Constrained by its Roots: How the Origins of the Global Asylum System Limit Contemporary Protection

By Randall Hansen

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Acknowledgments

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Executive Summary[1]

Territorial asylum—the principle that a refugee must reach the territory of a host country in order to lodge a protection claim—has evolved as the principal mechanism for providing humanitarian protection. However, making access to protection contingent upon access to territory has been criticized as at best inefficient, and at worst deadly. It creates powerful incentives for asylum seekers to undertake dangerous, illegal journeys, often at the hands of smugglers and traffickers, which come at high human and financial costs. But efforts to decouple access to territory from access to protection—either by processing applications in countries of first asylum or at consulates, or by resettling people directly from countries of first asylum—have remained small in scale. One oft-cited alternative, offshore processing, for example, has failed as a solution because it affects too few refugees and is too expensive.

The history of territorial asylum helps explain how it has remained the dominant model. It has been shaped by three major factors: (1) the evolution of the United Nations (UN) refugee regime, which came to depend on applications for asylum being made at or within the borders of refugee-status-granting states; (2) the 1951 UN Convention Relating to the Status of Refugees, which established a persecution-centered definition of who qualifies as a refugee that understands states as the main agents of persecution; and (3) international developments before and since the convention that required asylum seekers to make in-country applications for protection.

To this day, territorial asylum does not provide an easy solution for sudden influxes.

From its very beginnings, the refugee regime was designed to cope with regular, manageable outflows, not mass displacement. To this day, territorial asylum does not provide an easy solution for sudden influxes. Yet other durable solutions remain scarce. While states have resorted to resettlement in order to cope with mass influxes, the number of places routinely made available worldwide covers less than 1 percent of displaced people in need of protection.

Although there is no single policy that can solve the global refugee crisis in isolation, there are a series of steps that national governments could take to: (1) expand protection to refugees, (2) reduce outflows (and thus the pressures on national asylum systems), and (3) improve the quality of life and life chances of displaced persons globally. This entails the following:

- *Dramatically expanding resettlement.* Industrialized countries should greatly expand their resettlement programs (and, in addition, consider private sponsorship arrangements) to increase the number of places available beyond the current 360,000. This needs to be part of any long-term solution to dissuade individuals from making costly and dangerous illegal journeys to seek protection.

- *Expanding (financial) responsibility sharing.* Accidents of geography have often determined responsibility for refugees, with many seeking protection in neighboring countries. Some progress was made at the UN General Assembly Summit for Refugees and Migrants in September 2016 and accompanying meetings of leaders and representatives from civil society and the private sector. But while the recent summit acknowledged the importance of sharing responsibility more equitably, it did not set out how, concretely, to achieve this goal. While a global burden-sharing mechanism may be politically and practically out of reach, the

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1   The opinions expressed in this report, commissioned by the Transatlantic Council on Migration to stimulate discussion during a meeting in Berlin in January 2016, are solely those of the author.

international community could appeal to states that accept fewer refugees to provide greater financial assistance for the principal refugee-hosting states, especially those in the Global South.

■ *Concentrating resources where most refugees are—in the Global South.* Such efforts might focus on:

o *Providing refugees the legal right to work.* Legal access to jobs—both within and outside of camps, and both in law and in practice—is critical not just because it allows individuals to support themselves and their families, but because it is an important source of dignity, self-respect, hope for the future, and eventual integration.

o *Facilitating opportunities for refugee entrepreneurship and self-reliance.* Finding ways to create new jobs through refugee entrepreneurship has four mutually reinforcing benefits: (1) reducing costs for the United Nations High Commissioner for Refugees (UNHCR) and the host state; (2) avoiding the debilitating effects of long-term dependence, both for the refugee and the host community; (3) providing a means to involve the private sector in refugee protection; and (4) creating job opportunities for the host community.

o *Expanding access to education.* Despite overwhelming consensus that education is a key determinant of life chances, vast numbers of refugee children lack access to even primary education. More funding is needed to expand educational opportunities for both native-born and refugee populations in countries of first asylum.

Together, these measures can provide a viable alternative to territorial asylum by expanding resettlement in the Global North and concentrating resources, including development funds, in the Global South. Although a significant expansion of resettlement will make a difference, it is not realistic to expect 20 million refugees to be resettled. Its role will thus be complementary, and most refugees will likely remain within the Global South. Thus, development resources should aim to help host countries achieve greater inclusion of refugees by granting the right to work, expanding opportunities for education, and facilitating entrepreneurship and refugee self-reliance. Properly organized, these efforts could greatly expand protection for refugees, take pressure off borders and reception systems, and, in the most optimistic scenario, improve the lives of both refugees *and* nationals in the Global South.

I.   Introduction

Today, the territorial asylum system is overwhelmed. Globally, there were 65.3 million displaced persons in 2015. This figure includes 21.3 million refugees (including 5.2 million Palestinians), 40.8 million internally displaced persons, and 3.2 million asylum seekers.[2] Displacement has followed, moreover, a sharp upward trend: three times as many people are displaced today as in 2000, and in 2015 alone, 12.3 million people were displaced from their homes. Yet even these numbers do not capture the full scale of displacement. There are millions of people who flee state breakdown, climate change, natural disaster, famine, and drought,[3] but who do not benefit from the international refugee protection regime because they are not fleeing persecution as defined by international and national law.[4]

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[2]   United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2015* (Geneva: UNHCR, 2016), 2, www.unhcr.org/576408cd7.pdf.

[3]   The last three may be wholly, partly, or not at all affected by climate change.

[4]   Alexander Betts, *Development Assistance and Refugees: Towards a North-South Grand Bargain?* (Oxford: University of Oxford, Refugee Studies Centre, 2009), 13, www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb2-development-assis-tance-refugees-2009.pdf.

Durable solutions to provide protection for displaced populations are difficult to achieve. In the West, the basic mechanism used to provide protection to refugees is territorial asylum—meaning that a refugee must reach the territory of a host country in order to apply for protection. Other durable solutions for refugees, such as resettlement (the transfer of refugees directly from the country of first asylum to another state that has agreed to admit them) or voluntary repatriation, are infrequently invoked. In recent years, countries have resettled approximately 80,000 to 100,000 refugees globally each year—less than 1 percent of the refugees under the care of the United Nations High Commissioner for Refugees (UNHCR).[5] Three countries resettled the vast majority of refugees in 2015: the United States (67,000), Australia (9,000), and Canada (20,000, through both government and private sponsorship).[6] Voluntary repatriation is even rarer, as it violates the Refugee Convention signatory state's protection obligations unless certain conditions are met: the causes that led the individual to flee end and conditions guaranteeing "basic rights" are established, a "fundamental and durable" change in the home country, as well as "effective protection."[7] Voluntary repatriation schemes have been operated in Europe and North America in two cases: refugees fleeing the early 1990s Balkan war and refugees fleeing Kosovo in 1999.[8] Most of the refugees reaching Europe today, however, are fleeing protracted situations (such as those in Afghanistan, Eritrea, Iraq, and Syria) that are unlikely to be resolved in the near future—making return a distant possibility.

> *Other durable solutions for refugees, such as resettlement … or voluntary repatriation, are infrequently invoked.*

Countries of asylum in the Global South, by contrast, have traditionally relied on voluntary repatriation as a solution to displacement, but here, too, it is in decline. During 2013, a year in which 2.5 million refugees fled beyond their borders (another 6.5 million were internally displaced), approximately 414,000

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5   UNHCR reports that 98,800 refugees were resettled in 2010; 79,800 in 2011; 88,600 in 2012; 98,400 in 2013; 105,200 in 2014; and 107,100 in 2015. In 2015, 16.1 million refugees were under UNHCR mandate. See UNHCR, *Global Trends 2010: 60 Years and Still Counting* (Geneva: UNHCR, 2011), www.unhcr.org/en-us/statistics/country/4dfa11499/unhcr-glob-al-trends-2010.html; UNHCR, *Global Trends 2011: A Year in Crisis* (Geneva: UNHCR, 2012), www.unhcr.org/en-us/statistics/country/4fd6f87f9/unhcr-global-trends-2011.html; UNHCR, *Global Trends 2012: Displacement—The New 21st Century Challenge* (Geneva: UNHCR, 2013), www.unhcr.org/51bacb0f9.html; UNHCR, *Global Trends 2013: War's Human Cost* (Geneva: UNHCR, 2014), www.unhcr.org/en-us/statistics/country/5399a14f9/unhcr-global-trends-2013.html; UNHCR, *Global Trends, Forced Displacement in 2014: World at War* (Geneva: UNHCR, 2015), http://unhcr.org/556725e69.html; UNHCR, *Global Trends: Forced Displacement in 2015.*

6   UNHCR, "Global Trends 2015 Annex Tables—Table 23: Resettlement Arrivals of Refugees, 2015," accessed October 13, 2016, www.unhcr.org/globaltrends/2015-GlobalTrends-annex-tables.zip.

7   See Joan Fitzpatrick and Rafael Bonoan, "Cessation of Refugee Protection," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, eds. Erika Feller, Volker Türk, and Frances Nicholson (Geneva: Cambridge University Press and UNHCR, 2003), www.unhcr.org/419dbce54.pdf. "Effective protection" is an oft-invoked but rarely defined term. Protection against nonrefoulement is a necessary but insufficient by itself; effective protection is generally also understood to require fair and individual refugee status determination, physical and material safety, access to humanitarian assistance, primary and secondary education, a functioning judicial system, and livelihood opportunities. Many states will contest elements within this list. See Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law,* 3rd ed. (Oxford: Oxford University Press, 2007), 394–396; Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection," *International Journal of Refugee Law* 15, no. 4 (2003): 577-677.

8   UNHCR, *Voluntary Repatriation: International Protection* (Geneva: UNHCR, 1996), www.unhcr.org/4164f6404.pdf.

refugees returned to their countries of origin.[9] In 2014, the number of returnees fell further to 127,000, the lowest figure since 1983;[10] this rose slightly in 2015 to 201,00.[11] As total refugee populations have increased, repatriation has decreased: whereas 14.6 million refugees returned to their countries between 1993 and 2003, only 6.5 million did so between 2003 and 2013.[12] UNHCR, which supports return as a solution, admits that repatriation will only be isolated and idiosyncratic.[13]

While it has become the dominant response to refugee outflows, territorial asylum does not actually provide an easy response for mass movements as the system tends to break down under mass influxes. As such influxes have now become common, this report considers whether there are viable alternatives to territorial asylum, and explores how they might be implemented. It begins by reviewing the history of asylum, arguing that territorial asylum triumphed over diplomatic asylum not because it is more efficient or more equitable, but rather because it is more consistent with state sovereignty. States have accordingly resorted to resettlement in order to cope with large volumes of refugees but this tool, also, is an imperfect solution, namely because the spots available come nowhere close to meeting demand. The report concludes with a series of recommendations for addressing the current refugee crisis by concentrating attention and resources where the refugees are: in the Global South.

Box 1. Definition of Terms

Territorial asylum: when a state grants asylum to individuals who are within its borders.

Diplomatic asylum: when a state grants asylum to individuals who are outside its borders, for example in its diplomatic missions or consulates.

Offshore or external processing: the processing of asylum applications in designated processing centers before applicants reach the territory of the asylum-granting state.

Resettlement: a process that selects and relocates refugees from the country where they are seeking protection directly to a state that has agreed to admit them as refugees and grant them permanent resident status.

Source: United Nations High Commissioner for Refugees (UNHCR), "Frequently Asked Questions about Resettlement" (fact sheet, April 2012), www.unhcr.org/4ac0873d6.pdf.

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9   UNHCR, *UNHCR Statistical Yearbook 2013, 13th edition* (Geneva: UNHCR, 2015), 50, www.unhcr.org/54cf9bd69.html; UNHCR, "World Refugee Day: Global Forced Displacement Tops 50 Million for First Time in Post-World War II Era" (news release, June 20, 2014), www.unhcr.org/53a155bc6.html. Repatriation can be either unassisted or assisted, and the latter may in be voluntary or not. In cases of voluntary assisted return, international organizations (e.g., UNHCR, IOM) provide the individual information, funds, and/or transportation to their country of origin. See Laura Hammond, *This Place Will Become Home: Refugee Repatriation to Ethiopia* (New York: Cornell University Press, 2004); Laura Hammond, "'Voluntary' Repatriation and Reintegration," in *The Oxford Handbook of Refugee and Forced Migration Studies*, eds. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (Oxford: Oxford University Press, 2014), 503. The line between some forms of forced return and some forms of assisted voluntary repatriation is blurry. Repatriated refugees often face the prospect of reestablishing themselves in countries that they fled years or even decades earlier. In the context of the current refugee crisis, the Syrian nongovernmental organizations (NGOs) that were originally optimistic about the possibilities of repatriation now view it as impossible for the foreseeable future. See UNHCR, *Global Trends 2012*.

10   UNHCR, *Global Trends, Forced Displacement in 2014*.

11   UNHCR, *Global Trends: Forced Displacement in 2015*, 3.

12   UNHCR, *Statistical Yearbook 2013*, 50. These figures also have to be understood in the context of the overall refugee populations—that is, it should not be defined by outflows in any one year.

13   Author interview with UNHCR officials, Gaziantep, Turkey, June 13, 2014.

II.   The Origins of the Current Territorial Asylum System

Territorial asylum has a complex history that has been shaped by three major factors: (i) the evolution of the United Nations (UN) refugee regime, which came to depend on applications for asylum being made at or within the borders of refugee-status-granting states; (ii) the 1951 UN Convention Relating to the Status of Refugees, which established a persecution-centered definition of who qualifies as a refugee that understands states as the main agents of persecution; and (iii) international developments before and since the convention that required asylum seekers to make in-country applications for protection.

A.   The UN Refugee System in the Aftermath of World War II

In the immediate aftermath of World War II, tens of millions of people were displaced: between 21 million and 30 million driven out during the war, 12 million Germans expelled from Eastern Europe, and at least 4 million who fled the Soviet advance.[14] In anticipation of and in response to these movements, the Allies created the United Nations Relief and Rehabilitation Administration (UNRRA) in 1943. Forty-four governments signed the agreement creating the agency. The UNRRA mandate included a broad range of humanitarian efforts (food, housing, and medical care), but in the case of displaced persons its main aim was repatriation. Over the course of 1945, UNRRA and Allied high command (the Supreme Headquarters Allied Expeditionary Force, or SHAEF, under the leadership of General Eisenhower) repatriated millions of nationals, with murderous consequences for Soviets.[15]

Although most, if not all, refugees had fled the country of their nationality, the regime was not yet territorial.

Even that massive operation left at least 1 million displaced people who were unable or unwilling to return, including 400,000 Polish prisoners of war and forced laborers; 150,000 to 200,000 Estonian, Lithuanian, and Latvian Wehrmacht and SS soldiers, slave laborers, and civilians fleeing the Soviets; 100,000 to 150,000 ethnic Ukrainians; and 250,000 Jewish refugees, including a small group that had survived the death camps and death marches.[16] Most would not be repatriated: by 1946, growing Soviet-U.S. hostility and mounting evidence of summary Soviet execution of returnees made repatriation politically untenable. Instead, the United Nations created a new organization designed to take over the work of UNRRA and to deal with the remaining displaced persons: the International Refugee Organization (IRO).

The IRO understood refugees as those who were outside their borders as (i) victims of Nazi, Fascist, or collaborationist regimes; (ii) Spanish Republicans; and (iii) those defined as refugees before the outbreak of World War II. Although most, if not all, refugees had fled the country of their nationality, the regime was not yet territorial in that they did not travel under their own auspices to countries granting them asylum. Instead, the IRO processed refugees in the principal areas taken over from UNRRA in the western zones of

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14   Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001), 34; Louise W. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations. Its History and Work 1946–1952* (London: Oxford University Press, 1956), 15.

15   Gerard Daniel Cohen, *In War's Wake: Europe's Displaced Persons in the Postwar Order* (Oxford: Oxford University Press, 2012), 5.

16   Cohen, *In War's Wake*, 5–6; Randall Hansen, "State Controls: Borders, Refugees, and Citizenship," in *The Oxford Handbook of Refugee and Forced Migration Studies*, eds. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (Oxford: Oxford University Press, 2014), 253–65.

Germany and in Austria, the Middle East, India, Lebanon, and Shanghai.[17] Most of those processed by the IRO were in Germany (715,000) and Austria (46,000).[18] The IRO constitution provided for three durable solutions: repatriation, emigration or resettlement to a third country, and local settlement or integration in the first country of refuge.[19] Few refugees wanted to remain in Germany and, because Soviet executions and mounting Cold War tensions made returns to the Soviet Union less viable, repatriation only occurred on a minor scale: 72,687 refugees had been repatriated by 1951, with Poles representing the largest group (37,957).[20] By contrast, 1,038,750 refugees were resettled.[21] The process was as follows: each participating resettlement country supplied the IRO central administration with details of the number and types (age, sex, profession, qualifications) of refugees it could absorb; resettlement officers alerted refugees at assembly centers of resettlement opportunities; refugees were interviewed; successful refugees were sent to staging centers until there were enough to fill a ship; and then refugees were transported from these centers by train to ports, from which they sailed to Canada, the United States, Australia, New Zealand, South America, and elsewhere.[22] Within Europe, refugees resettled to Belgium or France traveled directly by train.[23]

From the beginning, the refugee regime dodged responsibility for the great movements of forced migrants: the Allies refused to define as refugees the approximately 12 million Germans expelled from former German territories and East European countries from 1945 to 1951.[24] The refugee system also did not apply to the approximately 8 million Hindus, Sikhs, and Muslims who fled or were expelled at the time of Indian partition because they received protection from another state (i.e., India or Pakistan).[25] The United Nations created separate organizations to address Palestinian and Korean refugees. And it all but ignored refugees fleeing Communist China until a full ten years after they fled, at which point UNHCR offered limited resettlement opportunities.[26] From its very beginnings, the refugee regime was fit to cope only with regular, manageable outflows; it was not prepared to cope with mass displacement.

B.   *The UN Convention Relating to the Status of Refugees*

The next step in the evolution of the refugee regime as we know it today was the establishment of the UNHCR and the adoption of the UN Convention Relating to the Status of Refugees. The drafters of the 1950 UNHCR Statute (defining its role and operations) and the 1951 convention were influenced both by the immediate past as well as expectations for future refugee flows. They looked backward to the persecution of minorities before and during World War II, above all the Jews, and forward to the victims of then-fledgling Communist states.[27] As a result, the UNHCR Statute and the Refugee Convention acquired—and has retained—characteristics specific to that time in history: a persecution-centered definition of who qualifies as a refugee that understands oppressive states as the main agents of persecution.[28]

The state-centric character of the 1951 convention is reflected in its Article 33, which outlines the main, indeed the only real, state obligation: "No Contracting State shall expel or return ('refouler') a refugee in

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17 Those processed in Shanghai were Jewish refugees who had traveled across the Eurasian landmass. See Holborn, *The International Refugee Organization*, 218.
18 There were also 26,000 in Italy, 37,000 in the Middle East, and 45,000 in China. See ibid., 22.
19 Ibid., 339.
20 Ibid., 356–57.
21 Susan F. Martin, *International Migration: Evolving Trends from the Early Twentieth Century to the Present* (Cambridge, UK: Cambridge University Press, 2014), 696–97; Holborn, *The International Refugee Organization*, 365.
22 Holborn, *The International Refugee Organization*, 370–74.
23 Ibid., 377–84.
24 In practice, some ethnic Germans secured support by describing themselves as victims of Communist repression, which they might well have been. At the same time, some non-German nationals—Latvians, Lithuanians, and Ukrainian SS troops—were able, because they were not Germans, to secure refugee status. See Cohen, *In War's Wake*, 48.
25 Astri Suhrke and Kathleen Newland, "Uphill into the Future," *International Migration Review* 35, no. 1 (2001), 286.
26 Ibid.
27 Loescher, *The UNHCR and World Politics*, 44.
28 Ibid.

any matter 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." Under the convention, when a person has a "well-founded fear of persecution" on any of these grounds, that person is a refugee, and states may not return him or her to countries where he or she would be at risk. Subject to qualifiers on security threats and serious crime, nonrefoulement is both an inviolable state obligation and the core of international refugee law.[29]

C.   *International Developments Favoring Territorial Asylum*

Nowhere does the convention oblige a state to process asylum seekers exclusively on its own territory. Similarly, the state obligations under the convention are not limited solely to national soil: states can refoule refugees from outside their borders (through, for instance, interdiction at sea or refusing landing rights to arriving ships or aircraft, which may lead to refugees being sent back to countries where they would be at risk).[30] Territorial asylum—the processing of asylum applications on the territory of a nation-state after a refugee crosses a land or sea border to reach that territory—nonetheless emerged in practice as the dominant response to refugee movements. The vast majority of refugees in the West secure that status in this way, by making applications after they have arrived in the country of asylum.[31]

> *Any doctrine that challenges the nation-state will face great resistance.*

Territorial asylum has become standard practice in the West because the 1951 Refugee Convention has been interpreted to require the processing of asylum applications at or within the borders of the nation-state. This interpretation emerged because territorial asylum (in theory) poses a negligible threat (if any) to the sovereignty of the nation-state.[32] Since the 1648 Peace of Westphalia—which ended religious wars in Europe and recognized the national sovereignty of successor states to the Holy Roman Empire—the international system has been founded on the sovereign nation-state.[33] For this reason, any doctrine that challenges the nation-state will face great resistance. And the conceptual alternative to territorial asylum—diplomatic asylum—does precisely that.

Diplomatic asylum rests on the concept of extraterritoriality, or the claim that a state's authority extends beyond its borders, which the legal theorist Hugo Grotius developed in the early 17th century to justify the privileges enjoyed by foreign embassies and those in their employ. As extraterritoriality can be

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29   Guy Goodwin-Gill, "The International Law of Refugee Protection," in *The Oxford Handbook of Refugee and Forced Migration Studies*, eds. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (Oxford: Oxford University Press, 2014), 40.
30   "The 1951 Convention," writes Goodwin-Gill, "does not deal with the question of admission, and neither does it oblige a state of refuge to accord asylum as such." See ibid., 45.
31   Territorial asylum is more common in Western countries than resettlement, which allows for asylum applications to be processed in a third country.
32   As legal scholar S. Prakash Sinha argues, "international law gives every state exclusive control over persons on its territory. Moreover, in the absence of treaty obligations, a state is neither bound to admit aliens to its territory, nor is it prevented from admitting them. It may choose to admit anyone it pleases, it may exclude anyone it pleases, or it may admit one on whatever terms and conditions it pleases. Herein lies the basis for its competence to grant asylum on its territory…[,] competence [that] is a consequence of the territorial sovereignty of states." See S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), 50.
33   The Peace of Westphalia, a set of treaties that ended the Thirty Years War, called for religious tolerance and, importantly, recognized the full territorial sovereignty of the states of the Holy Roman Empire. The Peace of Westphalia is widely recognized as the origin of the contemporary state system.

exercised against the wishes of other nation-states, it is inherently a challenge to national sovereignty.[34] When applied to asylum policy, extraterritoriality means that the sovereign right of the asylum-granting state to give someone refuge at their embassy in a foreign country supersedes the sovereign right of that individual's home country to apprehend one of its nationals on its soil.

By contrast, territorial asylum theoretically poses at most a minor challenge to national sovereignty because receiving states are exercising their right not to extradite a foreign national who is on their soil. Indeed, the refusal by a country of origin to recognize another state's grant of territorial asylum to one of its nationals would be a far greater violation of sovereignty: to repudiate the grant of asylum, the state would have to enter the asylum-granting state and retrieve their national. The international state system and the laws and norms governing it are thus structurally predisposed toward territorial asylum.

Territorial asylum theoretically poses at most a minor challenge to national sovereignty because receiving states are exercising their right not to extradite a foreign national.

The clearest statement on territorial asylum came in the same year as the 1967 protocol that amended the earlier Refugee Convention in the form of the UN Declaration on Territorial Asylum, which states: "Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States... It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."[35] These provisions make clear that state sovereignty is paramount and that the state is the central actor in granting or denying asylum. The declaration further reinforces state sovereignty by denying, as did the convention and protocol, any right to refugee status as such: territorial asylum involves a state granting protection to an individual who seeks it by traveling to that state.[36] As a result, the declaration—as one of the most robust statements on refugee entitlement to asylum—can clearly be seen as reinforcing the primacy of state sovereignty.[37]

III.   Territorial Asylum in Practice

To summarize the argument so far, three points have been made. First, the global refugee system was never designed to cope with mass movements. Second, territorial asylum, because it is more consistent with nation-state sovereignty, became the dominant mechanism for processing refugees who have fled or were expelled. Third, the refugee system is thus not a challenge to but rather a reinforcement of state

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34 Sinha, *Asylum and International Law*. The concept was popular among legal writers in the 16th and 17th centuries, but even then states never fully respected it. In 1540, for instance, the Venetian Republic seized magistrates who had taken refuge in the French embassy in Venice on the grounds that asylum could not be granted to those who had committed high treason. The French were furious, but the magistrates were seized nonetheless. By the end of the 17th century, the concept fell into disrepute in both Europe and Latin America. Diplomatic asylum has to a degree been revisited in Latin America, but has little, if any, support within Europe. See UN General Assembly, "Question of Diplomatic Asylum: Report of the Secretary General," UNHCR, September 22, 1975, http://unhcr.org/3ae68bf10.html.

35 UN General Assembly, "Declaration on Territorial Asylum," December 14, 1967, www.refworld.org/docid/3b00f05a2c.html. See also Sinha, *Asylum and International Law*, 50.

36 For a discussion, see Guy S. Goodwin-Gill, *The 1967 Declaration on Territorial Asylum—Introductory Note* (New York: United Nations, 2012), http://legal.un.org/avl/ha/dta/dta.html.

37 Ibid.

sovereignty. The section that follows explores how territorial asylum has operated in practice and evolved over time.

A.   Territorial Asylum in Traditional Countries of Immigration in the 1980s and 1990s

During the Cold War, the refugee system worked rather well from the perspective of Western governments;[38] refugees were few in number, and those who did seek asylum were often professional or artistic elites. When there were mass influxes, Western governments resorted to resettlement, exemplified by the sudden arrival of Hungarian refugees fleeing the 1956 Soviet crackdown. Of the refugees who arrived in Austria and Yugoslavia, 180,000 were resettled to 37 different countries. Resettlement was also the chief mechanism used to resolve the Indochinese refugee crisis, when some 900,000 refugees fled Vietnam after the fall of Saigon.

From the 1980s, as the costs of transportation declined, refugee applications at national borders surged, a process further accelerated by the fall of the Berlin Wall and, above all, the Balkan wars of the early 1990s (see Figure 1).

Figure 1. Asylum Seekers in Select European Countries, 1985-99*
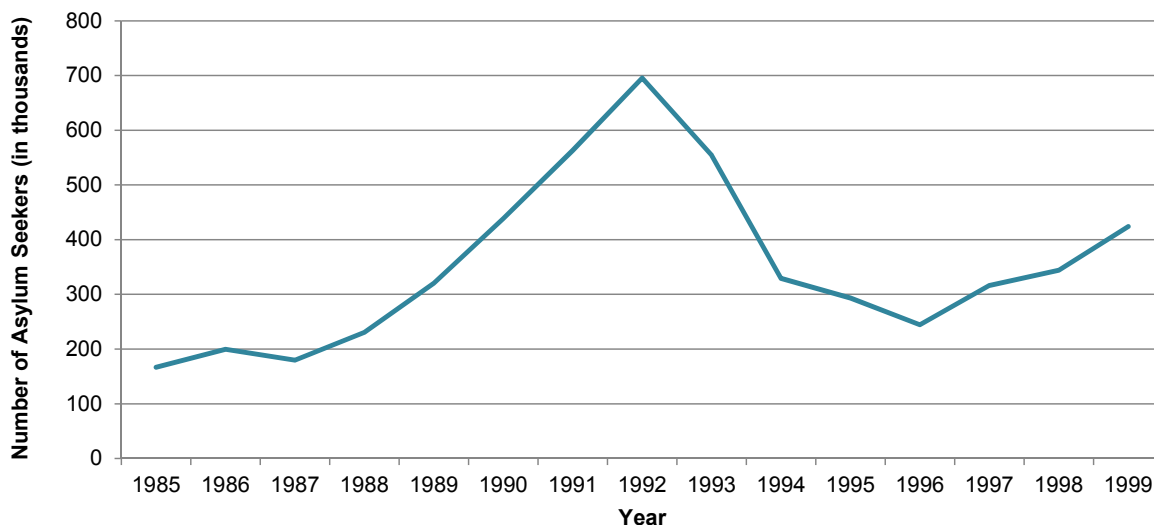
* These are rounded figures based on data for Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.
Sources: John Salt, *Current Trends in International Migration in Europe* (Strasbourg: Council of Europe, 1999); U.S. Committee for Refugees, *World Refugee Survey 1999* (Washington, DC: U.S. Committee for Refugees, 1999); European Council on Refugees and Exiles (ECRE), *Country Reports, 1998* (Brussels: ECRE, 1998); United Nations High Commissioner for Refugees (UNHCR), *The State of the World's Refugees 1995: In Search of Solutions* (Oxford: Oxford University Press, 1995), www.unhcr.org/publications/sowr/4a4c70859/state-worlds-refugees-1995-search-solutions.html.

The influx of asylum seekers at the border exposed the system's weaknesses. Asylum processing is cumbersome, expensive, and inadequate for the needs of many forced migrants, the majority of whom are do not receive individual refugee status determination.[39] For convention signatories, the submission of an asylum application triggers a complex, lengthy, and often expensive adjudication process. An asylum hearing must be arranged; in some countries, lawyers are appointed;[40] a case and possibly an appeal must be heard; and, if the applicant is unsuccessful, return procedures need to be initiated. European Union

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38   Loescher, *The UNHCR and World Politics*, 54–7.
39   The author develops the argument made in this section at greater length in Hansen, "State Controls."
40   In the United States, asylum seekers have no right to counsel.

(EU) Member States are obligated to provide asylum seekers with minimum levels of housing and support while their cases are being determined (though the quality of support varies considerably from country to country). And at the end of the adjudication process, which in the late 1990s lasted six months on average,[41] only a minority of asylum seekers was successful; most are not granted refugee status.[42] Once all non-convention statuses are included, only around half of asylum seekers are granted protection following the processing of their asylum applications. For example, in 2015, close to half of decisions taken on asylum claims (slightly more than 330,000 people) were positive in the EU-28.[43] The majority of asylum seekers, including some of those driven from their homes by poverty, instability, and war, are not understood to be refugees under the principles of the convention.

This complexity is all the more remarkable given that, in the end, it appears to make very little difference. Until recently, only a minority of individuals refused asylum were subsequently deported. Finding and deporting individuals is expensive; some asylum seekers deliberately destroy documentation to hinder return; countries of origin may refuse to take them back without such documentation (and sometimes even with it); and a significant number simply disappear into populous large cities and are unable to be found.[44]

B.   *The State Strikes Back: Externalizing Asylum Controls in the West*

Because the global refugee regime was not designed to challenge state sovereignty, it is unremarkable that states reasserted power over their borders in response to threats posed by forced migration to that sovereignty. Two dynamics discussed above—the initiation of the asylum process by touching the soil of a signatory country, and the severe constraints on deportation imposed by liberal democratic states—have encouraged a two-pronged strategy: (i) adopting measures to extend state borders outwards and (ii) increasing state capacity to remove failed asylum seekers from within these borders.

States have expanded visa requirements and begun to fine airlines that allow passengers to travel without proper documentation.

"Pushing the border out" describes the process by which states employ a range of measures to keep asylum seekers from reaching national borders. States have expanded visa requirements and begun to fine airlines that allow passengers to travel without proper documentation, thereby preventing asylum seekers from reaching their territory.[45] States have issued often dubious lists of "safe" origin countries, declaring them incapable of producing refugees and thus avoiding the need to process the asylum claims of any nationals from listed countries.[46] They have also interdicted asylum seekers traveling by sea, declared airports

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41   Timothy J. Hatton and Jeffrey G. Williamson, *Refugees, Asylum Seekers and Policy in Europe* (Bonn: Institute for the Study of Labor, 2004), 10, http://ftp.iza.org/dp1230.pdf.

42   Arthur C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (Oxford: Oxford University Press, 2002), 169.

43   According to Eurostat, 307,150 people received positive decisions at first instance in the EU-28 in 2015, out of 592,680 total decisions made; a further 26,145 received positive decisions upon appeal (out of 182,385 final decisions made). Positive decisions include refugee status, subsidiary protection, and humanitarian status. See Eurostat, "First Instance Decisions on Applications by Citizenship, Age and Sex. Annual Aggregated Data (rounded) [migr_asydcfsta]," updated September 14, 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asydcfsta&lang=en; Eurostat, "Final Decisions on Applications by Citizenship, Age and Sex. Annual Data (rounded) [migr_asydcfina]," updated September 14, 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asydcfina&lang=en.

44   Matthew J. Gibney and Randall Hansen, "Asylum Policy in the West: Past Trends, Future Possibilities," in *Poverty, International Migration and Asylum,* eds. George J. Borjas and Jeff Crisp (Houndmills, UK: Palgrave Macmillan, 2005), 70–96.

45   Virginie Guiraudon, "De-Nationalizing Control: Analyzing State Responses to Constraints on Migration Control," in *Controlling a New Migration World,* eds. Virginie Guiraudon and Christian Joppke (London: Routledge, 2001).

46   Randall Hansen, "Asylum Policy in the European Union," *Georgetown Immigration Law Journal* 14, no.3 (2000): 779-800.

international zones, and expanded out-of-country detention (to prevent asylum claims from being made).[47] And, finally, they have expanded deportation practices, though the numbers often remain low in comparison with asylum applications lodged.[48] These policies have been so heavy handed in part because the rights enjoyed by asylum seekers who do reach liberal democratic soil are so robust. As Matthew Gibney observed, there is often a direct relationship between illiberalism outside a nation's borders and liberalism within them.[49]

For Europe, North America, and Australia, the trick seemed to work. After a sharp rise in refugees in the 1990s (leading to much hand-wringing over Europe's "refugee crisis"), numbers fell again in the new millennium, due also in part to the end of the Yugoslav Wars. This success was, however, illusory, as numbers quickly rose again from the mid-2000s, and they skyrocketed after 2010.

Today, the global refugee system is broken. Following state breakdown in the Middle East, Turkey accepted 2,734,000 refugees by September 2016, less than 10 percent of which are in refugee camps.[50] Lebanon had 1,034,000 refugees at the end of June 2016, while Jordon hosts 656,000 as of September 2016.[51] Both states have less capacity than Turkey: Lebanon because of sectarian divisions and international instability, and Jordan because of its fragile economy and 2 million registered Palestinian refugees.

Figure 2. Total Global Displacement, 2000-14
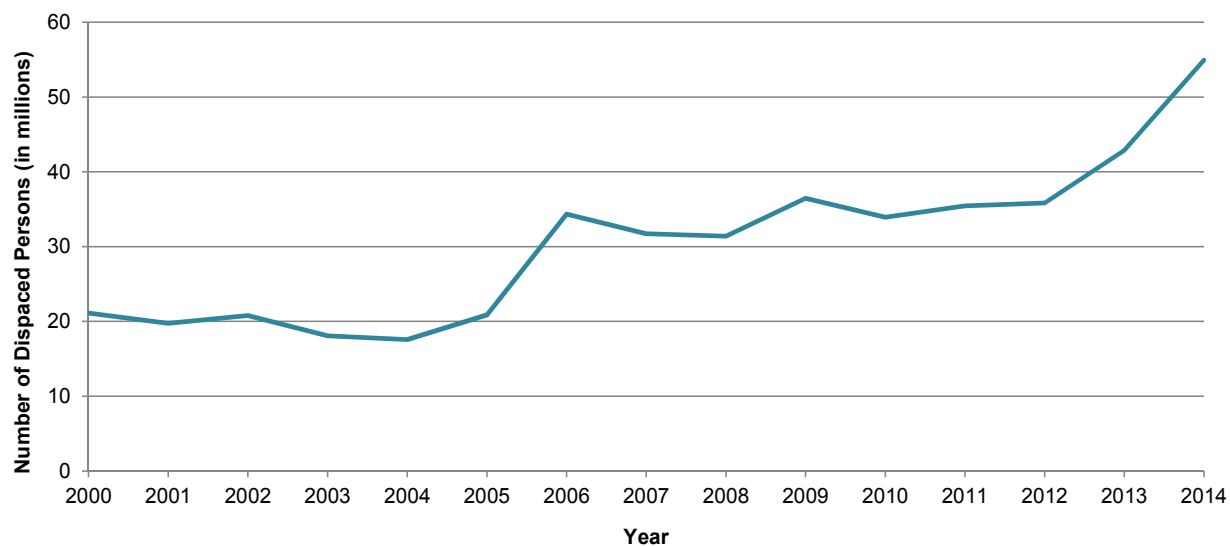
Source: United Nations High Commissioner for Refugees (UNHCR), "Population Statistics Database," accessed May 29, 2015, http://popstats.unhcr.org/en/overview.

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47 James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge, UK: Cambridge University Press, 2005), 283–98; Goodwin-Gill and McAdam, *The Refugee in International Law*.

48 In the United States and the United Kingdom, for example, there has been an increase in the number of noncitizens (including unauthorized migrants, failed asylum seekers, and those convicted of criminal offenses) who leave the country through deportation or under threat of removal. See Bridget Anderson, Matthew J. Gibney, and Emanuela Paoletti "Citizenship, Deportation, and the Boundaries of Belonging," *Citizenship Studies* 15, no. 5 (2011): 547–50.

49 Matthew J. Gibney, "The State of Asylum: Democratization, Judicialization and the Evolution of Refugee Policy," in *The Refugee Convention 50 Years On: Globalization and International Law,* ed. Susan Kneebone (Aldershot, UK: Ashgate, 2003), 19–46.

50 UNHCR, "Syria Regional Refugee Response," accessed October 13, 2016, http://data.unhcr.org/syrianrefugees/regional.php; Metin Çorabatir, *The Evolving Approach to Protection in Turkey: Assessing the Practical and Political Needs* (Washington, DC: Migration Policy Institute, 2016), www.migrationpolicy.org/research/evolving-approach-refugee-protection-turkey-assessing-practical-and-political-needs.

51 UNHCR, "Syria Regional Refugee Response."

C.   Europe's Current Refugee Crisis

In Europe, reception systems, and indeed border controls generally, were overwhelmed by the arrival of more than 1 million asylum seekers by sea in 2015, alongside hundreds of thousands of asylum seekers entering by land through the Balkan route. In Germany, which received 657,855 asylum applications in 2015,[52] registration systems broke down, local authorities complained of strain, reception centers overflowed, and thousands—perhaps tens of thousands—of refugees who had entered Germany absconded, never registered, or never submitted an application.[53] On the Central and Eastern Mediterranean routes, dangerous sea crossings to Italy and Greece continue. Between January and October 2016, 316,000 people crossed the Mediterranean, with nearly 3,700 dead or missing.[54]

Territorial asylum in its present form cannot cope with the number of refugees in the Global North.[55] Yet, the European refugee crisis is only one part of the global refugee challenge. Indeed, until mass influxes in Europe attracted so much attention, the Global North was almost a refugee sideshow; the vast majority of refugees were and are in the Global South.

D.   Refugees in the Global South

UNHCR reports that in 2015, 86 percent of the world's refugees were hosted in low- and middle-income countries (an increase from 70 percent from ten years ago)[56] and 42 percent of the total resided in just five countries in the Middle East and Asia.[57] Many of these countries face severe economic difficulties. More than half of refugees lived in countries with a per-person gross domestic product (GDP) of less than U.S. $5,000, as of 2014.[58] Recent estimates using 2015 data suggest about 6.6 million refugees were in protracted situations—defined as spending more than five years in exile—while another 8.9 million refugees, almost half of whom are Syrian, had been displaced within the last four years.[59]

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86 percent of the world's refugees were hosted in low- and middle-income countries.

The Middle East and above all Syria currently attract great attention, but there are massive displaced populations in Africa (20.2 million, including 4.8 million refugees and people in refugee-like situations,

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52   Bundesamt für Migration und Flüchtlinge (BAMF), *Asylgeschäftsstatistik für den Monat September 2016* (Nuremberg: BAMF, 2016), 2, www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201609-statistik-anlage-asyl-geschaeftsbericht.html?nn=7952206.

53   *Die Welt,* "Tausende Flüchtlinge verlassen Unterkünfte auf eigene Faust," *Die Welt*, October 29, 2015, www.welt.de/politik/deutschland/article148206719/Tausende-Fluechtlinge-verlassen-Unterkuenfte-auf-eigene-Faust.html. Upper estimates reach 200,000.

54   UNHCR, "Refugees/Migrants Emergency Response – Mediterranean," accessed October 10, 2016, http://data.unhcr.org/mediterranean/regional.php.

55   The "Global North" includes Australia, Austria, Belgium, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Lichtenstein, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States.

56   UNHCR, *Global Trends: Forced Displacement in 2015,* 18.

57   These five countries are: Turkey (2.5 million), Pakistan (1.6 million), Lebanon (1.1 million), Islamic Republic of Iran (979,000), and Jordan (664,000). See UNHCR, *Global Trends: Forced Displacement in 2015*.

58   UNHCR, *Global Trends 2014,* 2.

59   Xavier Devictor and Quy-Toan Do, "How Many Years Have Refugees Been in Exile?" (Policy Research Working Paper 7810, World Bank Development Research Group, Poverty and Inequality Team, Washington, DC, September 2016), http://documents.worldbank.org/curated/en/549261472764700982/pdf/WPS7810.pdf.

and 1.4 million asylum seekers) and in Asia (29.7 million, including 8.7 million refugees and people in refugee-like situations, and 0.4 million asylum seekers).[60]

The refugees that do make it to the North, even with the recent, sharp increase in refugee arrivals since the summer of 2015, represent a minority of the total. Figure 3 summarizes the results of refugee-status determination in the Global North over a 13-year period (the bottom portion of each bar indicates positive decisions).

Figure 3. Refugee Status Determination Rates in the Global North, 2000-13
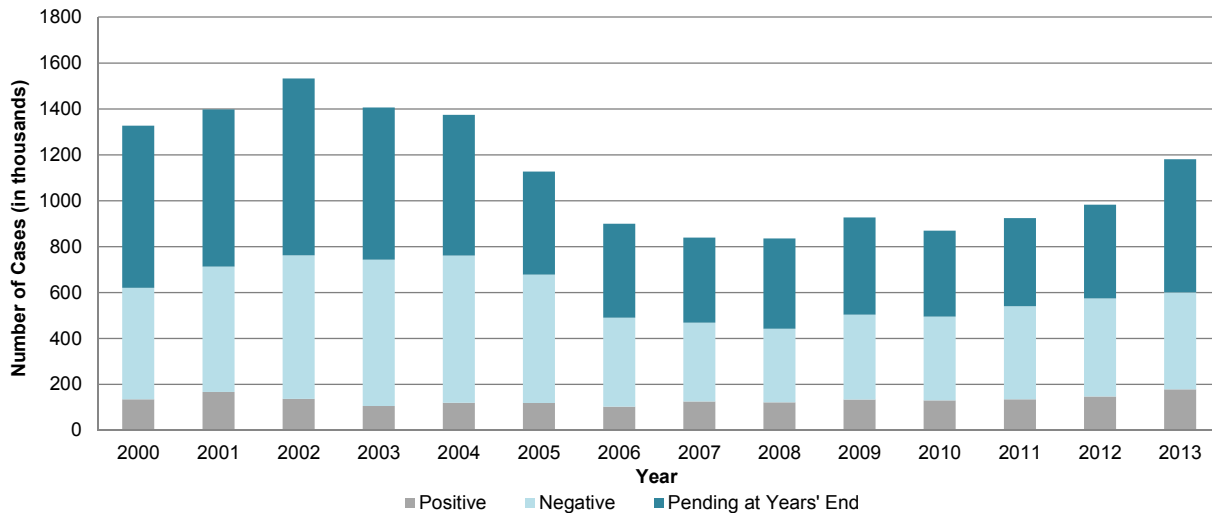
Source: UNHCR, "Population Statistics Database."

Only a fraction of refugees, in short, have any hope of securing protection in the West.

Even if we assume that Europe grants refugee status to, for example, 1.2 million refugees over the next two years, the scale of the refugee crisis means that even this act would do little to alter the global picture. The total would constitute only 30 percent of the refugees that fled a single country: Syria. And there is mounting evidence that even a country as wealthy and well-organized as Germany cannot cope with large-scale influxes.[61]

IV.   Alternatives to Territorial Asylum

The global refugee regime and the territorial asylum system underpinning it are overwhelmed by the global numbers and by the regional concentration of mass influxes. If the global refugee system is to be

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60   These displaced populations include refugees and people in refugee-like situations, asylum seekers, returnees, internally displaced persons (IDPs), stateless populations, and other individuals who do not fall into these categories but still qualify for assistance from UNHCR. See UNHCR, *Global Trends: Forced Displacement in 2015,* "Table 1: Refugees, Asylum-Seekers, Internally Displaced Persons (IDPs), Returnees (Refugees and IDPs), stateless persons, and others of Concern to UNHCR, by Country/Territory of Asylum, End-2015."

61   For a discussion of the pro-immigrant consensus that formed in Germany between 2005 and mid-2015, and how recent events have started to call this consensus into question, see Friedrich Heckmann, *Understanding the Creation of Public Consensus: Migration and Integration to Germany, 2005 to 2015* (Washington, DC: Migration Policy Institute, 2016), www.migrationpolicy.org/research/understanding-creation-public-consensus-migration-and-integration-germany-2005-2015.

rethought, one compelling alternative is out-of-country processing (also called "offshore processing" when oceans separate refugees from their intended destinations), which entails processing asylum applicants before they reach the soil of the asylum-granting state. Some states currently practice it. Australia has gone furthest: with a few exceptions, asylum seekers arriving by boat are interdicted, detained, and processed in Nauru or on Manus Island (Papua New Guinea). In the period 2009–13, between 43 and 48 percent of asylum seekers to Australia arrived by boat, and were thus processed offshore.[62] In the Australian case, as in all cases of offshore processing, a receiving country's legal obligations—including nonrefoulement—still apply.

There is an important difference between offshore processing following interdiction at sea, as practiced in Australia, and offshore processing managed in the country of origin or in transit countries (as proposed by some analysts for the European Union[63]). In the latter, asylum seekers do not need to undertake dangerous sea journeys, whereas the former does not help avoid this risk. Although the United States generally relies on the principles of territorial asylum, it has occasionally used offshore processing, generally in times of numbers-driven refugee crises. The most comprehensive application of offshore processing occurred during the Indochinese refugee crisis: between 1979 and 1999, the United States admitted 400,000 additional refugees whose applications were processed in Vietnam (a policy also called, confusingly, in-country processing).[64] In 1991, following a military coup in Haiti, the Bush administration established offshore processing facilities for Haitian asylum applicants. U.S. officials processed more than 18,000 applications over 18 months; 10,000 were granted entry to the United States and the rest returned voluntarily or involuntarily.[65] Most recently, in December 2014, the United States established an in-country refugee and parole program for Central American children from El Salvador, Guatemala, and Honduras who have parents legally present in the United States.[66]

Box 2. Temporary Protection Status

States at times offer "temporary protection" in lieu of full refugee status to provide swift access to protection in cases of sudden mass influxes. This happened during the conflicts in the former Yugoslavia in the early 1990s, for example. While this can be a complement to normal asylum procedures, it should not be seen as an alternative to territorial asylum for two reasons.

First, states that have offered temporary protection in the past—the United States since the 1980s, Germany in the 1990s—did so following an application on American or German soil, respectively. Asylum thus remained territorial; it was simply limited. Second, and more importantly, offering temporary protection would solve none of the current problems of border management, as refugees would continue to seek access to wealthy countries in the Global North. When refugees do not return to their countries of origin, the only lasting legacy of temporary protection regimes, as temporariness slides into permanence, might be the delayed integration of refugees in their new societies.

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62   Parliament of Australia, "Asylum Seekers and Refugees: What Are the Facts?" updated March 2, 2015, www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/AsylumFacts.

63   Madeline Garlick, "The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims" (commentary, Migration Policy Institute, March 2015), www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims.

64   Zara Rabinovitch, "Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing," *Migration Information Source*, October 16, 2014, www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing.

65   Although 5,400 applications had been filed in the program's first year, only six youth had arrived in the United States. See Maarten den Heijer, *Europe and Extraterritorial Asylum* (Oxford: Hart Publishing, 2012), chapter 7.

66   Victoria Rietig, "Top 10 of 2015 – Issue #8: A Shared Challenge: Europe and the United States Confront Significant Flows of Unaccompanied Child Migrants," *Migration Information Source*, December 9, 2015, www.migrationpolicy.org/article/top-10-2015-issue-8-shared-challenge-europe-and-united-states-confront-significant-flows.

Is Offshore Processing Realistic?

If offshore processing, or for that matter any alternative to territorial asylum, is to work, then it would have to apply to sufficient numbers of asylum seekers to reduce the current pressure on asylum systems. Indeed, numbers are the central issue. Unless asylum seekers can be quickly processed offshore and resettled in the West, none of these proposals has even the slimmest chance of reducing asylum pressures. Refugees will only forego travel to the country of their preferred destination and trust officers in embassies or third-country processing centers with their fate if they are reasonably confident that doing so will secure them refugee status relatively quickly. If processing times stretch on for years, and if rejection rates are high (which they are likely to continue to be), then many refugees will continue to assume the costs and risks of traveling to the territory of the country in which they hope to secure protection. And if this occurs, states too may lose interest in these schemes if they fail to reduce the number of refugees for wealthy countries or deter onward movements.[67]

> *Unless asylum seekers can be quickly processed offshore and resettled in the West, none of these proposals has even the slimmest chance of reducing asylum pressures.*

There is, naturally, a radical solution to this challenge. States could end territorial asylum entirely and *only* process applications offshore. Such a move would require, however, overturning decades of laws and norms governing international asylum, including the 1951 Refugee Convention and the 1967 protocol. Such a move is highly unlikely; it would create further problems in the form of spiraling costs, since offshore processing is extremely expensive. Australia currently spends more than AUS \$1 billion a year on offshore processing, a figure that is some 30 percent of UNHCR's *total* current budget.[68] Much of this sum flows from detention, which is an unavoidable cost: Australia pays AUS \$239,000 per year per person detained offshore, a figure far in excess of the costs of processing asylum seekers in countries that operate territorial asylum regimes.[69] The fact that detention is offshore—which is obviously necessary for offshore processing—makes detention three times more expensive in Australia than in Canada.[70] This high figure is justified by the Australian government on the grounds that offshore processing will deter other asylum seekers from undertaking the journey (and therefore, will reduce future costs).[71] That may or may not be the case, but what is clear is that detention alone is not a solution and that the detainees include refugees with legitimate protection claims. Australian efforts to respect these claims while avoiding individual asylum determination on Australian soil—by resettling some to Cambodia, for instance—have been a costly failure.[72]

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67   Garlick, "The Potential and Pitfalls of Extraterritorial Processing."

68   The figures for offshore processing come from the Australian Senate. See the Australian Broadcasting Corporation (ABC), "Fact Check: Does Australia Spend More on Offshore Processing than the UN Spends on Refugee Programs in South East Asia?" ABC, July 20, 2015, www.abc.net.au/news/2015-07-14/cost-of-offshore-processing-united-nations-fact-check/6609764.

69   Ben Doherty and Nick Evershed, "Australian Immigration Detention Costs Double That of US and Europe," *The Guardian*, October 1, 2015, www.theguardian.com/australia-news/2015/oct/01/australian-immigration-detention-costs-double-that-of-us-and-europe-report. This figure is based on a cost of U.S. \$459 per day. In comparison, the United States and Canada pay U.S. \$224 and U.S. \$134 per day, respectively.

70   Ibid.

71   That goal was originally achieved—applications fell from 18,000 to 11,000 following the rolling out of the current offshore detention program in 2001–02. After remaining stable throughout the mid- to late 2000s, however, applications are rising again, reaching 20,000 in 2012. See UNHCR, "Statistical Online Population Database – Asylum Seekers (Refugee Status Determination)," accessed December 3, 2015, http://popstats.unhcr.org/en/asylum_seekers. Since then, they have fallen again, reaching 9,000 in 2014. See William Spindler, "Asylum Applications in Industrialized Countries Soar to Almost 900,000 in 2014," UNHCR, March 26, 2015, www.unhcr.org/5512c51e9.html.

72   For more on the Australia-Cambodia agreement, see Madeline Gleeson, "The Australia-Cambodia Relocation Agreement is Unique, But Does Little to Improve Protection," *Migration Information Source*, September 21, 2016, www.migrationpolicy.org/article/australia-cambodia-refugee-relocation-agreement-unique-does-little-improve-protection.

Were offshore processing to supplant territorial asylum, processing costs would rise immensely, greatly exceeding the current amounts spent on in-country processing. For this reason, it is not a viable option. For now, resettlement remains the only alternative to territorial asylum for refugees seeking protection in a third country.[73]

V.   Policy Recommendations

The global refugee crisis does not admit of easy solutions, and it is doubtful that any one policy choice will serve as a magic bullet. Nonetheless, a series of steps might ease the crisis. Some of these are being implemented; others are not yet on the agenda. The goals of these recommendations are threefold: (i) giving protection to refugees, (ii) reducing the outflow, and (iii) improving the quality of life and life chances of displaced persons globally.

A.   *Recommendation 1: Expand Resettlement*

The numbers of refugees resettled worldwide are currently too low. UNHCR estimated that there were 1.15 million refugees in need of resettlement in 2016; but in recent years, only 80,000 to 100,000 refugees have been resettled annually.[74] In the wake of the Syrian crisis, some resettlement countries have expanded their programs: for example, the United Kingdom pledged in 2015 to resettle 20,000 Syrians by 2020, while the United States added 10,000 resettlement places for Syrians in fiscal year (FY) 2016, increasing refugee admissions to 85,000 in total, and the Obama administration pledged to admit 110,000 refugees in FY 2017.[75]

The West responded to two great postwar refugee crises—the 1956 Hungarian refugee crisis and the Indochinese refugee crisis beginning in the 1970s—through resettlement. Large-scale resettlement would provide a durable solution to at least some of the millions of refugees in the Middle East, Africa, and Asia, and an expanded program would have a secondary benefit in that refugees might be less likely to undertake expensive and dangerous trips at the hands of smugglers or traffickers to reach countries of refuge if they were confident in the availability of other entry points. Moreover, private sponsorship—an arrangement whereby private citizens assume primary responsibility for resettling refugees, providing financial and other forms of support for period of time—is an important part of resettlement in Canada and can reduce costs further.[76]

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73 Though unlike territorial asylum, where people apply for protection in a particular country, refugees who are selected for resettlement do not choose their destination.

74 UNHCR, *Global Trends* reports, 2010–15; UNHCR, *UNHCR Projected Global Resettlement Needs 2016* (Geneva: UNHCR, 2015), 12, www.unhcr.org/protection/resettlement/558019729/unhcr-projected-global-resettlement-needs-2016.html.

75 Prime Minister's Office,"Syria: Refugees and Counter-Terrorism – Prime Minister's Statement" (Statement to the United Kingdom House of Commons, September 7, 2015), www.gov.uk/government/speeches/syria-refugees-and-counter-ter-rorism-prime-ministers-statement; The White House, Office of the Press Secretary, "Presidential Determination – Refugee Admissions for Fiscal Year 2017" (press release, September 28, 2016), www.whitehouse.gov/the-press-office/2016/09/28/presidential-determination-refugee-admissions-fiscal-year-2017; The White House, Office of the Press Secretary, "Statement by National Security Advisor Susan E. Rice on Syrian Refugee Admissions" (press release, August 29, 2016), www.white-house.gov/the-press-office/2016/08/29/statement-national-security-advisor-susan-e-rice-syrian-refugee.

76 While the United States does not have a full private sponsorship program, the deep involvement of nonprofit actors in supporting refugees after resettlement has proven to be a valuable model for community engagement. See Judith Kumin, *Welcoming Engagement: How Private Sponsorship Can Strengthen Refugee Resettlement in the European Union* (Brussels: Migration Policy Institute Europe, 2015), www.migrationpolicy.org/research/welcoming-engagement-how-private-sponsor-ship-can-strengthen-refugee-resettlement-european.

Although a significant expansion of resettlement will make a difference, it is not realistic to expect 20 million refugees to be resettled. Its role will thus be complementary, and most refugees will likely remain within the Global South. This observation leads to the second recommendation.

B.   Recommendation II: Expand (Financial) Responsibility Sharing

Although all signatory states to the 1951 convention and the 1967 protocol have clear obligations to refugees, accidents of geography have determined which countries bear the greatest responsibility for refugees. Generally, these are countries adjacent to the ones from which refugees flee. Such an outcome cannot be regarded as fair under any circumstances, and it is much less so given that countries in the Global South bear the greatest refugee burden. Some progress was made at the UN General Assembly Summit for Refugees and Migrants in September 2016, the accompanying UN Leaders' Summit on Refugees, and a U.S. private sector roundtable. Leaders pledged to double resettlement places for 2017; new funding was pledged for humanitarian and development assistance; and new measures were unveiled to improve access to education and work in countries of first asylum.[77] UN members committed to "a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees"—but did not agree on how, concretely, this goal could be achieved.[78]

> *Accidents of geography have determined which countries bear the greatest responsibility for refugees.*

One option is to create a responsibility-sharing formula that weights wealth, population, and current refugee populations. The pursuit of such mechanisms at the regional level—notably within the European Union—has not met great success, and if continued failure marks international efforts in this area, then states and the United Nations should consider a "visa or voucher" approach. That is, those states that accept fewer refugees should be obligated, again according to a weighted formula, to provide greater financial assistance to states that do in order to support refugees who remain in the Global South. It is unlikely that more than a few countries would agree to such transfers voluntarily, and any successful scheme would have to be subject to an international treaty. This point on the Global South leads to the next recommendation.

C.   Recommendation III: Concentrate the Resources Where the Refugees Are

Since the vast majority of refugees are in the Global South, there is a great imbalance in provision of support for refugees. The Global North supports too few and those it does support receive a disproportionate share of the resources: they enjoy financial and in-kind benefits that are unimaginable for the overwhelming majority of the world's refugees. The result is that countries with the largest number of refugees have fewer resources per refugee. Moreover, refugees in the Global South are often in greatest need—the elderly, the infirm, and unaccompanied minors—are least able to marshal the resources and/or the will to make the journey to the West (although they may be eligible for the small number of resettlement places on offer).

There are instrumental as well as normative reasons for expanding resources spent in the Global South. Fairness demands such redistribution. So do politics and economics. The more that is done for

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77   Demetrios G. Papademetriou and Susan Fratzke, "Global Refugee Summits Offer Reasons for Both Disappointment and Hope" commentary, Migration Policy Institute, September 2016, www.migrationpolicy.org/news/global-refugee-summits-offer-reasons-both-disappointment-and-hope.

78   United Nations General Assembly, *New York Declaration for Refugees and Migrants*, September 13, 2016, 13, www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1.

refugees in the Global South, and the greater the degree to which they have a future for themselves and their families there, the less likely they will be to make the journey to the North. And having fewer refugees, in the end, is what the West wants. Moreover, money goes far further in Lebanon, Jordan, and Turkey than it does in Germany or Sweden, so more refugees can be helped at lower cost—with the strong caveat that how much money is spent matters as much as *how* it is spent. Here, the logic of what former UNHCR Deputy Commissioner T. Alexander Aleinikoff has called "Newton's Fourth Law"[79] is followed: displaced populations stay displaced. Although most refugees want to go home, most do not do so for many decades, if at all. It is essential that they do not in those years waste away in forced idleness in refugee camps or cities. Resources should thus be given to countries in the Global South to help include refugees in local societies by giving them the right and access to work, the right and access to an education, and expanded opportunities to help themselves through entrepreneurship.[80] Each of these merits brief comment:

1.   A Right to Work

In market societies as well as the few remaining command economies, work is fundamental to dignity, self-respect, and regular contact with the broader society. Few things are more soul-destroying than forced idleness, and only paid work and the wages it brings offer any hope of improving one's life chances and those of one's family. Depending on the work, it can also have further benefits in the form of training and skills-expansion. Work matters, arguably, more than citizenship, as people can be socially and economically included through work without citizenship, whereas citizenship without the ability to find work can still leave individuals isolated and impoverished. *Work must be at the core of efforts to promote refugee inclusion.*

> *Only paid work and the wages it brings offer any hope of improving one's life chances and those of one's family.*

In the absence of a legal right to work, refugees can only work in the unauthorized sector.[81] This point applies to refugee camps but also well beyond them; since most refugees live outside camps, the right to work cannot be limited to the camp setting. Refugees need to work wherever they are, and they need to be able to travel to places where there are jobs, whether in cities or in rural parts of the country. As Katy Long has argued, there is a strong case for linking mobility rights with rights to work: when, as in Kenya, refugees are confined to isolated camps with few economic prospects, work and thus inclusion are highly unlikely.[82] A meaningful right to work also requires that states avoid imposing processing delays, large fees, and other bureaucratic obstacles that make it impossible to take advantage of formal rights where they exist. Finally, hosting states, UNHCR, and donor states can incentivize work by offering language training, arranging credit to jump-start businesses, and working with refugees to identify market opportunities. UNHCR has already made a start in these areas.[83]

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79   Comments by T. Alexander Aleinikoff on a draft of Randall Hansen, "Population Displacement and the Global Refugee System" (report prepared for the conference Congress of Vienna 2015: In Search of Principles for a Stable World Order, Vienna, October 23, 2015).

80   The author develops these three recommendations at greater length in Randall Hansen, "Population Displacement and the Global Refugee System" (report prepared for the conference Congress of Vienna 2015: In Search of Principles for a Stable World Order, Vienna, October 22–25, 2015), www.iwm.at/wp-content/uploads/DebatingEuropebackgroundpaper-1.pdf.

81   There can of course be, and often is, unauthorized labor.

82   Katy Long, "Extending Protection? Labour Migration and Durable Solutions for Refugees" (Research Paper No. 176, New Issues in Refugee Research, UNHCR, October 2009), www.unhcr.org/4ad334a46.pdf.

83   For the details, see UNHCR, "Livelihoods," accessed January 4, 2016, www.unhcr.org/pages/4ad2e7d26.html.

2.   Increase Refugee Entrepreneurship and Self-Reliance

Like anyone else, refugees may work for others or they make work for themselves. Expanded opportunities for refugee entrepreneurship and self-reliance bring a double benefit: they create new jobs (thus preventing displacement of local workers), and they increase refugee autonomy.[84] Preliminary research suggests that self-reliance is possible given the right regulatory framework. Alexander Betts and his colleagues undertook extensive qualitative and quantitative research in Uganda, where refugees are allowed to work legally. They found that refugees function both as employers and employees, customers and suppliers, and that Ugandans generally welcomed their economic activity.[85]

> *Expanded opportunities for refugee entrepreneurship and self-reliance bring a double benefit.*

Refugee entrepreneurship and employment have three mutually reinforcing benefits: (1) they reduce costs for donors and for the host state; (2) they avoid the debilitating effects of long-term dependence on external support, which, like all forms of long-term welfare dependency, destroys autonomy and personal dignity; and (3) they provide a means for involving the private sector in refugee protection.

3.   Expand Opportunities for Education at All Levels

The more educated refugees are, the better their labor market chances: a large body of scholarly literature confirms the fact that education is basic to an individual's economic success.[86] Of direct interest to refugees is a further regional and class bias to these gains: improvements are greatest for low-income individuals and for those living in sub-Saharan Africa.[87] The current state of refugee education is, however, pitiable. The availability and quality of education in both camps and cities varies widely; in Eastern Africa and the Horn of Africa only 2 percent of urban refugees have access to education; teacher training for refugees is inadequate (ten days is deemed sufficient); results are often poor where there is education; and girls almost everywhere have less access to schools than boys.[88]

As is so often the case, diagnosing the cause of the problem suggests the solution, or at least part of it. The most basic issue is access: refugee children must have the right to study in their country of residence. Urban refugees cannot achieve an education if they are not admitted to local schools. To provide education, someone has to pay for it, and current funding levels are simply too low. Despite the overwhelming importance of education for refugees' life chances, just 1.65 percent of humanitarian aid is allocated for education (down from 2.3 percent in 2010). Overall, merely one-third of requests for education funding are met, a figure half that for other sectors.[89]

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84   UNHCR defines self-reliance as "the social and economic ability of an individual, a household or a community, to meet essential needs (including protection, food, water, shelter, personal safety, health and education) in a sustainable manner and with dignity. Self-reliance, as a program approach, refers to developing and strengthening livelihoods of persons of concern, and reducing their vulnerability and long-term reliance on humanitarian/external assistance." See UNHCR, *Handbook for Self-Reliance* (Geneva: UNHCR, 2005), 1, www.unhcr.org/44bf7b012.pdf.

85   Alexander Betts, Louise Bloom, Josiah Kaplan, and Naohiko Omata, *Refugee Economics: Rethinking Critical Assumptions* (Oxford: University of Oxford, Refugee Studies Centre, 2014), 11–13, www.rsc.ox.ac.uk/refugeeeconomies.

86   Benjamin Tal and Emanuella Enenajor, *Degrees of Success: The Payoff to Higher Education in Canada* (Toronto: Canadian Imperial Bank of Commerce, 2003), http://research.cibcwm.com/economic_public/download/if_2013-0826.pdf.

87   George Psacharopoulos and Harry Anthony Patrinos, "Returns to Investment in Education: A Further Update" (Policy Research Working Paper 28, World Bank, Washington, DC, September 2002), 2, 13, and appendix, http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2881.

88   Sarah Dryden-Peterson, *Refugee Education: A Global Review* (Geneva: UNHCR, 2011), www.unhcr.org/4fe317589.pdf.

89   Dryden-Peterson, *Refugee Education*, 9; Kevin Watkins, *The Hidden Crisis: Armed Conflict and Education* (Paris: United Nations Educational, Scientific and Cultural Organization, 2011), 1 and 19, www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/gmr2011-UNESDOC.pdf.

Despite the lower costs of refugee inclusion in the Global South, implementing these three policies will not, in light of the massive numbers of people involved, be inexpensive. The West therefore needs to provide further resources, and the most likely venue for doing so is through fostering development rather than increasing humanitarian budgets. At the moment, refugee crises are viewed as humanitarian ones, and donor states and UNHCR respond accordingly with limited funds for temporary shelter, food, and emergency medical relief. But most refugee crises are in fact ones of long-term displacement, poverty, and hopelessness. Donor states should think of them not as humanitarian problems but as development issues, and should earmark development funds for refugees. Such a policy shift would have two advantages. First, it would open up much larger budgets for refugees (budgets for humanitarian aid are tiny in comparison). Second, it would entail a paradigm shift through which refugees would be conceived of not as discrete populations but as part of their new host societies. Development funds would be designed to improve the lot of both refugees and the local population.

> *Development budgets should ... be expanded with the proviso that refugees are included in them.*

Naturally, no government in the Global South would or could tolerate a reduction in its development budget in order to transfer funds to refugees who are, after all, noncitizens. Development budgets should, therefore, be expanded with the proviso that refugees are included in them. If more funding leads to better teachers, better schools, modernized transportation infrastructure, and more jobs, life could improve for both refugees and locals. To the degree it does so, refugees may come to be seen not as an intolerable burden but an economic and political asset.

VI.   Conclusions

Territorial asylum has its origins in the early refugee regime, with its emphasis on state sovereignty and a right to seek asylum but no right of access to the territory of a country where that would be possible. It operated reasonably well in the context of low, regular application levels but has broken down in face of the current mass influx (and, for that matter, in the case of past mass influxes). Alternatives to territorial asylum in the form of offshore processing will only work if they process massive numbers—a shift that might considerably disrupt the current refugee regime based around the 1951 convention and 1967 protocol, and the cost of which would be massive.

Against this background, the report recommends two steps for resolving the refugee crisis: expanding resettlement in the Global North and concentrating resources, including development funds, in the Global South. Those resources should aim to help host nations achieve greater inclusion of refugees through a right to work, expanded opportunities for education, and entrepreneurship and refugee self-reliance. Properly organized, these efforts could greatly expand protection for refugees, take pressure off borders and reception systems, and, in the most optimistic scenario, improve the lives of both refugees *and* nationals in the Global South.

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