undertakes not to remove *or keep from its territory by application of police measures*, such as expulsions *or non-admittance at the frontier* (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case *not to refuse entry* to refugees *at the frontier* of their countries of origin. (emphasis added)<sup>236</sup>

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234. For an attempt to answer some of these questions, see Lauterpacht & Bethlehem, *supra* note 211. See also Hathaway, *Leveraging*, *supra* note 225, at 509–10 (suggesting that the absence of a common understanding of the content of the putative customary international law of *non-refoulement* itself undermines the assertion that the principle of *non-refoulement* is part of customary international law).

235. A related question is whether people who are interdicted on the high seas and request asylum enjoy the right of territorial asylum. See *supra* Part III.A.iv.

236. *Convention Relating to the International Status of Refugees*, *supra* note 122, at art. 3.



This treaty was only ratified by nine countries, one of which, the United Kingdom, made an explicit reservation and refused to consent to the obligation “not to refuse entry to refugees at the frontier of their countries of origin.”<sup>237</sup> This treaty is no longer in force. The lack of widespread participation and the explicit refusal by the United Kingdom to consent to non-rejection at the frontier are telling. But more importantly, this 1933 treaty demonstrates that the issue of non-rejection at the frontier was a known issue among States, diplomats, and international humanitarian and refugee circles even in 1933, yet it is so rarely explicitly addressed in later refugee and human rights treaties.

A lack of commitment to the principle of non-rejection at the frontier cannot stem from a failure to thoroughly consider the plight of refugees and this particular legal question. Rather, it appears that States have chosen not to consent to such a legal obligation. They refused to explicitly do so in the context of the 1951 Refugee Convention, and since then, with one exception (the African Refugee Convention),<sup>238</sup> have failed to include an explicit right of non-rejection at the frontier in every refugee treaty and every human rights treaty, most notably the 1984 Convention against Torture. If it were the case that non-rejection at the frontier was indeed part of customary international law, there should have been no lack of enthusiasm for including such a provision in relevant treaties. This lack of commitment within the Global Refugee Convention and the Convention against Torture indicates, at best, a desire for ambiguity, and, at worst, a refusal on the part of the negotiating States to consent to the principle of non-rejection at the frontier.

Indeed, over the course of the 1970s, the United Nations attempted to adopt a Convention on Territorial Asylum, but by 1980 that effort collapsed and the project was abandoned.<sup>239</sup> Although a final version of a treaty was never adopted, the last draft, negotiated in part by a conference of plenipotentiaries in 1977, provided a non-rejection-at-the-frontier clause in its *non-refoulement* provision<sup>240</sup> and a separate right-to-be-admitted provision.<sup>241</sup>

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237. Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT’L REV. RED CROSS 727, 730 (2001).

238. See *supra* Part III.B (discussing *non-refoulement* in the African Refugee Convention).

239. Guy S. Goodwin-Gill, *The 1967 Declaration on Territorial Asylum*, UNITED NATIONS AUDIOVISUAL LIB. INT’L L. 7 (2012), <https://perma.cc/7J5P-Z77J> (calling the negotiating conference a “failure” and lamenting that the adoption of an international convention on territorial asylum “seems as remote as ever”); Atle Grahl-Madsen, *Regulating the Refugees: UN Convention/Protocol on Territorial Asylum, Legal Developments in Various Countries*, in IN DEFENSE OF THE ALIEN 64, 66 (1982) (“[V]ery few governments wished to see the adoption of a liberal Asylum Convention, guaranteeing the *bona fide* refugee an abode.”).

240. U.N. Conference on Territorial Asylum, *Article 2 Non-refoulement*, ¶ 2, U.N. Doc. A/CONF.78/DC.5 (Feb. 3, 1977); see also Weis, *supra* note 11, at 166–68.

241. U.N. Office of the High Comm’r for Refugees, *Elaboration of a Draft Convention on Territorial Asylum*, Report of the Secretary-General, Aug. 29, 1975, Annex ¶¶ 82–96, U.N. Doc. A/10177, <https://perma.cc/XHD8-TSWH> (“A person seeking asylum *at the frontier* or in the territory of a Contracting State shall be admitted provisionally or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by a competent authority.”) (emphasis added).

And although this draft did not provide for a right to receive asylum, each State party would have committed “to endeavour in a humanitarian spirit to grant asylum” to qualified people.<sup>242</sup> The negotiations on this treaty collapsed shortly after the 1977 conference, as few States seemed willing to bind themselves to these obligations.<sup>243</sup> There was certainly a lack of enthusiasm for doing so.<sup>244</sup>

Of course, treaties are a separate source of law than customary international law. But the point here is that *if* States have consented to be bound by a customary international law that forbids rejection at the frontier and provides a right of admission, it should have been not only easy but natural—wholly expected and uncontroversial—to include those principles in the terms of treaties that touch upon the subject of refugees and asylum seekers, especially since granting such rights dovetails nicely with the rights that refugees and asylum seekers do seem to have. Yet, except for African states in the context of the African Refugee Convention, States have refused to do so.

The second reason to conclude that the customary international law of *non-refoulement* does not forbid rejection at the border is that, of the scholars and international law institutes that have asserted that the principle of *non-refoulement* is a part of customary international law, most (though not all) do not explicitly include the principle of non-rejection at the frontier within its scope.<sup>245</sup> In fact, non-rejection at the frontier and the right to be admitted is deliberately omitted from the International Law Commission’s Draft Articles

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242. U.N. Conference on Territorial Asylum, U.N. Doc. A/CONF.78/DC.1 (Jan. 20, 1977).

243. During the debate among the 1977 plenipotentiaries, there was a stark division between States that wanted to prohibit the rejection of asylum seekers who appear at frontiers and those States that did not want to obligate themselves to admit anyone onto their territories. Generally speaking, among the former were the States of Western Europe, Australia, Canada, the United States, and several Latin American and African states. Amongst the latter was nearly every Asian state, every Soviet bloc state, Chile, Argentina, and the States of the Middle East. U.N. Conference on Territorial Asylum, U.N. Docs. A/Conf.78/C.1/SR.14, SR.22 - SR.27 (Jan. 26, 1977, Feb. 2-7, 1977). Some States expressed a lack of enthusiasm for the project since too few States were willing to obligate themselves to more progressive laws. See U.N. Conference on Territorial Asylum, ¶¶ 4-41, U.N. Doc. A/Conf.78/C.1/SR.17 (Jan. 28, 1977); U.N. Conference on Territorial Asylum, ¶¶ 40, 44, U.N. Doc. A/Conf.78/C.1/SR.26 (Feb. 8, 1977). Savitri Taylor and Jodie Boyd report that the Australian delegation to the conference of plenipotentiaries was directed to “ensure that States were ‘not legally obliged’ to admit asylum seekers even on a provisional basis.” Taylor & Boyd, *supra* note 112, at 259.

244. Grahl-Madsen, *supra* note 239, at 66 (“[V]ery few governments wished to see the adoption of a liberal Asylum Convention, guaranteeing the *bona fide* refugee an abode.”); Paul Weis, *The Draft United Nations Convention on Territorial Asylum*, 1979 BRIT. Y.B. OF INT’L L. 151, 169 (1981) (“The number of refugees is ever-increasing in this troubled world, and it is therefore understandable that many governments show reluctance to enter into firm commitments in this field.”). Grahl-Madsen also reports that the drafts considered before the collapse of the negotiations were also full of contradictions, indicative of the lack of enthusiasm to adopt a legally binding instrument. Grahl-Madsen, *supra* note 239, at 67. See also, UNHCR *Roma Rights* Amicus Brief, *supra* note 146, at ¶ 52 (asserting, despite the fact the then-current draft did not in fact grant an individual right to asylum, that the 1977 Conference of Plenipotentiaries “failed, not because of any doubt as to the scope of the *non-refoulement* principle, but because States were not then prepared to accept an individual right to asylum”). In 1954, the Organization of American States adopted its own Convention on Territorial Asylum, but it does not address the principle of *non-refoulement* at all, let alone the principle of non-rejection at the border. The treaty focuses instead on the rights of States to grant asylum to foreign nationals.

245. There is nothing in the U.S. Restatement of Foreign Relations Law concerning *non-refoulement*, let alone rules pertaining to non-rejection at the border.

on the Expulsion of Aliens. The ILC is tasked with articulating and codifying customary international law, but in the Draft Articles, the one document in which one would most expect to see an articulation of non-rejection at the frontier/right to be admitted, if indeed such a rule is part of customary international law, the ILC deliberately avoids articulating the existence (or non-existence) of such a rule. It purposefully excludes this issue from the scope of the principle of *non-refoulement* with regard to refugees.<sup>246</sup> And in its articulation of the rules of *non-refoulement* applicable to all people who would face threats to life or threats of torture, cruel, inhuman, or degrading treatment, the ILC limits the scope of those provisions to “expulsion” alone,<sup>247</sup> a term defined to explicitly exclude the notion of admission (or non-rejection at the frontier).<sup>248</sup> Certainly, if the ILC considered that the law of non-rejection existed, it would have articulated it. The ILC acknowledges that the definition of *non-refoulement* “touches upon questions of admission,” but otherwise deliberately chose to maintain the same kind of ambiguity as that embedded in the Global Refugee Convention’s articulation of *non-refoulement*. Apparently, the ILC just doesn’t want to go there.

The ILC’s failure to articulate a non-rejection-at-the-frontier rule is particularly telling since the ILC tells its readers in introductory comments and elsewhere that the Draft Articles not only codify current customary international law on this subject but also include rules that “involve . . . the progressive development of fundamental rules on the expulsion of aliens.”<sup>249</sup> So despite the liberty the ILC gave itself to present rules going beyond those that it believes to be part of positive customary international law, it still shied away from discussing any ostensible requirement that States admit asylum seekers or otherwise refrain from rejecting them at their frontiers.

Third, and lastly, it should not be readily or casually concluded that any particular customary international law has been attained. States do not easily consent to limitations on their sovereign prerogatives, especially the right to control the flow of people across their borders, in particular their right to control which non-nationals are admitted into their territories.<sup>250</sup> In fact, it has been said that States have a pre-occupation with preserving this prerogative.<sup>251</sup>

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246. Int’l L. Comm’n., Draft Articles, *supra* note 229, at comment (3) to art. 1, comment (5) to art. 2, art. 6.

247. *Id.* at arts. 23, 24.

248. *Id.* at art. 2, comment (5) to art. 2.

249. *Id.* at general comment (1), comment (2) to art. 3.

250. *See, e.g.,* Chae Chan Ping v. United States, 130 U.S. 581, 603, 609 (1889); *Minister for Immigration and Multicultural Affairs v Vadarlis* [2001] FCA 1329, ¶¶ 114–25, 186 (Austl.).

251. *See* Patricia Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 AUSTL. L.J. 148, 153 (1986) (“States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there . . . States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual, or to a group of individuals, is something which falls to each nation to resolve for itself.”); Hucker, *supra* note 97, at 327 (“Invocation of the principle of state sovereignty has routinely accompanied decisions to exclude or expel aliens where the legitimacy of official action is challenged.”); Paul Weiss, *The International Protection of Refugees*, 48 AM.

The prerogative is considered a hallmark of sovereignty<sup>252</sup> and assiduously protected.<sup>253</sup> This prerogative is so valued that a customary international law carving out an exception, even an exception that would merely obligate States to admit persons who appear at the frontier seeking asylum, is one that must be discerned only after clear evidence that not only do most States behave in this manner<sup>254</sup> but that they do so because they have accepted an international legal *obligation* to do so. In other words, there must be *opinio juris sive necessitatis*. In short, the burden of proof for those advocating the existence of a customary international law is high—and has not been reached here.

Given all of the observations above, there is ample reason to conclude that States have not consented to such an obligation. That being said, several States have declared that non-rejection at the border is or might be a part of customary international law. The Cartagena Declaration, for example, declares that the principle of *non-refoulement* includes non-rejection at the frontier.<sup>255</sup> Specifically, it affirms the importance of “the principle of *non-refoulement* (including the prohibition of rejection at the frontier)” and declares the principle a “rule of *jus cogens*.” In and of itself the declaration is not binding, but it does provide exceptionally strong evidence that those States who signed the declaration or have reaffirmed it since—a total of at least twenty-eight States, all in Latin America or the Caribbean<sup>256</sup>—believe

J. Int'l L. 193, 198–99; Jill I. Goldenziel, *The Curse of the Nation-State: Refugees, Migration, and Security in International Law*, ARIZ. ST. L.J. 579, 614–28; Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 5, U.N. Doc. A/CONF.2/SR.5 (Nov. 19, 1951) (reporting the U.S. representative stating that “[t]here was no subject on which governments were more sensitive or jealous regarding their freedom of action than on the determination of immigration policies”); UN Economic and Social Council, Study on the Position of Stateless Persons, 67, U.N. Doc. E/1112, Feb. 1, 1949 (“As regards to the right of sojourn, governments will assuredly not renounce their sovereign powers in this respect.”).

252. Regina ex parte Eur. Roma Rts. Ctr. v. Immigr. Officer at Prague Airport [2005] 2 AC 1 (HL) ¶¶ 11–12; Ilias and Ahmed v. Hungary, App. No. 47287/15, Eur. Ct. H.R., ¶ 125 (Nov. 21, 2019) (calling this right “a matter of well-established international law”).

253. This imperative to maintain control over which persons get to cross a country’s borders is reflected in many international instruments, in particular those that address migrant and migrant rights. See *supra* note 109.

254. A more than cursory review of State practice and municipal laws seems to indicate that many States admit people who appear at their borders and ask for asylum or protection from persecution. Such admission may be temporary and may be immediately withdrawn if and when the State deems the applicant to be ineligible for refugee protection or (further) asylum otherwise. *E.g.*, 8 U.S.C. § 1158 (providing for an initial review to determine if the applicant makes a prima facie case for international protection followed by a more rigorous examination as appropriate); European Parliament and Council, Directive 2013/32/EU, art. 3.1, O.J. L 180/60; European Parliament and Council, Regulation (EU) No 604/2013, art. 3.1, O.J. L 180/31. Nevertheless, widespread State practice alone, even coupled with explicit reference in municipal law, is insufficient to deem that practice obligatory under customary international law. See Tom J. Farer, *How the International System Copes with Involuntary Migration: Norms, Institutions and State Practice*, 17 HUM. RTS. Q. 72, 79 (1995) (“Efforts to summon a consensus among United Nations members that persons claiming fear of persecution should not be summarily turned back at the border have not been successful. But despite the reluctance of states to commit themselves formally, in practice states have generally admitted persons who arrive at their borders with claims to protection which are not palpably without merit.”). *But see* Hathaway, *Leveraging*, *supra* note 225, at 515–16 (providing numerous examples of how States have not practiced *non-refoulement* generally).

255. *Supra* note 203 and accompanying text.

256. See, e.g., San Jose Declaration, *supra* note 49; Mexico Declaration, *supra* note 49 (recognizing both the principle of non-rejection at the border and “the commitment of Latin American countries to

that non-rejection at the frontier is or should be a part of the customary international law of *non-refoulement*.<sup>257</sup> Thus, the principle of non-rejection at the frontier seems to be a part of the customary international law of Latin America.

Similarly, the Bangkok Principles explicitly include non-rejection at the frontier as coming within the scope of the principle of *non-refoulement*.<sup>258</sup> The Bangkok Principles contain a lengthy set of provisions on *non-refoulement*. Its basic articulation of the principle, as found in Article III, is as follows:

“No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.”<sup>259</sup>

However, there are signals within the Bangkok Principles that undermine the existence of any actual obligation to admit asylum seekers. For example, immediately after articulating the *non-refoulement* rule, the Principles seem to suggest that States are not necessarily obligated to adhere to *non-refoulement* measures since States “decide” to adhere to them.<sup>260</sup> And even more confusingly, the Bangkok Principles articulate the principle of *non-refoulement* a second time, this time without an explicit statement on non-rejection at the frontier. Article V of the Principles states that “[a] refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, nationality, ethnic origin, religion, political opinion, or membership of a particular social group.”<sup>261</sup> And, most damningly, the member States of the Asian-African Legal Consultative Organization, the organization that adopted the Bangkok Principles, explicitly declared the Principles to be non-binding and merely inspirational,<sup>262</sup> thus undermining any assertion that the Bangkok Principles are their attempt

keep their borders open in order to guarantee the protection and security of those who have a right to enjoy international protection”); Brasilia Declaration, *supra* note 49; Brazil Declaration, *supra* note 49; *see also* UNHCR, *Cartagena +30*, <https://perma.cc/5B24-KXQF> (listing the twenty-eight States that adopted the 2014 Brazil Declaration); *see also* Draft Declaration on the Right of Asylum, *supra* note 73, ¶ 11 (reporting the assertion that a right to territorial asylum was a peremptory norm in Latin America).

257. Cartagena Declaration, *supra* note 17, at part III, ¶ 5.

258. Bangkok Principles, *supra* note 18.

259. *Id.* at art. III.1. People whose presence constitutes “a danger to the national security or public order . . . or . . . a danger to the community” do not enjoy the principle of *non-refoulement*. *Id.*

260. *Id.* at art. III.2 (“In cases where a State *decides to apply* any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.”) (emphasis added).

261. *Id.* at ¶ 3. This second articulation, however, provides for no exceptions in the case of people who might be deemed a danger to the security or public order of the State.

262. *Id.* at Notes, Comments and Reservations Made by the Member States of AALCO, Introductory Remarks, ¶ 2. The fact that this statement is appended at the end of the document after the body of the Principles had been drafted reflects the fact that AALCO is more properly understood as a body of international legal scholars rather than a body that represents the direct voice of the member States.

to articulate what they believe to constitute customary international law, even on a regional basis.

Additionally, and quite dramatically, the UN General Assembly's 1967 Declaration on Territorial Asylum provides that "[n]o person [seeking in other countries asylum from persecution] shall be subjected to measures such as rejection at the frontier . . ." <sup>263</sup> But the Declaration on Territorial Asylum is not legally binding and should not be seen as an articulation of customary international law. This was clearly understood during the drafting and at the time of adoption. <sup>264</sup> It was understood that there would be elements within the resolution that were not a part of positive international law and elements that many States did not agree with. And indeed, this declaration was taken without a vote and instead was adopted by the Sixth Committee by acclamation <sup>265</sup> and by the General Assembly two weeks later by consensus. <sup>266</sup>

Of course, it may very well be that certain aspects of the Declaration on Territorial Asylum are a part of customary international law. <sup>267</sup> In fact, the principle of *non-refoulement*, generally speaking, was understood to be a particularly important element of the provision, <sup>268</sup> a fact that re-enforces the assertion that the principle is a part of customary international law. But as a whole, the Declaration always was intended to be an aspirational document, <sup>269</sup> with elements that were not part of customary international law (at least not yet). <sup>270</sup> Since the Declaration was always understood to be non-legally binding, the negotiations over the text were not particularly high stakes. And although the *non-refoulement* provision includes a prohibition against rejection at the frontier if such rejection would result in *refoulement*,

263. Declaration on Territorial Asylum, *supra* note 66, at art. 3.1. The Declaration provides an exception "for overriding reasons of national security or in order to safeguard the population." *Id.* at art. 3.2.

264. U.N., Econ. & Soc. Council, Comm. on Human Rights, Office of Legal Affairs, Memorandum on the Use of the Terms "Declaration" and "Recommendation," ¶ 4, U.N. Doc. E/CN.4/L.610 (Apr. 2, 1962) ("[A General Assembly declaration] cannot be made binding on Member States, in the sense that a treaty or convention is binding upon the parties to it."); Weis, *supra* note 11, at 102, 117, 118 (recounting how the non-legally binding nature of the declaration was "frequently emphasized in the proceedings which led to its adoption"); U.N. Doc. A/6912, *supra* note 79, at ¶ 13 ("The great majority of delegations stressed that the draft declaration under consideration was not intended to propound legal norms . . . [and after adoption by the General Assembly] would not of itself be a legally enforceable instrument or give rise to legal obligations"); U.N. Doc. A/6570, *supra* note 72, ¶ 14, 39, 42, Annex ¶ 80.

265. U.N. Doc. A/6912, *supra* note 79, at ¶ 69.

266. Declaration on Territorial Asylum, *supra* note 66; *see also* UNITED NATIONS, *What Does It Mean When a Decision Is Taken "By Consensus?"*, <https://perma.cc/KVD8-X7D5> ("Consensus is reached when all Member States agree on a text, but it does not mean that they all agree on every element of a draft document. They can agree to adopt a draft resolution without a vote, but still have reservations about certain parts of the text.")

267. *See* Weis, *supra* note 11, at 118. Even the States participating in the International Conference on Human Rights in Tehran 1968, a largely failed conference marked by dissent and division, affirmed the importance of the principle of *non-refoulement* as articulated in the Global Refugee Convention and the Declaration on Territorial Asylum. *See id.* at 125; Roland Burke, *From Individual Rights to National Development: The First UN International Conference on Human Rights, Tehran, 1968*, 19 J. WORLD HIST. 275 (2008) (describing the divisiveness).

268. Weis, *supra* note 11, at 102, 112.

269. U.N. Doc. A/6912, *supra* note 79, at ¶¶ 13, 14, 16.

270. *See* Weis, *supra* note 11, at 98–99; U.N. Doc. A/6912, *supra* note 79, at ¶ 13.

the negotiation history provides scant evidence as to whether the negotiating States considered non-rejection at the border to be part of the customary international *non-refoulement* law. Non-rejection at the frontier was a part of the earliest drafts of the declaration<sup>271</sup> and it appears that it was never extensively debated or discussed.<sup>272</sup>

The negotiating States were also aware that the International Law Commission had been tasked with codifying customary international asylum law and that a project to draft a Convention on Territorial Asylum was also underway. Both of these projects focused on the actual international law in this area. Certainly, the existence of these projects, coupled with the aspirational nature of the Declaration, affected the tenor of the negotiations, the degree to which States would scrutinize and reflect upon the significance of the Declaration's provisions, and their willingness to adopt progressive declaratory provisions. And surely many members of the UN General Assembly hoped the Declaration would serve as an inspiration for the adoption of an actual treaty on the subject.<sup>273</sup>

Elsewhere, the Committee of Ministers of the Council of Europe has “recommended” that member States ensure they apply the principle of *non-refoulement* in a manner that includes non-rejection at the frontier, but the recommendation's language does not clearly indicate that the Committee believes non-rejection at the border to be an element of Article 33 of the Refugee Convention or a part of customary international law.<sup>274</sup>

The UNHCR Executive Committee (“ExCom”), a committee of over one hundred interested States,<sup>275</sup> has also made repeated references to the principle of non-rejection at the frontier, urging States to refrain from rejecting

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271. See U.N. General Assembly, Third Committee, Draft Declaration on the Right of Asylum, ¶ 6, U.N. Doc. A/5359 (Dec. 14, 1962) (presenting the original draft text of the declaration provided by the Commission on Human Rights in 1960).

272. Weis, *supra* note 11 (recounting the negotiations); Goodwin-Gill, *supra* note 239; U.N. Doc. A/6570, *supra* note 72; U.N. Doc. A/6912, *supra* note 79.

273. See, e.g., U.N. Doc. A/6570, *supra* note 72, at ¶ 39; Weis, *supra* note 11, at 115–16. Consistent with their enthusiasm for establishing liberal refugee and asylum law, Latin American countries were particularly enthusiastic about adopting a treaty on territorial asylum, one that would reflect the progressive notions of asylum practiced in Latin America. See U.N. Doc. A/6912, *supra* note 79, at ¶¶ 62–63 (listing 22 Latin American and Caribbean states and only three non-Latin American states (Nigeria, Norway, and Somalia) as the sponsors of the final resolution recommending that the General Assembly adopt the final draft Declaration on Territorial Asylum). See also Memorandum on the Use of the Terms “Declaration” and “Recommendation,” *supra* note 264, ¶ 4 (“[A General Assembly declaration, though not itself binding international law] may be considered to impart, on behalf of the [General Assembly], a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.”). The willingness of States to adopt a declaration on territorial asylum coupled with the failure to adopt a convention on territorial asylum recalls the words of Patrick Kelly: “Aspirational or recommendatory instruments, enacted while states remain unwilling to sign concrete treaties provide compelling evidence that states lack the normative conviction necessary to create customary obligations, rather than evidence that the states believe these norms are binding.” Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J INT'L L. 449, 487 (2000).

274. Council of Europe Committee of Ministers, *supra* note 201.

275. As of October 2020, there were 106 State members of ExCom. U.N. High Comm'r for Refugees, *UNHCR Executive Committee of the High Commissioner's Programme: Composition for the period October 2020–October 2021*, <https://perma.cc/NQG7-N36E>.

people who present themselves at the border to immigration officials and ask for asylum.<sup>276</sup> Although ExCom urges States to behave in this way, there is ample reason to conclude that ExCom is not asserting that non-rejection-at-the-frontier is part of customary international law. The committee has never expressly and clearly stated that non-rejection-at-the-frontier is part of customary international law. Instead, the language used by the Executive Committee when it discusses non-rejection-at-the-frontier is often ambiguous, seemingly purposefully so, in this regard. For example, in Conclusion No. 21, ExCom expressed concern that “refugees have been refused asylum, have been rejected at the frontier or subjected to measures of expulsion or forcible return in disregard of the fundamental principle of *non-refoulement*. . .”<sup>277</sup> In Conclusion No. 82, ExCom articulates what the principle of *non-refoulement* is in one paragraph but does not address the issue of rejection-at-the-frontier until a later paragraph and then does so without reference to the principle of *non-refoulement* at all.<sup>278</sup> On a few occasions, however, the Executive Committee has rather less ambiguously referred to “the fundamental principle of *non-refoulement including non-rejection at the frontier*.”<sup>279</sup> But regardless, ExCom conclusions are adopted by consensus, are explicitly non-legally binding, and largely serve to encourage States to behave in accordance with certain norms—often developing norms that have not achieved the status of positive international law.<sup>280</sup>

Likewise, some scholars, scholarly institutes, and courts have asserted, or at least suggested, that the customary international law of *non-refoulement* includes an obligation to admit asylum seekers who appear at the frontier. The UN High Commissioner for Refugees has stated that the “duty not to *refoule*” is a prohibition against “any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he

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276. *E.g.*, UNHCR Exec. Comm., Conclusion No. 6 (XXVIII) *Non-Refoulement* (1977), ¶ (c); UNHCR Exec. Comm., Conclusion No. 21 (XXXII) General (1981), ¶ (f); UNHCR Exec. Comm., Conclusion No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981), at Part II.A.2; UNHCR Exec. Comm., Conclusion No. 81, *supra* note 33, ¶ (h); UNHCR Exec. Comm., Conclusion No. 82 (XLVIII) Conclusion on Safeguarding Asylum (1977), ¶ (d)(iii); UNHCR Exec. Comm., Conclusion No. 85 (XLIX) Conclusion on International Protection (1998), ¶ (q); UNHCR Exec. Comm., Conclusion No. 99 (LV) General (2004), ¶ (l).

277. Exec. Comm., Conclusion No. 21, *supra* note 276.

278. UNHCR Exec. Comm., Conclusion No. 82, *supra* note 33, ¶¶ (d)(i), (d)(iii); *see also* UNHCR Exec. Comm., Conclusion No. 81, *supra* note 276 (listing non-rejection-at-the-frontier as its own item apparently distinct from the *non-refoulement* listing).

279. *E.g.*, UNHCR Exec. Comm., Conclusion No. 22, *supra* note 276, ¶ (II)(A)(2) (emphasis added); *see also* UNHCR Exec. Comm., Conclusion No. 99, *supra* note 276, ¶ (l).

280. UNHCR Exec. Comm., 39th Sess., 431st mtg., ¶ 63, U.N. Doc. A/AC.96/SR.431 (Oct. 6, 1988) (confirming that UNHCR ExCom conclusions do “not create obligations for States in international law”); G.A. Res. 428 (V), annex ¶ 1, Statute of the Office of the U.N. High Comm’r for Refugees (Dec. 14, 1950) (stating that UNHCR acts “under the authority of the General Assembly,” which itself is not a law-making body). UNHCR also urges States to admit asylum seekers who appear at their borders, but these statements reflect desired behavior and are not attempts to articulate legal obligations. *E.g.*, UNHCR, *Convention Plus: Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers*, ¶ 28, U.N. Doc. FORUM/CG/SM/03 (Mar. 11, 2004).



or she would risk persecution. . . [including] rejection at the frontier . . . .”<sup>281</sup> The International Law Association has stated that non-rejection at the border constitutes one of the “minimum standards of international [refugee] law for incorporation in all States.”<sup>282</sup> Professor Goodwin-Gill, a preeminent scholar of international refugee law, has argued that the principle of *non-refoulement* secures admission.<sup>283</sup> Sir Elihu Lauterpacht and Daniel Bethlehem have asserted that the customary international law of *non-refoulement* prohibits States from rejecting asylum seekers if such rejection would compel the asylum seeker to “remain in . . . a territory where he or she may face a threat of persecution . . . .”<sup>284</sup>

However, all of these assertions suffer from the same flaws undermining their value as statements of positive international law: none survey State practice and State motivation.<sup>285</sup> They are mere assertions. And furthermore, they never really tease out and identify the non-rejection-at-the-frontier issue and address it as a stand-alone question. Instead, they merely conclusorily list non-rejection among a string of behaviors ostensibly required by the principle of *non-refoulement*.<sup>286</sup> The fact that an obligation to admit someone into a State’s territory is so qualitatively different than an obligation not to expel someone who has already entered the territory would seem to merit special examination by the scholars. But scholars rarely examine it closely at all. And some scholarly and judicial opinions are mere observations or reiterations of what others have asserted or suggested.<sup>287</sup>

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281. UNHCR Exec. Comm., *Note on International Protection*, ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001) (including rejection *at the frontier* in the list of activities that “return[s] [someone] *to*” the frontier); *see also* Rep. of the U.N. High Comm’r for Refugees Supplement No. 12, ¶ 22, U.N. Doc. A/40/12 (Sept. 13, 1985) (asserting that the principle of *non-refoulement* “requires that no person shall be subjected to such measures as rejection at the frontier.”); UNHCR, *supra* note 64, ¶ 10 (“[A]t a minimum *there would seem to be* a general responsibility on States to admit asylum-seekers who arrive at the frontier and seek to have their status determined. For a refugee to enjoy and exercise fundamental rights and freedom, admission, somewhere, is required as the first step. This *suggests* that the appropriate interpretation of provisions in the 1951 Convention dealing with *non-refoulement*, non-expulsion and non-penalization for illegal entry, is that the asylum-seeker is to be admitted.”) (emphasis added).

282. INT’L L. ASS’N, *supra* note 222, at preamble, ¶¶ 5, 8.

283. GOODWIN-GILL & MCADAM, *supra* note 26 at 382–83. Professor Goodwin-Gill appears to have greatly influenced the development of UNHCR’s argument that the Global Refugee Convention’s *non-refoulement* provision prohibits rejecting asylum seekers at frontiers and that such prohibition is also contained in the customary international law (if any) of *non-refoulement*. *See* UNHCR *Haitian Centers* Amicus Brief, *supra* note 146 (listing Professor Goodwin-Gill as a primary author); UNHCR *Roma Rights* Amicus Brief, *supra* note 146, ¶¶ 39–57 (arguing that non-rejection at the frontier is a component of the customary international law of *non-refoulement* and listing Professor Goodwin-Gill as the author).

284. Lauterpacht & Bethlehem, *supra* note 211, at 150, 163. In addition to being such a broad assertion and not limited to application at the frontier, Lauterpacht and Bethlehem claim that there is only the most limited national security exception. *Id.*; *see also* *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R. (Feb. 23, 2012) (Pinto de Albuquerque, J., concurring) (asserting a broad scope of the *non-refoulement* principle within “international human rights law”).

285. *See, e.g.*, Marjoleine Zieck, *Refugees and the Right to Freedom of Movement: From Flight to Return*, 39 MICH. J. INT’L L. 19, 50–51 (2018) (asserting that non-rejection at the border is “implied” by “[t]he finding that the prohibition of refoulement has extraterritorial reach in case of effective control over a refugee”).

286. *E.g.*, INT’L L. ASS’N, *supra* note 222.

287. *E.g.*, *Regina ex parte Eur. Roma Rts. Ctr. v. Immigr. Officer at Prague Airport* [2005] 2 AC 1 (HL) ¶ 26; *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., at ¶ 23 (Feb. 23, 2012); *Note on*

All in all, assertions that non-rejection at the frontier is part of the customary international law of *non-refoulement* seem more like wishful thinking or advocacy rather than assessments that the community of States has actually consented to a legal obligation to let any asylum seeker enter their territories.<sup>288</sup> Declarations of such a rule by the UN General Assembly and inter-governmental organizations dedicated to the protection of refugees, despite their authoritative tone, strike one as aspirational or what some may call “soft law,” that is to say, not a part of positive law at all. Indeed, as mentioned above, such an obligation would strike at the heart of sovereignty, the right to control one’s borders and to decide which things—and which people—get to cross them and enter the country. We seem to be left with the conclusion that, aside from the States parties to the African Refugee Convention and perhaps the countries of Latin America who clearly seem to have consented to a regional customary international law of *non-refoulement* that includes a non-rejection at the frontier obligation,<sup>289</sup> such an obligation is not one that States have generally been willing to consent to pursuant to positive international law.<sup>290</sup>

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Migration and the Principle of Non-Refoulement: ICRC, 2018, *supra* note 221, at 352–53; HUM. RTS. WATCH, “*The Silent Treatment*”: *Fleeing Iraq, Surviving in Jordan*, 24–26 (2006), <https://perma.cc/YHW5-XBXP>. Modern assertions of what constitutes customary international law too often are mere reflections of narratives founded less on disciplined examinations of whether State practice is sufficiently widespread and motivated by a sense of legal obligation or even on indirect methods of surveying State assertions of what is and is not customary international law rather than, at best, on the works of one or two scholars who have engaged in good faith indirect analysis (or advocacy) whose progressive and desirable conclusions (accurate or not) are then repeated as authoritative by later progressive scholarly and institutional voices. Eventually there is a chorus of scholarly and institutional voices singing the same verse giving the appearance to those looking even later that the lyrics must be factually true. The scientific method it is not.

288. See Hathaway, *Leveraging*, *supra* note 225, at 506–07 (criticizing refugee scholars for attempting to ordain an expansion of refugee law instead of rigorously discerning it or encouraging States to develop it); see also Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT’L L. 551, 617, 624 (1986) (transparently acknowledging, for the sake of their humanitarian advocacy, the “presumption” of the existence of a customary norm of non-rejection at the border); UNHCR, *supra* note 64, ¶¶ 7–20 (suggesting an interpretation of various provisions the Refugee Convention in order to achieve a certain desired goal); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 640 (2000) (characterizing much modern advocacy of the existence of customary international legal rules as “colored by a moralism reminiscent of the natural law view”).

289. Perhaps it is not surprising that such international law exists at certain regional levels, since most asylum seekers within these regions will likely come from the populations of neighboring States, populations that are less perceived as “the other” by regional States. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 176–78 (1990).

290. It is reasonable to ask why one might be more willing to discern such customary international law in Latin America on the basis of the statements made by Latin American countries but resist doing so for the entire global community of States given their similar statements in ExCom Conclusions and in the Declaration on Territorial Asylum. In other words, why is the Cartagena Declaration relatively persuasive evidence of the existence of a customary international law prohibiting rejection at the frontier but ExCom Conclusions and the Declaration on Territorial Asylum are not? The answer is simple. Each of the latter instruments are expressly non-legally binding and largely aspirational, whereas the Cartagena Declaration was made (and repeatedly reaffirmed!) without such qualification by States in a region (Latin America) known for its progressive development of generous refugee and asylum law.

#### IV. ASYLUM SEEKERS' RIGHT TO ADMISSION AND TERRITORIAL ASYLUM

The previous section accepted as true the assertion that there is a customary international law of *non-refoulement* that prohibits the deportation of certain people who have entered a State's territory. But that section also concluded that, with the possible exception of regional customary law in Latin America, the customary international law of *non-refoulement* does not seem to impose an obligation on States to admit asylum seekers into their territories in the first place. It also concluded that, except for the African Refugee Convention, no treaty regime imposes such an obligation. This section urges the community of nations to rationalize international refugee and asylum law by granting asylum seekers a right to admission and certain rights to territorial asylum.<sup>291</sup>

##### A. *The Rights*

International law is concerned with providing protection to refugees and other persecuted individuals. And people have the right to seek asylum. And the principle of *non-refoulement* is widely accepted as a norm in international law. Given all of that, how can one not conclude that States *ought* to admit asylum seekers who request entry into their territories, at least temporarily, at least in order to establish whether or not the asylum seekers are entitled to further protections, including the right to stay. In other words, a right of admission seems to be a corollary to the right of *non-refoulement*. And, since even temporary entry would constitute asylum in its most general sense, this right to admission would necessarily imply a right to asylum, albeit perhaps only temporary asylum.

Otherwise, the international humanitarian protection regime that is refugee and asylum law is undermined by an enormous gap, an inconsistency between rights that do currently exist (e.g., the right to seek asylum, the right of *non-refoulement*) and those that currently do not (e.g., the right to be admitted, the right to asylum).<sup>292</sup> Only by including a right to admission and a right to (at least temporary) asylum do we impart a coherence and a normative consistency on the international refugee and asylum regime.<sup>293</sup> The

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291. Some may characterize this plea as part of a project to transform and incorporate refugee and asylum law into the ethics of human rights and humanitarian law. I characterize it as nothing more than what it is: a plea to expand international law addressing asylum-seekers and refugees. See generally Hathaway, *Leveraging*, *supra* note 225.

292. See also U.N. Conference on Territorial Asylum, *Summary Rec. of the Third Meeting*, ¶ 35, U.N. Doc. A/CONF.78/C.1/SR.3 (Jan. 19, 1977) (Ecuador lamenting this "lacuna in international law"); Goodwin-Gill, *supra* note 239, at 8–9 (characterizing this as "a gap that remains to be bridged").

293. This inconsistency or incoherence is compounded by the fact that if an asylum seeker who evades immigration officials at the border and surreptitiously and unlawfully enters the territory of a State party to the Refugee Convention qualifies as a "refugee" under the Convention, he or she would enjoy many Convention rights vis-à-vis that State, including the right of *non-refoulement*. E.g., Refugee Convention, *supra* note 8, at arts. 4, 16, 22.1, 27, 33.1 (providing rights to religious practice, court access, education, identity papers, and *non-refoulement*, respectively, to all refugees within the State territory); see also *id.* at art. 31 (providing that under certain circumstances illegal entrants are not to be penalized).

current inconsistency in the law conflicts with the normative foundation of refugee law: protecting people. Given the current state of the law, States run the risk of condemning persons whose lives and freedoms are unjustifiably threatened (persecuted) to life under that threat. Or, to borrow the words of Trygve Lie, the first Secretary General of the United Nations, States run the risk of “delivering [the persecuted] into the hands of [their] persecutors.”<sup>294</sup>

Many of the arguments by scholars, jurists, and international organizations asserting the obligation of non-rejection at the frontier take this same form—arguing that the principle of *non-refoulement* necessarily implies a right to non-rejection at the frontier, i.e., a right to be admitted into a country. Their arguments are less rooted in identifying *opinio juris* or strictly interpreting treaties than they are in apparent deduction from the basic principle of *non-refoulement* and a desire to increase the efficacy of the international protection regime. And about that, they are right. The principle of *non-refoulement* ought to be coupled with the right not to be rejected at frontiers, or, more bluntly, with a right to admission. Asylum seekers ought to have a right to cross international borders and enter the territories of third-party States and to have their applications for further protection considered and to receive further protection if their claims are meritorious.<sup>295</sup> It’s the rational and humanitarian thing to do.

Host States should consider applications for further protection in good faith and eventually make an informed determination if each asylum seeker merits protection. Asylum seekers should be allowed to remain in their host States during the pendency of the determination procedures.<sup>296</sup> And if a host State determines that an admitted asylum seeker otherwise merits international protection (asylum), the State should continue to provide it. In other words, meritorious asylum seekers should have the right to territorial asylum.

The community of nations should stand up and declare in no uncertain terms that asylum seekers have a right to be admitted into other countries and to have these particular rights to asylum. States should ensure such principles are enshrined within positive international law, either within the body of customary international law or codified and embodied in a widely ratified global

A persecuted person should not have to succeed in entering a country unlawfully in order to enjoy a right of non-refoulement.

294. Ad Hoc Comm. on Statelessness and Related Problems, Status of Refugees and Stateless Pers. – Memorandum by the Secretary-General, comments on art. 24 ¶ 3, U.N. Doc. E/AC.32/2 (Jan. 3, 1950).

295. Professor Zeick has suggested that current international law demands that States ensure that their borders are “responsive” (as opposed to “hermetically sealed off”) such that they “provide[] for reasonable access to [a] state’s territory, measured by the immediacy of the risk, and afford[] the opportunity for . . . protection claim[s] to be made.” Zeick, *supra* note 285, at 53–55. Although this Article disagrees with her assessment of the current state of the positive international law, a proposal that this be the standard seems reasonable.

296. UNHCR Exec. Comm. has urged countries to admit asylum seekers and allow them to remain there pending decisions on their asylum applications. *E.g.*, UNHCR Exec. Comm., Conclusion No. 8, ¶ (e)(vii), U.N. Doc. 12A A/32/12/Add.1 (Oct. 12, 1977).

treaty on territorial asylum, or, preferably, both. Only States can make this so.<sup>297</sup>

The plea made here is couched in somewhat general terms. All asylum seekers should be admitted in order to determine whether they merit protection and should be granted continued protection if they are meritorious. As discussed above, the qualifications for meriting protection change depending on the international legal regime applicable for the country. For example, the scope of who qualifies as a “refugee” is much greater under the African Refugee Convention than it is under the Global Refugee Convention, and may be greater still pursuant to an individual State’s municipal law. Additionally, some treaty regimes provide for different sets of exceptions, or in some cases, no exceptions at all (e.g., the Convention against Torture’s *non-refoulement* rule). And the extent of protections and the nature of rights to which refugees, asylees, and asylum seekers whose applications are pending are entitled depends, again, on the applicable international legal regime and municipal law at play. It is beyond the scope of this Article to suggest that the qualifications for international protection and the nature of the protections should be harmonized or to suggest what the minimum level of qualifications and protections should be.<sup>298</sup> Again, what is important in the first instance is that States admit all persons who are requesting protection, consider their applications in good faith, and grant additional protections when they are merited.

### B. *Limitations and Qualifications*

Some may object that an international law that requires States to admit any foreigner who comes knocking on the door asking for asylum will act as an open invitation for a flood of people to inundate one’s country. After all, under such a law, merely making a request is enough to obtain admission. A request operates as an entry permit, and this right certainly can be abused.<sup>299</sup> However, such fears would appear to be significantly unfounded. The fact is that many States currently have a practice of admitting people who appear at

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297. See generally Hathaway, *Leveraging*, *supra* note 225 (encouraging States to expand refugee law). *But see* GOODWIN-GILL & MCADAM, *supra* note 26, at 415 (“Experience shows that efforts to secure agreement on such a divisive issue [as granting a right to asylum] are more likely to produce equivocation, qualification, and exception, that can tend only to dilute the rules and principles already established in State practice.”).

298. There might be a relationship between the scope of meritorious conditions and the extent to which States will be willing to commit to opening their borders to asylum seekers. States may be more resistant to open their borders to asylum seekers if the scope of additional protection is broader.

299. This fear recalls President Trump’s repeated use of the word “invasion” when referring to incoming migrants, including those applying for asylum. See Ben Zimmer, *Where Does Trump’s ‘Invasion’ Rhetoric Come From?*, ATLANTIC (Aug. 6, 2019), <https://perma.cc/G8FA-QD3N>. Even the Supreme Court is not immune from such fears. See, e.g., *Chae Chan Ping*, 130 U.S. at 603, 606 (justifying exclusionary immigration laws based in part on the need “to preserve [the United States’] independence, and give security against foreign aggression and encroachment” including encroachment from “vast hordes of [foreign] people crowding in upon us”).

their frontiers and ask for asylum.<sup>300</sup> An international law obligating this practice should not change what we currently observe on the ground.

Additionally, although this right of international movement might seem audacious, and perhaps a significant notch out of sovereignty, certain limiting principles would be in effect. For example, admission might only be temporary. When a country admits an asylum seeker, the country should do so in order to ensure it protects a potentially protection-eligible person and give itself time to determine their eligibility for further protection. If an asylum seeker is not qualified for protection, then the admitting State can remove the person from the country. The determination that an asylum seeker is not eligible for protection may happen quickly (e.g., in the case of someone who is manifestly ineligible)<sup>301</sup> or it may take a longer time, but nevertheless, once a non-eligibility determination is made, the person may be removed. Before a final eligibility determination is made, however, the receiving State should provide temporary refuge (asylum).<sup>302</sup>

Further, since the right of admission is a function of the principle of *non-refoulement*, an asylum seeker who enters a receiving country from a safe country may be returned to that country.<sup>303</sup> And indeed, the principle of *non-refoulement* does not prohibit a receiving State from sending an asylum seeker to any (willing) safe country including repatriating refugees and asylum seekers back to their home countries when and if they become safe.<sup>304</sup> A

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300. *Supra* note 254.

301. The UNHCR Executive Committee recognizes the possibility of manifestly unfounded applications and has stated that “denial in the first instance” after an initial screening is acceptable in these cases. *E.g.*, UNHCR Exec. Comm., Conclusion No. 8, *supra* note 296, ¶ (e)(vii); UNHCR Exec. Comm., Conclusion No. 30 The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, ¶ (d), U.N. Doc. 12A A/38/12/Add/1 (Oct. 20, 1983). UNHCR warns, however, rightly so, that the possibility that such quick denials may occur should not incentivize receiving States to fail to consider applications in good faith or make non-individualized determinations and inadvertently fail to protect someone who merits protection. *E.g.*, *id.*

302. For discussions of the provision of temporary refuge, including with regard to mass influxes of asylum seekers, see UNHCR Exec. Comm., Conclusion Nos. 5, 11, 14, 15, 19, 21, 22, 62, 71, 74, 100, 103; Fitzpatrick, *supra* note 112; Coles, *supra* note 112, at 194–99 (“If admission is to be related to the principle of *non-refoulement*, it must be regarded as providing either a temporary or durable solution.”). The African Refugee Convention explicitly provides for “temporary residence in any country of asylum” for refugees. African Refugee Convention, *supra* note 16, at art. II.5.

303. See UNHCR Exec. Comm., Conclusion No. 58 (XL), Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, U.N. Doc. 12A A/44/12/Add/1 (Oct. 13, 1989) (stating that when a person enters a country in an irregular manner from a country where they have already found protection, he may be returned to that country provided he is protected from *refoulement* in that country and will be treated in accordance with basic human rights standards).

304. See James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 137–40 (1997) (“The failure to promote repatriation is . . . inconsistent with the logic of refugee status as a situation-specific trump on immigration control rules. Because refugees are admitted on the basis of necessity, it cannot legitimately be asserted that they should routinely be entitled to stay in the host state once the harm in their own country has been brought to an end.”). Even if one’s home country is not safe throughout its territory, it may be possible to repatriate someone to a safe geographic location within their home country. See Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1(A)(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugee, U.N. Doc. HCR/GIP/03/04 (July 23, 2003).

country is only safe, however, if the country itself would not *refoule* or send the asylum seeker to an unsafe country.<sup>305</sup>

Of course, other than a country of citizenship, any safe third country to which a refugee or asylum seeker may be sent must agree to accept the person. However, even under a legal regime where States must admit, at least temporarily, all asylum seekers, the principle of burden-sharing exists.<sup>306</sup> Burden-sharing refers to the idea that the protection of refugees is the burden of the entire international community of States.<sup>307</sup> The burden of providing humanitarian protection should not be borne by one or a handful of States, but by all States. Countries admitting asylum seekers and providing asylum (temporary or otherwise) should be regarded as acting on behalf of the entire international community and, as a result, should be entitled to appropriate assistance from other States. Burden-sharing is especially important in the context of mass influxes of refugees. Burden-sharing may come in the form of financial assistance, technical assistance, or volunteering to accept and resettle refugees who are in overly burdened countries.<sup>308</sup> Burden-sharing is especially important to assist less economically developed countries.<sup>309</sup> Participation in burden-sharing, however, is voluntary, not legally obligatory. States must agree to cooperate. Therefore, until some forms of burden-sharing are obligatory or until a supranational or international authority can mandate burden-sharing, States ought to admit all the asylum seekers who appear at their borders. They cannot ignore asylum seekers in the hopes that some other country will protect them. Every State ought to take individual responsibility for every asylum seeker who asks for protection (as if on a joint and several basis).<sup>310</sup> It should be acknowledged, however, that the absence of an

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305. For a discussion of the challenges of sending refugees to third countries, including the risk of facing “indirect *refoulement*” and the need to conduct individualized assessments, see Rosemary Byrne & Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185, 186 (1996); Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*, 28 MICH. J. INT’L L. 223 (2007). For legal standards for determining when a third State is a safe country, see, e.g., European Parliament and Council Directive, *supra* note 254, at art. 38.1. *See also* Ilias and Ahmed v. Hungary, App. No. 47287/15, Eur. Ct. H.R., ¶ 124-41 (Nov. 21, 2019).

306. *See, e.g.*, New York Declaration, *supra* note 109, ¶ 68, Annex I.1 (encouraging States to burden share); African Refugee Convention, *supra* note 16, at art. II.4 (same); *see also* Goran Melander, *Refugees and International Cooperation*, 15 INT’L MIGRATION REV. 35 (1981).

307. *See supra* notes 35–39 and accompanying text (discussing international protection); *see also* Global Refugee Convention, *supra* note 8, at Preamble (“[T]he grant of asylum may place unduly heavy burdens on certain countries, and . . . a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.”).

308. For suggestions of ways to better ensure burden sharing, see, e.g., Joseph Blocker & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RIGHTS L. REV. 53 (2016) (suggesting the international community enforce (tradable) financial claims against countries of origin for the benefit of host countries); E. Tendayi Achiume, *Syria, Cost-Sharing and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015); Hathaway & Neve, *supra* note 304 (suggesting the establishment of sub-global level agreements to allocate the burdens of refugee flows on the basis of pre-established criteria).

309. It is no small irony that the great majority of mass influx situations in recent decades have been ones that imposed the most immediate protection burdens on such countries.

310. In 2018, the United Nations, under the auspices of UNHCR, finalized the “Global Compact on Refugees.” The primary objective of the Global Compact is “to provide a basis for predictable and

effective burden-sharing regime, perhaps more than any other factor, threatens to undermine the ability to effectuate a commitment to admit all asylum seekers.

Additionally, during the pendency of an application, States could place certain restrictions on admitted asylum seekers to deter fraudulent applications, such as employment restrictions and requirements to stay within a certain geographic region of the receiving State.<sup>311</sup> In fact, UNHCR considers it acceptable, though not desirable, under certain limited circumstances to detain asylum seekers during the pendency of their application.<sup>312</sup> Under no circumstances, however, may detention be punitive.<sup>313</sup> Any detention should be of a humanitarian and civilian character and must always be humane.<sup>314</sup>

States can also deter people from making fraudulent applications by imposing penalties on people who make them.<sup>315</sup> Although penalties may include restrictions on future entry, consistent with the proposal here, restrictions should never be placed on the ability of someone to seek asylum, and hence admission (protection), in the future. Of course, that exception creates the possibility of a Cry Wolf dynamic, in which a country may be faced with someone who repeatedly requests asylum and repeatedly gains admission as a result, only to repeatedly be found to be making fraudulent applications. Increasingly severe penalties could be imposed on such a person. States may not, however, impose measures that would dissuade people from making good-faith asylum applications in the State.<sup>316</sup>

The fact that there might be certain exceptions to the principle of *non-refoulement* and the so-called right of qualification should also give States some comfort in consenting to an international legal obligation to admit all asylum seekers who appear at their frontiers. As noted above, there are exceptions in various treaty articulations of the principle of *non-refoulement*. For example, the Global Refugee Convention permits the *refoulement* of people who are “a danger” to the security or community of the host country even

equitable burden- and responsibility-sharing.” Rep. of the High Comm’r for Refugees, Part II Global Compact on Refugees, ¶ 3, U.N. Doc. A/73/12 (Part II) (Aug. 2, 2018). The Global Compact, however, explicitly states that the Compact “is not legally binding,” thus reflecting the resistance States have towards expanding the scope of their responsibilities to help refugees, including resistance to any obligation to open their borders to those seeking refuge from persecution and other extreme threats in their home countries. *Id.* ¶ 4.

311. *But see* Edwards, *supra* note 79 (suggesting that the right to enjoy asylum implies a right to be relatively free from such restrictions).

312. *See* UNHCR Exec. Comm., Conclusion No. 44 (XXXVII), Detention of Refugees and Asylum-Seekers, U.N. Doc. 12A A/41/12/Add.1 (Oct. 13, 1986) (expressing the opinion that in view of the hardship which it involves, detention should normally be avoided and otherwise used sparingly and humanely).

313. *Id.*

314. *See id.*; *see also* UNHCR Exec. Comm., Conclusion No. 85 (XLIV), Conclusion on International Detention, U.N. Doc. 12A A/53/12/Add.1 (Oct. 9, 1998) (deploring that many countries continue routinely to detain asylum seekers).

315. *See, e.g.*, 8 U.S.C. § 1182(a)(6)(C)(i), (a)(9).

316. In an effort to preempt the conditions for asylum seeking in the first place, perhaps States should be encouraged to provide foreign aid, contribute to international economic development, and insist on collective adherence to human rights norms.



if they qualify as refugees.<sup>317</sup> It should be noted, however, that some treaties that explicitly contain a *non-refoulement* provision do not provide exceptions (e.g., the Convention against Torture), and it may be that customary international law's prohibition against *refoulement* is stronger than the prohibition provided for in the Refugee Convention.<sup>318</sup>

States can also find comfort in the so-called "right of qualification," the right of a State to decide for itself whether an asylum seeker meets the applicable treaty-based or customary legal qualifications for international protection and asylum.<sup>319</sup> As discussed above, there are several treaties, each with their own standards of qualification and their own exceptions (or lack thereof). Many of the elements of these qualifications and exceptions are ambiguous (e.g., the interpretation of "persecution;"<sup>320</sup> whether a fear of persecution is "well-founded" enough;<sup>321</sup> the scope of "particular social group;"<sup>322</sup> the identification of what a "fundamental" right is;<sup>323</sup> whether a third country is a "safe" third country; and the extent other, non-persecutorial threats merit protection). A State entertaining a request for asylum must apply its international obligations in good faith, but has, pursuant to the right of qualification, the right to determine for itself whether any asylum seeker meets these standards for international protection.<sup>324</sup>

Furthermore, there is nothing in this proposal that would require a State to admit people who apply for asylum from abroad, far from the frontier.<sup>325</sup> And a State would be under no obligation to provide international travel or otherwise assist a person to escape persecution in a foreign State or protect them from threats to their life and freedom. (Such obligations, however, would jibe

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317. Refugee Convention, *supra* note 8, at art. 33.2.

318. *See supra* notes 228–36 and accompanying text.

319. *See, e.g.*, African Refugee Convention, *supra* note 16, at art. I.6 (providing States parties the right of qualification); *see also* Declaration on Territorial Asylum, *supra* note 66, at art. 1.3 ("It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."). Refugee Status Determination (RSD) is the term commonly used to refer to the "legal and administrative procedures undertaken by States and/or the UNHCR to determine whether an individual should be recognized as a refugee in accordance with national and international law." UNHCR Global Report 2005, *Glossary*, <https://perma.cc/V36S-9BZM>.

320. *See supra* note 24 and accompanying text (listing ambiguous terms in the Global Refugee Convention).

321. *See id.*

322. *See id.*

323. *See supra* Part III.C.ii (discussing the implied *non-refoulement* principle of the ICCPR).

324. The process of determining an asylum seeker's qualification should include robust judicial review. This Article is agnostic as to whether it would be preferable to have international review of States' determinations. *But see* Goodwin-Gill, *supra* note 239, at 7 ("While it still remains for each state to 'evaluate' the grounds for the grant of asylum, today that discretionary competence is necessarily qualified, to a point, by increased recognition of the individual's protected rights and interests, on the one hand, and by the powerful normative weight of the principle of *non-refoulement* . . . , on the other.").

325. This comment is made notwithstanding principles of diplomatic asylum, a topic that is beyond the scope of this Article.

well with the proposal made in this Article and would reflect and reinforce the humanitarian norms underlying the proposal.<sup>326</sup>)

Most comforting to those who might fear being overrun by asylum seekers, however, might be the observation that many States already readily admit asylum seekers who appear at their frontiers,<sup>327</sup> albeit not necessarily pursuant to international law.<sup>328</sup> We should not expect that a legal obligation to act in a way States are already acting for the most part will dramatically increase asylum requests at the frontier, even fraudulent ones. And, indeed, giving asylum seekers the legal right to be admitted into countries would dampen the incentive for people to enter countries in an irregular manner and would therefore serve to reduce those numbers.

### CONCLUSION

This Article was inspired by a simple question: When do people have the right to cross international boundaries pursuant to international law? Except pursuant to the African Refugee Convention and regional customary international law in Latin America, refugees and other asylum seekers do not appear to have such a right.<sup>329</sup> Beyond those regional exceptions, no other international law—treaty or customary—clearly appears to prohibit States from rejecting people who arrive at their frontiers asking for asylum. By extension, beyond those regional exceptions, persecuted people trying to flee the countries persecuting them have no international legal right to be granted territorial asylum in other States.

The classical publicists Grotius and Suarez recognized the right of asylum as a “natural right of the individual, with a corresponding duty of the state acting on behalf of the international community to grant asylum.”<sup>330</sup> In recent decades, there have been repeated, consistent and robust declarations by intergovernmental organizations, international organizations, scholars, and

326. See Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT'L L. 1215 (2013) (proposing the use of “asylum visas”).

327. See *supra* note 254.

328. There are voices that reject the notion that *opinio juris* must be independently identified in order to discern a customary international law. Such voices assert that State practice alone may give rise to law. E.g., International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law, 8 (2000), <https://perma.cc/MR2G-7F8Y> (“[A] rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.”); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 182 (2005). The author does not subscribe to this concept of customary international law, although sufficiently dense practice may very well be evidence of *opinio juris*.

329. This statement is made with regard to refugees and asylum seekers in their capacity as refugees and asylum seekers. In their capacities as citizens of certain countries, many people have rights pursuant to regional economic integration treaties to cross international frontiers. See, e.g., TFEU, *supra* note 89; Acuerdo sobre Regularización Migratoria Interna de Ciudadanos del MERCOSUR, Bolivia y Chile, Ley No. 3577 (MERCOSUR Acuerdo No 11/02); *Protocol Relating to Free Movement of Persons, Residence and Establishment*, 1 OFFICIAL J. ECOWAS 3 (1979), <https://perma.cc/Z9P6-DP4Y>.

330. Weis, *supra* note 11, at 119.

refugee advocates that States ought to admit asylum seekers who appear at their frontiers, carefully evaluate their claims, and grant meritorious people continued protection. Currently, the international rhetoric about refugee protection is strong. The EU is reevaluating its approach to refugee protection, promoting a more generous, rational, and comprehensive approach.<sup>331</sup> The municipal law of many States prohibits rejection at borders. And as just stated, regional international law in both Africa and Latin America already provides for such rights. Perhaps the time is right to crystalize the norm of non-rejection at the frontier and grant meritorious people a right to territorial asylum in a global treaty.

Perhaps it is time for progressive States to make another attempt at adopting a convention on territorial asylum.<sup>332</sup> In the 1970s, the attempt to adopt such a convention foundered, but much of the resistance to it came from the Soviet Bloc and certain military dictatorships.<sup>333</sup> Times have changed. Some of the obstacles that undermined the adoption of a progressive convention on territorial asylum in the 1970s are gone. And States that supported adopting such a convention, in particular those of Western Europe and Latin America,<sup>334</sup> would appear to be just as willing today. Maybe now is the time to try again.<sup>335</sup> Although it may be impossible to adopt a progressive convention that would have immediate widespread global participation, widespread global participation need not be an immediate goal.<sup>336</sup> Widespread participation can be achieved over time.<sup>337</sup>

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331. See Eur. Comm'n, Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020, <https://perma.cc/USB5-5S5N>.

332. Some have argued that non-rejection at the frontier has become a part of customary international law. See *supra* notes 255–90 and accompanying text. If those voices are correct, there should be little difficulty to codify such an obligation into a global treaty. See also Henkin, *supra* note 120, at 118 (“The international community should reject by its refugee law, as it has with its human rights law generally, the notion that States maintain exclusive power over entry and presence in their territory as the very essence of their national sovereignty.”); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243, 247 (1997) (“[T]he nation state has indeed impeded and confounded human rights goals . . . .”); ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

333. *Supra* note 243.

334. *Id.*

335. The text of the last draft of the Draft Convention on Territorial Asylum can be pieced together using the following sources: U.N. Docs. A/CONF.78/DC.1 through DC.5; UN General Assembly, U.N. Doc. A/10177 (Aug. 29, 1975). The preamble, Articles 4 through 9, and a proposed new article were drafted in 1975 by a “Group of Experts” designated by the UN General Assembly and were not considered by the Conference of Plenipotentiaries during their 1977 conference since the 1977 conference concluded before the conference could turn its attention to them.

336. Since they have already committed to admit asylum seekers who appear at their frontiers, the States of Latin America and Africa might readily ratify such a treaty.

337. Indeed, the Refugee Convention was adopted in 1951 and entered into force in 1954, but as of 1960 there were only approximately twenty States parties. And even now, seventy years after its adoption, the Refugee Convention (and/or its Protocol) has less than 150 parties. *Status of Treaties, Convention Relating to the Status of Refugee*, UNITED NATIONS TREATY COLLECTION, <https://perma.cc/HR4T-DRGX>. Consider too the words of Paul Weis after the adoption of the Declaration on Territorial Asylum:

The transition from traditional international law as a law between states to transnational law (Jessup) and ultimately to a “common law of mankind” (C.W. Jenks) fully protecting the rights of the individual is bound to be slow. The right of asylum is in a special category; there would be no need for it if human rights were observed everywhere. We are, however, unfortunately still far

In 1939, 900 Jewish passengers sought refuge from Nazi persecution but were turned away by country after country, and many of those passengers were eventually murdered by the Nazis.<sup>338</sup> It's past time for the international community of States to accept the harsh lessons of the *MS St. Louis* and promise the world's people the right of territorial asylum. After all, in the words of one *St. Louis* survivor, "People should look after people if they are in need."<sup>339</sup>

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from this ideal state. As long as there are violations of human rights, there will be a need for the grant of asylum. In the meantime, asylum is the only safeguard for the victims of these violations of human rights which the international community is unable to prevent.

It is to be hoped that the practice of states will continue to be guided by the principles of the Declaration [on Territorial Asylum] and that these principles will be further strengthened by being included in municipal legislation and treaty law, thus paving the way for the progressive development of international law relating to territorial asylum.

Weis, *supra* note 11, at 149.

338. OGLIVIE & MILLER, *supra* note 1.

339. Fromkin, *supra* note 5.