

# ARTICLES

## THE STATE OF THE RIGHT OF ASYLUM IN INTERNATIONAL LAW

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### I. INTRODUCTION<sup>1</sup>

Ian Martin, the former Secretary General of Amnesty International, recently observed: "Governments . . . are more often motivated by self-interest than by considerations of humanity, and this provides a further reason for those seeking to combat human rights violations to *insist upon the right of asylum*."<sup>2</sup> To insist effectively upon the right of asylum, one must first ascertain its contours and understand the state of that right in international law today.

To this end, Part II of this Article discusses first the scope and legal stature of the three distinct "rights" falling under the umbrella of the "right of asylum": (i) the right of a state to grant asylum; (ii) the right of an individual to seek asylum; and (iii) the right of an individual to be granted asylum. Part II then focuses on the most uncertain of these rights, the right of an individual to be granted asylum, and considers whether such a right exists as a matter of

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1. The present inquiry only deals with territorial asylum, asylum within the territory of a state, not with the related but separate topic of extraterritorial or diplomatic asylum, asylum in an embassy or a foreign mission of a state. For a thorough discussion of extraterritorial/diplomatic asylum, see S. PRAKASH SINHA, *ASYLUM AND INTERNATIONAL LAW* (1971).

2. Ian Martin, *Foreword* to DANIELE JOLY, *REFUGEES: ASYLUM IN EUROPE?* vii, vii (1992) (emphasis added).

customary international law. Part II concludes with a discussion of a state's duty not to return a person to persecution (the principle of *non-refoulement*). Part III suggests that the development of a right to be granted asylum could come from the formulation and recognition of an asylum-seeker's right to admission. Part IV then considers the question of the admission of asylum-seekers by states that, in principle, could offer aliens refuge from persecution. Finally, Part V proposes recommendations to improve the protection of persons fleeing persecution, considering not only the interests of the individuals in need of protection, but also those of individual states, and the world community of states. It is important to note that the purpose of this article is not to restate the law of asylum, but to identify trends and formulate suggestions for new approaches which could serve to assist persons suffering or fleeing persecution in their home states in seeking and receiving refuge elsewhere.

If the right of asylum is to play a meaningful role in the system of protection of individuals fleeing persecution, the issues of admission and burden-sharing must be addressed. Human rights advocates cannot simply insist upon this right and states cannot refuse to act in the humanitarian spirit in which they drafted and adopted human rights and refugee treaties and declarations. In fashioning solutions to the plight of refugees, the confluence of interests present in the concept of asylum must be emphasized and humanitarianism must be perceived as the highest goal.

## II. THE RIGHT OF ASYLUM IN INTERNATIONAL LAW

### A. What is Asylum?

The word "asylum" is the Latin counterpart of the Greek word "*asylon*," which means freedom from seizure.<sup>3</sup> Historically, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer. Sacred places first provided such a refuge and scholars are of the view that "the practice of asylum is as old as humanity itself."<sup>4</sup>

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3. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 3 (1972). Professor Grahl-Madsen explained that the Greek word "*asylon*" is derived from "*a*" meaning "not" and "*syle*" meaning "right of seizure." *Id.*

4. SINHA, *supra* note 1, at 5; see also UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 33 (1993) ("The concept of asylum has been in existence for at least 3,500 years and is found, in one form or another, in the texts and traditions of many different ancient societies."). See

Despite its long history and worldwide practice, the term "asylum" still awaits a universally accepted definition. An authority in the area of refugee law, the late Professor Atle Grahl-Madsen, voiced the common observation of scholars that, "[t]he term 'asylum' has no clear or agreed meaning."<sup>5</sup> Notwithstanding this caveat, when the discussion turns from the meaning of "asylum" as a term to its meaning as a right, scholars are able to list concrete elements of that right. Indeed, the right of asylum has been said to comprise certain specific manifestations of state conduct:

- (i) to admit a person to its territory;
- (ii) to allow the person to sojourn there;
- (iii) to refrain from expelling the person;
- (iv) to refrain from extraditing the person; and
- (v) to refrain from prosecuting, punishing, or otherwise restricting the person's liberty.<sup>6</sup>

## B. The Three Faces of the Right of Asylum

1. *The Right of a State to Grant Asylum.* The right of a state to grant asylum is well established in international law. It follows from the principle that every sovereign state is deemed to have exclusive control over its territory and hence over persons present in its territory.<sup>7</sup> One of the implications of this generally recognized rule is that every sovereign state has the right to grant or deny asylum to persons located within its boundaries.<sup>8</sup> Traditionally, thus, in

generally QUADRENI: FOR FORTY YEARS, UNHCR ALONGSIDE REFUGEES 34-62 (UNHCR Branch Office in Italy ed., 1991) (tracing the history of asylum).

5. ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM 50 (1980). See also Kay Hailbronner, *Molding a New Human Rights Agenda*, 8 WASH. Q. 183 (1985) (noting that asylum has been the most difficult of human rights to define).

6. Tom Clark, *Human Rights and Expulsion: Giving Content to the Concept of Asylum*, 4 INT'L J. REFUGEE L. 189, 190 (1992) (citing a United Nations report by Special Rapporteur Mubanga-Chipoya). These are essentially the facets of the right of asylum identified by Professor Grahl-Madsen. GRAHL-MADSEN, *supra* note 5, at 12.

7. Felice Morgenstern, *The Right of Asylum*, 1949 BRIT. Y.B. INT'L L. 327, 327.

8. See GRAHL-MADSEN, *supra* note 5, at 23 (noting that "[t]he right of a State to grant asylum flows from its territorial integrity, which is a pillar of international law."); SINHA, *supra* note 1, at 50 (noting that "[i]nternational law gives every state exclusive control over persons on its territory" and that consequently, absent contrary treaty obligations, a state may admit whoever it chooses on whatever terms it desires); Morgenstern, *supra* note 7, at 327 (noting that "[a] competence to grant asylum . . . derives directly from the territorial sovereignty of states."); S. Prakash Sinha, *An Anthropocentric View of Asylum in International Law*, 10 COLUM. J. TRANSNAT'L L. 78, 88 (1971) (positing that "[c]ustomary international law does not make it a

international law, the right of asylum has been viewed as the right of a state, rather than the right of an individual.<sup>9</sup>

There is little dispute as to this general principle of international law. It is confirmed in international and regional instruments as well as in state practice. First, the Universal Declaration of Human Rights provides in Article 14(1) *inter alia* the right of each individual to “enjoy in other countries asylum from persecution.”<sup>10</sup> The late Professor Hersch Lauterpacht noted that this wording was introduced by the British delegation, interpreting it as meaning “*the right of every state to offer refuge and to resist all demands for extradition.*”<sup>11</sup> Professor Lauterpacht commented that such a right is one, “which every state . . . possesses under international law.”<sup>12</sup> Second, the Declaration on Territorial Asylum adopted by the General Assembly of the United Nations in 1967 provides in Article 1(1) that, “[a]sylum granted by a State, *in the exercise of its sovereignty*, to persons entitled to invoke Article 14 of the Universal Declaration of

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duty of the state to admit aliens into its territory, and if it chooses to admit them it may do so on whatever terms and conditions its national interests may require.”).

9. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 121 (1983) (noting that the “individual . . . has no right to be granted asylum” and that the right of asylum “appertains to states.”); GRAHL-MADSEN, *supra* note 5, at 2 (observing that “[t]raditionally, the ‘right of asylum’ is understood as the right of a State to grant asylum.” (emphasis in original)); JOLY, *supra* note 2, at 16 (noting that “it is the sole prerogative of the recipient state to recognize refugees and grant them asylum on its territory.”); Hailbronner, *supra* note 5, at 184 (noting that “states remain under no obligation to grant asylum . . . to refugees.”); Morten Kjaerum, *Article 14*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 220 (Asborn Eide et al. eds., 1992) (noting that “States have been unwilling to pledge themselves in international conventions to the individual’s right to asylum.”); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1253 (1990) (noting that “[c]lassically, the right of asylum under international law belonged to states and not to individuals.”); Morgenstern, *supra* note 7, at 335 (arguing that the asylum-seeker “has no general ‘right’ of asylum against [the] state.”); Paul Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 1953 BRIT. Y.B. INT’L L. 478, 481 (noting that “[a]ccording to general international law as at present constituted, the so-called right of asylum is a right of States, not of the individual.”). Because most states adhere to this view, the grant of asylum in such states is discretionary with the state. See generally A. Roman Boed, Comment, *Past Persecution Standard for Asylum Eligibility in the Seventh Circuit: Bygones are Bygones*, 43 DEPAUL L. REV. 147, 158 (1993) (noting that in the United States, it is in the discretion of the Attorney General whether to grant asylum).

10. Universal Declaration of Human Rights, art. 14(1), G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

11. Hersch Lauterpacht, *The Universal Declaration of Human Rights*, 1948 BRIT. Y.B. INT’L L. 354, 373 (emphasis added).

12. *Id.*

Human Rights, . . . shall be respected by all other States.”<sup>13</sup> Further, Article 1(3) of this Declaration vests *the state* of asylum with the authority “to evaluate the grounds for the grant of asylum.”<sup>14</sup>

Consistent with international instruments, regional instruments evidence the right of a state to grant asylum. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides, in Article II(1), that member states of the Organization of African Unity “shall use their best endeavors *consistent with their respective legislations* to receive refugees.”<sup>15</sup> Similarly, the Convention on Territorial Asylum adopted by the Organization of American States in 1954, stipulates in Article 1 that, “[e]very State has the right, *in the exercise of its sovereignty*, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State.”<sup>16</sup> The Asian-African Legal Consultative Committee, in 1966, adopted Principles Concerning Treatment of Refugees, Article III(1) of which states that, “[a] State has the *sovereign right to grant or refuse asylum in its territory to a refugee*.”<sup>17</sup> Lastly, in 1977, the Committee of Ministers of the Council of Europe adopted a Declaration on Territorial Asylum that in Article 2 reaffirms the right of states to grant asylum.<sup>18</sup> Finally, in addition to these regional agreements, many states have municipal asylum adjudication procedures.<sup>19</sup>

13. Declaration on Territorial Asylum, art. 1(1), G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6912 (1967) (emphasis added). See Paul Weis, *The Draft United Nations Convention on Territorial Asylum*, 1979 BRIT. Y.B. INT'L L. 151, 152 [hereinafter Weis, *Draft Convention*] (observing that the inclusion of the “in the exercise of its sovereignty” language in article 1(1) was intended “to make it clear that asylum was not a right of the individual but the right of States to grant asylum”); Paul Weis, *The United Nations Declaration on Territorial Asylum*, 1969 CAN. Y.B. INT'L L. 92, 136 [hereinafter Weis, *Declaration*] (noting that article 1(1) of the Declaration on Territorial Asylum “merely restates a generally recognized rule of international law.”).

14. Declaration on Territorial Asylum, *supra* note 13, art. 1(3).

15. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. II(1), 1001 U.N.T.S. 45, 48 (emphasis added).

16. Convention on Territorial Asylum, Mar. 28, 1954, OEA/Ser.X/1, art. 1 (emphasis added).

17. Principles Concerning Treatment of Refugees, 1966, art. III(1), *reprinted in* UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 201, 203 (1979) (emphasis added).

18. Declaration on Territorial Asylum, Nov. 18, 1977, art. 2, *reprinted in* GRAHL-MADSEN, *supra* note 5, at 212. Article 2 of the Declaration reads in relevant part: “The member states of the Council of Europe . . . reaffirm their right to grant asylum.” *Id.*

19. See Martin, *supra* note 9, at 1256 (observing that most Western states have asylum claims systems through which they exercise the discretionary act of granting asylum); Boed, *supra* note 9, at 149-53 (discussing the asylum process in the United States).

2. *The Right of an Individual to Seek Asylum.* The second aspect of the right of asylum is the right of an individual to seek asylum. This is an individual right that an asylum-seeker has *vis-à-vis* his state of origin.<sup>20</sup> Essentially, it is the right of an individual to leave his country of residence in pursuit of asylum. The basis for this right is the principle that "a State may not claim to 'own' its nationals or residents."<sup>21</sup>

This right is enshrined in several international and regional instruments. Article 13(2) of the Universal Declaration of Human Rights proclaims that, "[e]veryone has the right to leave any country, including his own."<sup>22</sup> While *strictu sensu* the Universal Declaration of Human Rights is not a legally binding instrument, it has been declared to set forth "the inalienable and inviolable rights of all members of the human family and [to constitute] an obligation for the members of the international community."<sup>23</sup> Moreover, the Declaration has been said to be "an authoritative expression of the customary international law of today in regard to human rights."<sup>24</sup> The right of an individual to leave his country can thus be seen as a part of modern customary international law. With the adoption of the International Covenant on Civil and Political Rights, the right of an individual to leave his country became written law binding on the states parties to the Covenant.<sup>25</sup> Article 12(2) of the Covenant states that, "[e]veryone shall be free to leave any country, including his own."<sup>26</sup>

20. GRAHL-MADSEN, *supra* note 5, at 2. Note that this individual right does not impose any obligation on potential or actual receiving states.

21. GRAHL-MADSEN, *supra* note 3, at 26.

22. Universal Declaration of Human Rights, *supra* note 10, art. 13(2).

23. Proclamation of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 U.N. GAOR, U.N. Doc. A/CONF. 32/41 (1968) (emphasis added). *But see* Christian Tomuschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L.J. 257, 258 (1992) (arguing that despite pronouncements to the contrary, including the Proclamation of Teheran, the Universal Declaration "has never been promoted as such, in its entirety, to a rule of customary international law.").

24. Weis, *Declaration*, *supra* note 13, at 147 citing H. Waldock, *General Course of International Law*, 106 RECUEIL DES COURS 32, 33 (1962).

25. International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., 183d plen. mtg., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Note that as of June 1, 1993, the Covenant has entered into force for 116 states parties. *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 886 (1993).

26. International Covenant on Civil and Political Rights, *supra* note 25, art. 12(2).

This right is also recognized in binding regional instruments.<sup>27</sup> For example, Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>28</sup> proclaims that, “[e]veryone shall be free to leave any country, including his own.”<sup>29</sup> Similarly, the American Convention on Human Rights<sup>30</sup> stipulates in Article 22(2) that, “[e]very person has the right to leave any country freely, including his own.”<sup>31</sup> This right has “become part of the written law of nations.”<sup>32</sup>

With respect to those states that have become parties to the Optional Protocol to the International Covenant on Civil and Political Rights,<sup>33</sup> those states that have recognized the right of private petition for the purposes of the European Convention, or states which have become parties to the American Convention, an individual has standing to invoke the right to leave his country. This right has also been vindicated through the United Nations Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, two functional commissions created by the United Nations Economic and Social Council under Article 68 of the

27. The right of an individual to leave his own country is also included in the Draft Charter on Human and People's Rights in the Arab World. The Draft Charter provides in Article 8(2): “Everyone who is a citizen of an Arab country or of Arab origin has the right to leave his country and return to it.” Draft Charter on Human and People's Rights in the Arab World, 1987, art. 8(2), in INTERNATIONAL INSTITUTE OF HIGHER STUDIES IN CRIMINAL SCIENCES, DRAFT CHARTER ON HUMAN AND PEOPLE'S RIGHTS IN THE ARAB WORLD 9 (1987) [hereinafter DRAFT CHARTER ON HUMAN RIGHTS IN THE ARAB WORLD]. Note, however, that the right to leave one's own country is specifically limited to citizens of Arab countries and to persons of Arab origin. See M. Cherif Bassiouni, *Explanatory Memorandum: Draft Charter on Human and People's Rights in the Arab World*, in DRAFT CHARTER ON HUMAN RIGHTS IN THE ARAB WORLD, *supra*, at 25, 27 (“It was agreed to link this right with nationality on the one hand and Arab origin on the other so that both Arab nationals and those of Arab origin who either lost or were deprived of their nationality could exercise this right (to freely leave and return).”). Finally, note that the Draft Arab Charter has not yet been ratified or acceded to by any state and is consequently not yet in force.

28. Council of Europe Agreement No. 46: Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, 7 I.L.M. 978 (1968).

29. *Id.* art. 2(2).

30. American Convention on Human Rights, Nov. 22, 1969, O.A.S. Off. Rec., OEA/Ser.K./XVII/1.1, Doc. 65 (Rev. 1), Corr. 2 (1970).

31. *Id.* art. 22(2).

32. GRAHL-MADSEN, *supra* note 3, at 105.

33. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., 183d plen. mtg., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966). Note that as of June 1, 1993, the Optional Protocol has entered into force for 67 states parties. NOWAK, *supra* note 25, at 886.

U.N. Charter.<sup>34</sup> The right to leave one's own country in pursuit of asylum is thus a right of the individual asylum-seekers, enforceable in certain situations.<sup>35</sup>

3. *The Right of an Individual to be Granted Asylum.* The third component right under the umbrella of the right of asylum is the right of an individual to be granted asylum. While Grotius and Suarez are said to have recognized the right of asylum as the natural right of an individual entailing a corresponding state duty to grant asylum,<sup>36</sup> this view has not yet been generally recognized under international law. Felice Morgenstern's view that, "[t]here can be no doubt that the individual has no general 'right' of asylum against [the] state,"<sup>37</sup> is generally accepted to represent the status of an individual's right of asylum *vis-à-vis* the state of refuge.<sup>38</sup> International and regional instruments dealing with human rights, asylum, and refugees, as well as the failure of the international community to agree on a convention on territorial asylum illustrate the general proposition that,

34. Pursuant to the procedure established under U.N. ECOSOC Resolution 1503 (1970), thousands of individuals from various countries have invoked Article 13(2) of the Universal Declaration and the Commission on Human Rights has asked the states concerned to allow the petitioners to leave their countries. Frequently, the Director of the United Nations Centre for Human Rights has used his good offices to this end, primarily in cases of family reunification. Interview with Alfred de Zayas, Senior Human Rights Officer of the United Nations Centre for Human Rights (May 18, 1994).

35. It is not, however, an unqualified right. Morgenstern notes that a valid state interest in prosecuting the asylum-seeking individual may supersede the right to seek and enjoy asylum in accordance with valid extradition treaties. Morgenstern, *supra* note 7, at 331-35.

In practice, states have at times condoned disregard for the right of an individual to seek and/or enjoy asylum. See *Ker v. Illinois*, 119 U.S. 436 (1886) (finding that where appellant had been kidnapped in Peru and brought to the United States, the U.S. Supreme Court held that "there is no language in this treaty [the Extradition Treaty with Peru] or in any other treaty made by this country on the subject of extradition, 'which says in terms that a party fleeing from the United States to escape punishment for a crime becomes thereby entitled to an asylum in the country to which he has fled.'"). Abduction of fugitives from a foreign country has again been recently condoned by the U.S. Supreme Court. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (holding that a forcible abduction from a foreign country does not preclude the exercise of *in personam* jurisdiction by a U.S. court, and thus the trial of an abducted defendant before a U.S. court for alleged violations of U.S. criminal laws, as long as the extradition treaty does not expressly prohibit such abductions). On the related topic of the political offense exception in extradition, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* ch. VIII (3d rev. ed. forthcoming 1994).

36. Weis, *Declaration*, *supra* note 13, at 119.

37. Morgenstern, *supra* note 7, at 335.

38. Note that municipal laws of some states provide for the right of an individual to be granted asylum in certain circumstances. This point is addressed *infra* in part I.C.



in international law today, an individual has no right to asylum enforceable *vis-à-vis* the state of refuge.

Article 14(1) of the Universal Declaration of Human Rights proclaims the right of an individual "to seek and to enjoy in other countries asylum from persecution."<sup>39</sup> Scholars agree that this provision merely affords the individual a right to seek asylum, not a right to receive it.<sup>40</sup> Professor Lauterpacht criticized the language of Article 14(1) for giving the individual a right to seek asylum without specifying whose duty it is to give effect to that right.<sup>41</sup> Similarly, with respect to the "enjoyment" of asylum in other countries postulated by Article 14(1), Professor Lauterpacht noted that since that provision was intended by its drafters merely to provide for the right of a state to grant asylum<sup>42</sup> (an existing right of states) there was no need to include it in the Declaration.<sup>43</sup> The Declaration thus did not provide an innovation to existing international law with respect to an individual's right to receive asylum in a particular state.

The drafting history of Article 14(1), however, reveals that the drafters of the Declaration contemplated—but ultimately declined to adopt—any significant innovation in the law of asylum. The original draft of Article 14 provided that, "[e]veryone has the right to seek and to be granted, in other countries, asylum from persecution."<sup>44</sup> This generous provision would have vested individuals with the right to asylum *vis-à-vis* the state of refuge. However, it was changed

39. Universal Declaration of Human Rights, *supra* note 10, art. 14(1), at 4.

40. JOLY, *supra* note 2, at 15-16 (noting that "[r]efugees are guaranteed the right to 'seek' asylum but not to obtain it . . ." (emphasis added)); SINHA, *supra* note 1, at 90 (noting that article 14(1) gives the individual "the right to seek and to enjoy asylum, but not to be granted asylum." (emphasis added)); Lauterpacht, *supra* note 11, at 373 (positing that article 14(1) provides "a right 'to seek' asylum, without any assurance that the seeking will be successful." (emphasis added)); Sinha, *supra* note 8, at 91-92 (noting that the Declaration gives an individual the right to seek asylum, "but not to be granted it." (emphasis added)); Stephen B. Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 339, 347 (Michigan Yearbook of International Legal Studies ed., 1982) (observing that while article 14(1) gives individuals the right to seek and enjoy asylum, "[s]tates are not enjoined to provide such enjoyment upon request.").

41. "It is perhaps a matter for regret that in a Declaration purporting to be an instrument of moral authority an ambiguous play of words, in a matter of this description, should have been attempted. Clearly, no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving it." Lauterpacht, *supra* note 11, at 373 (emphasis added).

42. See *supra* note 11 and related text (noting that the right to enjoy asylum meant "the right of every state to offer refuge . . ." (emphasis added)).

43. Lauterpacht, *supra* note 11, at 373.

44. Morgenstern, *supra* note 7, at 336 (emphasis added).

during subsequent deliberations of the Declaration's text. The British, Australian, and Saudi Arabian representatives objected to obliging states to grant asylum.<sup>45</sup> The British representative, Mrs. Corbet, proposed an amendment that read: "[e]veryone has the right to seek and to enjoy asylum from persecution."<sup>46</sup> Over some objection,<sup>47</sup> this text was adopted.<sup>48</sup> By substituting the words "to enjoy" for the words "to be granted" in Article 14(1), the drafters indicated their desire not to oblige states to grant asylum to individuals. The Declaration thus does not give rise to an individual's right to asylum *vis-à-vis* the state of refuge or any state in particular.

International instruments adopted subsequent to the Declaration likewise do not provide for an individual's right to be granted asylum. In preparing the International Covenant on Civil and Political Rights, states had an opportunity to provide for the right to asylum. During discussions on the draft Covenant at the Seventh Session of the United Nations Commission on Human Rights, the Yugoslavian representative voiced a concern that the right to asylum was absent from the draft.<sup>49</sup> The Yugoslavian representative proposed an additional article to the Covenant, providing for an individual's right of asylum.<sup>50</sup> This proposal failed, however, because many representatives did not consider the right of asylum to be an individual's fundamental right and because there was disagreement as to the class of persons to whom asylum should be granted.<sup>51</sup> Consequently, the Covenant, as adopted, contains no provision relating to asylum. Thus,

45. *Id.*

46. Weis, *Draft Convention*, *supra* note 13, at 151.

47. The French representative objected to the weakened right of asylum and was of the opinion that "[t]he persecuted would need to receive asylum, not merely the right of asylum." Morgenstern, *supra* note 7, at 337.

48. *Id.* (noting that the British amendment "which, from the point of view of the individual for whose protection the whole Declaration is intended—makes the right of asylum meaningless, was adopted" with thirty votes for it, one vote against it, and twelve states abstaining.)

49. Weis, *Declaration*, *supra* note 13, at 96.

50. *Proposals for Additional Articles Submitted by the Representative of Yugoslavia*, 1951 Y.B. ON H.R. 546, U.N. Doc. E/CN.4/573. The proposed article provided:

Any *person* persecuted for his political or scientific convictions, for his activities in the struggle for national or political liberation or by reason of his race, nationality or religion or his efforts in support of the realization of the principles of the Charter of the United Nations and the Universal Declaration of Human Rights *shall have the right of asylum*.

*Id.* (emphasis added).

51. Weis, *Draft Convention*, *supra* note 13, at 151.

under it, states have no obligation to grant asylum.<sup>52</sup> Similarly, the International Covenant on Economic, Social, and Cultural Rights is silent on a right to asylum.<sup>53</sup>

The principal international instruments relating to the protection of refugees, the 1951 Convention relating to the Status of Refugees<sup>54</sup> and the 1967 Protocol relating to the Status of Refugees,<sup>55</sup> also do not provide a right to be granted asylum.<sup>56</sup> During the drafting of the Refugee Convention, France and the United Nations Secretariat submitted a proposed article providing for, "favourable consideration to the position of refugees seeking asylum from persecution."<sup>57</sup> The *Ad Hoc* Committee on Stateless Persons and Related Problems accepted this proposal for discussion, but decided not to include asylum provisions in the operative part of the Refugee Convention.<sup>58</sup> The United Nations High Commissioner for Refugees explains in the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* that, "the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol."<sup>59</sup> Thus, as with other international instruments, these refugee instruments do not vest an individual with a right to asylum.

Similarly, regional instruments do not provide for an individual's right to asylum.<sup>60</sup> African and American regional instruments

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52. Alfred De Zayas, *Human Rights and Refugees*, in *MIGRATION AND MIGRATION POLICY* 25, 26 (International Organization for Migration ed., 1992) (noting that "[s]tates chose not to restrict their sovereignty").

53. SINHA, *supra* note 1, at 90.

54. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

55. Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

56. See Martin, *supra* note 9, at 1255 (noting that the Convention does not guarantee asylum "even for those duly adjudged to be refugees under its provisions."); Tomuschat, *supra* note 23, at 258 (noting that the Refugee Convention "does not confer a right to asylum, but is essentially confined to regulating the status of those who have been accepted as refugees by a State.").

57. Weis, *supra* note 9, at 481.

58. *Id.* Of course, the grant of refugee status under the Refugee Convention comes very close to a formal grant of asylum under domestic laws of many states. Permission to sojourn in a country without a formal grant of asylum provides the individual with refuge, which amounts to *de facto* asylum.

59. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* 7 (1979) [hereinafter *HANDBOOK*].

60. A possible notable exception is the Draft Charter on Human and People's Rights in the Arab World, providing in Article 40(1): "Every citizen who is subjected to persecution on political grounds has the right to seek and obtain asylum in any Arab country in accordance with the law and the provisions of this Charter." DRAFT CHARTER ON HUMAN RIGHTS IN THE

address asylum, but do so with great respect for state sovereignty and thus without much direct benefit for the individual's right to asylum. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides in Article II(1): "[member states] shall use their best endeavors *consistent with their respective legislations* to receive refugees."<sup>61</sup> The American Declaration of the Rights and Duties of Man provides in Article 27: "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.*"<sup>62</sup> Similarly, the American Convention on Human Rights provides at Article 22(7): "[e]very 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.*"<sup>63</sup> Each of these instruments leaves the right of asylum in the realm of state sovereignty. Equally silent with respect to the right to asylum is the European Convention on Human Rights.<sup>64</sup> It makes no reference to asylum.<sup>65</sup>

In light of this background on the right to asylum, it is not surprising that the 1977 United Nations Conference on Territorial Asylum, convened with the goal of adopting a Convention on

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ARAB WORLD, *supra* note 27, art. 40(1), at 14 (emphasis added). Note, however, that the Draft Charter seems to limit the right to seek and obtain asylum to citizens of Arab countries. That this was the intent of the drafters is not clear. In his Explanatory Memorandum to the Draft Arab Charter, Professor Bassiouni stated: "Paragraph 1 of Article 40 addresses the possibility of subjecting *an individual* to political persecution. It was thus provided that *an individual* shall have the right to seek and obtain asylum in any Arab country." Bassiouni, *supra* note 27, at 29 (emphasis added). Also note that Professor Bassiouni observed that "[t]his article does not depart from established obligations of states under the international treaties." *Id.* A right of an individual to obtain asylum in a state implies an obligation on the part of the state to grant asylum to that individual. Such an obligation departs from established obligations of states under international treaties and it is thus doubtful that the drafters of the Draft Arab Charter actually meant to grant to an individual the right to "obtain asylum in any Arab country" as Article 40(1) of the Draft Arab Charter seems to do. Whatever the actual right created by Article 40(1) may be, it is not yet enforceable because the Draft Arab Charter has not entered into force.

61. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II(1), *supra* note 15, at 193, 195 (emphasis added).

62. The American Declaration of the Rights and Duties of Man, May 2, 1948, art. 27, O.A.S. Off. Rec. OEA/Ser.LV/II.23/Doc. 21/Rev.6 (emphasis added).

63. American Convention on Human Rights, art. 22(7), *supra* note 30, at 207, 216 (emphasis added).

64. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

65. Terje Einarsen, *The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum*, 2 INT'L J. REFUGEE L. 361, 362 (1990).

Territorial Asylum, proved to be catastrophic.<sup>66</sup> The Conference was preceded by a meeting of the Group of Experts, which produced draft articles of the Convention.<sup>67</sup> Article I provided: “[e]ach Contracting State, acting in the exercise of its sovereign rights, shall use its best endeavours in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention.”<sup>68</sup>

The draft articles of the Group of Experts formed the basis of the discussion of the Conference of the Plenipotentiaries, convened by the Secretary General at the request of the United Nations General Assembly.<sup>69</sup> The Conference designated a Committee of the Whole to deliberate the draft articles. While the representatives to the Committee of the Whole agreed on the necessity of reconciling the right of the state to grant asylum with the persecuted individual’s interest in receiving asylum, they did not agree on the method by which this should be done.<sup>70</sup> Austria, Colombia, Costa Rica, France, and Italy favored a German proposal for the recognition of a duty to grant asylum.<sup>71</sup> The creation of such a duty would have resulted in the right of an individual to be granted asylum in the country of refuge. The majority of the states represented on the Committee of the Whole, however, favored a text leaving the state the right to grant asylum.<sup>72</sup> Thus, Article I, as adopted by the Committee of the Whole, reflects the predominant view that the right of asylum is the right of a state to grant asylum, not the right of an individual to receive asylum. Article I of the draft Convention reads: “Each Contracting State, acting in the exercise of its sovereignty, shall endeavour in a humanitarian spirit to grant asylum in its territory to any persons eligible for the benefits of this Convention.”<sup>73</sup>

There was also considerable disagreement among states on other provisions of the Convention, and the Conference adjourned without finishing its work.<sup>74</sup> The Conference advised the General Assembly

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66. GRAHL-MADSEN, *supra* note 5, at vii.

67. Weis, *Draft Convention*, *supra* note 13, at 154.

68. *Id.* at 155.

69. *Id.* at 159.

70. *Id.* at 160.

71. *Id.*

72. *Id.* at 161.

73. *Id.* See also GRAHL-MADSEN, *supra* note 5, at 62-63 (setting forth the text of the adopted articles of the draft Convention).

74. GRAHL-MADSEN, *supra* note 5, at 61 (noting that “[i]t is hardly possible to speak of any international consensus with respect to any of the texts which came out of the Committee of the Whole”).

that work on the draft Convention should be continued, but “[m]ost Western delegations were not in favour of an early resumption.”<sup>75</sup> Once again, the world community passed over an opportunity to grant to individuals the right to asylum *vis-à-vis* the state of refuge. As evidenced by the defeat of the German proposal for a duty of a state to grant asylum, the will of the international community remains behind the traditional view that the right of asylum is a right of the state. Even if the draft Convention on Territorial Asylum were adopted, in its final form, Article I would have granted to the individual nothing more than he already had.

The most recent expression of the international community with respect to the right of asylum suggests that the right of an individual to be granted asylum has yet to evolve in international law. In June 1993, representatives of 171 states gathered at the World Conference on Human Rights in Vienna.<sup>76</sup> In his opening address to the Conference, United Nations Secretary-General Boutros Boutros-Ghali said: “I believe that at this moment in time it is less urgent to define new rights than to persuade States to adopt existing instruments and apply them effectively.”<sup>77</sup> Not surprisingly, the Vienna Declaration and Programme of Action adopted by consensus of the 171 states represented at the Human Rights Conference did not expand the traditional notion of the right of asylum. Article 23 of the Vienna Declaration merely reiterates the provisions of Article 14(1) of the Universal Declaration of Human Rights: “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.”<sup>78</sup> Thus, in international law today, as before the 1977 Territorial Asylum Conference and the 1993 Human Rights Conference, the individual has no right to asylum *vis-à-vis* the state of refuge.

### C. The Right to Asylum in Municipal Law

In the absence of international instruments establishing an individual’s right to asylum, the practice of states may create such a

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75. Weis, *Draft Convention*, *supra* note 13, at 168.

76. UNITED NATIONS, WORLD CONFERENCE ON HUMAN RIGHTS 1 (1993).

77. Boutros Boutros-Ghali, Human Rights: The Common Language of Humanity, Opening Statement of the World Conference on Human Rights (June 14, 1993), *in* UNITED NATIONS, WORLD CONFERENCE ON HUMAN RIGHTS 13 (1993).

78. The Vienna Declaration and Programme of Action, June 25, 1993, *in* UNITED NATIONS, WORLD CONFERENCE ON HUMAN RIGHTS 36 (1993).

right. State practices evidencing international rights are both general and followed out of a sense of legal obligation (*opinio juris*).<sup>79</sup> With respect to the right to asylum, it cannot be said that such a right exists as a matter of customary international law.

The Czech Republic,<sup>80</sup> the Federal Republic of Germany,<sup>81</sup> and Italy,<sup>82</sup> are among only a few states whose constitutions provide for an individual right to asylum, and, even then, there is no evidence that these states do so out of legal obligation rather than humanitarian concern for those in need of asylum. For example, in Germany,

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79. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4 (4th ed., 1990) (discussing international custom as a source of international law).

80. The Czechoslovak Constitutional Law of January 1991 enacting the Charter of Basic Rights and Freedoms provides in Article 43 that the Republic "grants asylum to citizens of other countries, persecuted for invoking political rights and freedoms. Asylum may be denied to one who acted contrary to fundamental human rights and freedoms." ÚSTAVNÍ ZÁKON ČR [Constitution] art. 43 (Czech Republic). Although the Czech and Slovak Federal Republic has dissolved as of January 1, 1993, the new Constitution of the Czech Republic in effect from January 1, 1993 provides in Articles 3 and 112(1) that the Charter of Fundamental Rights and Freedoms constitutes a part of the new constitutional order. *Id.* arts. 3, 112(1).

81. Until May 1993, the Basic Law of the Federal Republic of Germany, the Constitution of the Republic, provided at Article 16(2) that "[p]ersons persecuted on political grounds shall enjoy the right of asylum." GRUNDGESETZ [Constitution] [GG] art. 16(2) (F.R.G.). This provision had been interpreted by the German Federal Constitutional Court as directly enforceable law binding on the legislative, executive, and judicial branches of the government. Hailbronner, *supra* note 5, at 183. Because this provision left no scope for discretion of the German authorities in evaluating asylum applications, on May 26, 1993, the Bundestag, the German parliament, voted to amend the constitutional asylum provisions. HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH WORLD REPORT 1994* 218 (1993). See also THE FEDERAL MINISTRY OF THE INTERIOR, *SURVEY OF THE POLICY AND LAW CONCERNING FOREIGNERS IN THE FEDERAL REPUBLIC OF GERMANY* 51 (July 1993) [hereinafter *SURVEY OF LAW CONCERNING FOREIGNERS IN GERMANY*] (noting that the constitutionally-guaranteed right of asylum, as originally written, "gave persons suffering political persecution an entitlement to be granted asylum, leaving no scope for discretion. . . . This has brought the right of asylum to the verge of collapse: The right of asylum has more and more turned into uncheckable vehicle of uncontrolled migration."). The constitutional amendment repealed Article 16(2) and replaced it with Article 16(a). GG art. 16(a) (F.R.G.). See also Gesetz zur Änderung des Grundgesetzes (Artikel 16 und 18) 1993 BGBl I 1002 (F.R.G.). While the new constitutional asylum provision contains a guarantee identical to the provision of the old Article 16(2), "Politisch Verfolgte geniessen Asylrecht," that is that persons persecuted on political grounds have the right of asylum, the amendment precludes aliens entering from "safe" countries from invoking this right. GG art. 16(a) (F.R.G.). See also *SURVEY OF LAW CONCERNING FOREIGNERS IN GERMANY*, *supra*, at 53-54 (discussing the constitutional changes); Sam Blay & Andreas Zimmerman, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT'L L. 361 (1994) (discussing the new German asylum law); Stefan Telöken, *The Domino Effect*, REFUGEES, Dec. 1993, at 38 (discussing the new German asylum law).

82. Article 10 of the Italian Constitution provides: "A foreigner to whom the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right of asylum within the territory of the Republic, under conditions laid down by law." COSTITUZIONE [Constitution] art. 10 (Italy).

the right to asylum was not written into the Constitution out of a sense of legal obligation but rather out of the desire of the drafters, some of whom had themselves fled the Nazi regime, to place asylum "above changing political considerations of expediency and public interest."<sup>83</sup>

Thus, while some states give effect to their prerogative to grant asylum by creating in their municipal laws the right of an individual to asylum, such practice is far from general and, even where followed, does not constitute *opinio juris*.<sup>84</sup> It is therefore evident that the right of asylum in international law today consists of only the first two components identified by Professor Grahl-Madsen: (i) the right of a state to grant asylum, and (ii) the right of an individual to seek asylum—the asylum-seeker's right *vis-à-vis* his state of origin.<sup>85</sup> To date, no international instrument or custom vests the individual with a right to be granted asylum, a right *vis-à-vis* the state of refuge.

#### D. The Duty not to Return a Person to Persecution: the Principle of *Non-Refoulement*

Although *non-refoulement* is not as sweeping as the right of asylum, it provides an asylum-seeker with at least a temporary refuge and thus partial or *de facto* asylum.<sup>86</sup> The principle of *non-refoulement* is understood in international law as the duty of a state not to return a person to a place of persecution. Professor Grahl-Madsen notes that the duty of *non-refoulement* was first imposed in Article 3(2) of the Convention relating to the International Status of Refugees<sup>87</sup>: "Each of the Contracting Parties undertakes, in all cases, not to return refugees across the frontiers of their country of origin."<sup>88</sup> Paul Weis, the former Director of the Legal Division of

83. Hailbronner, *supra* note 5, at 183. A *Survey of the Policy and Law Concerning Foreigners in the Federal Republic of Germany* issued by the German Federal Ministry of the Interior supports this point further:

At the time [under the Nazi regime], a lot of Germans had only survived because they were admitted to and protected in other countries. That is why the right of asylum in the Federal Republic was worded very generously and went beyond the international law and the right of asylum granted by any other state.

SURVEY OF LAW CONCERNING FOREIGNERS IN GERMANY, *supra* note 81, at 51.

84. GOODWIN-GILL, *supra* note 9, at 121 (noting that "[s]tate practice . . . permits only one conclusion: the individual still has no right to be granted asylum.").

85. GRAHL-MADSEN, *supra* note 5, at 2.

86. For a thorough discussion of the principle of *non-refoulement*, see GOODWIN-GILL, *supra* note 9, at 69-97.

87. GRAHL-MADSEN, *supra* note 5, at 40.

88. *Id.*



the Office of the United Nations High Commissioner for Refugees, contrasts asylum and *non-refoulement* in the following manner: "Asylum entails admission, residence and protection; *non-refoulement* is a negative duty, not to compel a person to return to a country of persecution."<sup>89</sup> Nothing in the principle of *non-refoulement*, however, precludes a state from sending an asylum-seeker to a country in which he would not be persecuted.<sup>90</sup>

Today, binding and non-binding international, regional, and municipal instruments provide for the principle of *non-refoulement*.<sup>91</sup> Article 33(1) of the 1951 Convention relating to the Status of Refugees (entitled Prohibition of Expulsion or Return ("refoulement")) provides that, "[n]o 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."<sup>92</sup> Article 42(1) of the Convention specifically designates Article 33 as one of the articles to which a state may not make reservations.<sup>93</sup> It must be noted, however, that the Convention is not universal but only binds those 110 states that are parties to it. Moreover, the duty of *non-refoulement* contained in Article 33(1) exists only with respect to persons determined to be refugees under the Convention. Additionally, Article 33(1) as written provides no right of admission for the purpose of seeking asylum.<sup>94</sup>

Article I(1) of the Protocol relating to the Status of Refugees incorporates Articles 2 through 34 of the Convention thus making the duty of *non-refoulement* expressed in article 33(1) of the Convention binding on states parties to the Protocol.<sup>95</sup>

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89. Weis, *Draft Convention*, *supra* note 13, at 166.

90. *See id.* (noting that the application of the principle of *non-refoulement* does not necessarily lead to a grant of asylum and that the "country concerned may admit the person only temporarily, or expel him to another country in which he does not fear persecution.").

91. For example, § 243(h) of the Immigration and Nationality Act in effect in the United States provides for mandatory withholding of deportation of any alien to a country if, "[t]he alien's] life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1988).

92. Convention relating to the Status of Refugees, *supra* note 54, art. 33(1).

93. *Id.* art. 42(1).

94. GRAHL-MADSEN, *supra* note 5, at 40 (stating that Article 33 "may only be invoked in respect of persons who are already present—lawfully or unlawfully—in the territory of a Contracting State" and that "it does not obligate the Contracting State to admit any person who has not already set foot in its territory.").

95. Protocol relating to the Status of Refugees, *supra* note 55, art. I(1).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also prohibits *refoulement*.<sup>96</sup> Article 3(1) stipulates: "No 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>97</sup> A comparison of the *non-refoulement* provisions of the Refugee Convention and the Convention Against Torture manifests an apparent difference in the category of persons protected from *refoulement*. While the Refugee Convention only protects those determined to be refugees under its provisions, the Convention Against Torture extends its protection against *refoulement* to any person who would be in danger of being subjected to torture. This difference is less significant than might appear. A person who would be in danger of being subjected to torture, as that term is defined in the Convention Against Torture,<sup>98</sup> would not only be protected from *refoulement* by the Convention Against Torture but would also likely

96. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., at 197, U.N. Doc. A/39/51 (1984).

97. *Id.* at 198. In its first decision applying Article 3(1) of the Convention Against Torture, the U.N. Committee Against Torture recently decided that Switzerland, the state party in question, would violate its *non-refoulement* obligation under the Convention should it expel the petitioner, a deserter from the Zairian Army, to Zaire where he allegedly faced persecution. *Mutombo v. Switzerland*, Comm. No. 13/1993 (1994) (forthcoming) (transcript on file with author). In reaching this decision, the Committee considered all relevant information including the serious human rights situation in Zaire, the petitioner's ethnic background, alleged political affiliation, detention history, and the fact that he deserted from the Army and left Zaire clandestinely. *Id.* ¶¶ 9.4 and 9.5. The Committee's decision, however, is limited *ratione temporis* and *ratione loci*. Switzerland may not expel Mr. Mutombo "in the prevailing circumstances," but presumably may do so if circumstances change. Moreover, Switzerland is free to expel Mr. Mutombo to any country where he would not face the risk of being returned to Zaire or of being subjected to torture. *See id.* ¶ 10 (noting that "the State party has an obligation to refrain from expelling [Mr.] Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture.").

98. The Convention Against Torture defines the term "torture" as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, *supra* note 96, art. 1(1).

be considered to have a well-founded fear of persecution under the Refugee Convention, thus qualifying for its protections as well.<sup>99</sup>

A significant difference between the scope of the *non-refoulement* provision of the Refugee Convention and that of the Convention Against Torture, however, might lie in the application of each treaty to the rejection of aliens at a nation's border. Although by its terms neither treaty prohibits rejection at a border, the U.S. Supreme Court has interpreted the *non-refoulement* provision of the Refugee Convention to have no extraterritorial effect. Thus, in the Court's view, it is not prohibited to return or reject aliens who have not yet entered the territory of the intended state of refuge.<sup>100</sup> The *non-refoulement* provision of the Convention Against Torture, on the other hand, has not yet been so limited. Indeed, with respect to the

99. The Refugee Convention defines the term "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 . . . .

Convention relating to the Status of Refugees, *supra* note 54, art. 1(A)(2). While the Refugee Convention does not define the term "persecution," in the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, the U.N. High Commissioner for Refugees noted that while no "universally accepted" definition of "persecution" exists, "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution." HANDBOOK, *supra* note 59, clause 51, at 14. The *Handbook*, however, does not elaborate on what constitutes a serious violation of human rights. The Universal Declaration of Human Rights is instructive on customary international law regarding human rights. See *supra* notes 22 & 23 and accompanying text (discussing the Universal Declaration's effect on customary international law in the area of human rights). The Universal Declaration stipulates, for example, that "[e]veryone has the right to life, liberty and security of person." Universal Declaration of Human Rights, art. 3, *supra* note 10. Moreover, Article 5 of the Universal Declaration explicitly proscribes *torture*, cruel, inhuman, and degrading treatment or punishment. *Id.* art. 5. Clearly, torture is both a "serious violation of human rights" and could well be a "threat to life or freedom." Provided it was carried out because of one of the stipulated reasons, torture would amount to persecution within the meaning of the Refugee Convention.

100. *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993). *But see Sale*, 113 S. Ct. at 2567 (Blackmun, J., dissenting) (stating that the majority incorrectly defines "return" in order to "strain to sanction" the U.S. Government's interception of fleeing refugees) and *1981 Conclusion No. 22 (XXXII), Protection of Asylum Seekers in Situations of Large-Scale Influx*, adopted by the Executive Committee on International Protection of Refugees of the UNHCR Programme, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CONCLUSIONS ON THE INTERNATIONAL PROTECTION OF REFUGEES 49 (1992) [hereinafter CONCLUSIONS] (noting at section II(A)(2) that "[i]n all cases the fundamental principle of *non-refoulement*—including *non-rejection at the frontier*—must be scrupulously observed." (emphasis added)).

extraterritorial effect of the Convention Against Torture, Professor Christian Tomuschat suggests:

Since the paramount objective is protection from torture, one will have to conclude here that *refoulement* is to be interpreted in a broad sense as comprehending any form of State action, including rejection at the border. Article 3 [of the Convention Against Torture] proceeds from the assumption that governmental authorities surrendering a person to the authorities of another State that habitually practices torture would themselves become accomplices of the crime of torture. In that perspective, the subtle legal distinction between returning someone who has already put his foot on the territory of the desired host State, and preventing another person from performing that symbolic act becomes immaterial.<sup>101</sup>

The non-binding Declaration on Territorial Asylum contains an unambiguous provision with respect to *non-refoulement* in that it explicitly prohibits "rejection at the frontier."<sup>102</sup> *Non-refoulement* provisions also appear in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>103</sup> Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee,<sup>104</sup> American Convention on Human

101. Tomuschat, *supra* note 23, at 259.

102. Declaration on Territorial Asylum, *supra* note 13, art. 3(1) (providing: "No person . . . shall be subjected to measures such as rejection at the frontier."). Note, however, that Article 3(2) of the Declaration on Territorial Asylum allows an exception to non-rejection "for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons." *Id.*

With respect to non-rejection in cases of mass influx of persons, the 1981 Conclusion No. 22 (XXXII) of the Executive Committee on International Protection of Refugees of the UNHCR Programme recommends: "In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection." CONCLUSIONS, *supra* note 100, § II(a)(1), at 49.

103. Article II(3) of the OAU Convention provides: "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." OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 15, art. II(3).

104. Article III(3) of the Principles provides: "No one seeking asylum . . . should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory." Principles Concerning Treatment of Refugees, *supra* note 17, art. III(3).

Rights,<sup>105</sup> Council of Europe Resolution on Asylum to Persons in Danger of Persecution,<sup>106</sup> and the Draft Charter on Human and People's Rights in the Arab World.<sup>107</sup>

Although the International Covenant on Civil and Political Rights does not contain a specific *non-refoulement* provision, its Article 7 prohibits torture.<sup>108</sup> The United Nations Human Rights Committee said that under Article 7: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*."<sup>109</sup>

While many scholars agree that the principle of *non-refoulement* has acquired "a high degree of general acceptance,"<sup>110</sup> their opinions differ as to whether *non-refoulement* has become a part of customary international law.<sup>111</sup> The practice of states attests to the uncertain

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105. In language similar to Article 33(1) in that it does not provide for non-rejection at the frontiers, Article 22(8) of the American Convention provides: "In no case may an alien be deported or returned to a country, . . . if in that country his right to life or personal freedom is in danger of being violated." American Convention on Human Rights, *supra* note 30, art. 22(8).

106. Article 2 of the resolution provides that member governments, "should . . . ensure 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 [an asylum-seeker] to return to, or remain in, a territory where he would be in danger of persecution . . ." Resolution 14 (1967) on Asylum to Persons in Danger of Persecution, June 29, 1967, art. 2, in OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 305 (1992). Cf. Einarsen, *supra* note 65 (arguing that jurisprudence under the European Convention on Human Rights indicates an emergence of an implied right to *de facto* asylum).

107. Article 40(2) of the Draft Charter provides: "No person enjoying asylum or seeking it shall be expelled to an Arab or foreign country where his life would be in danger or where he may be persecuted." Draft Charter on Human and People's Rights in the Arab World, 1987, art. 40(2), in DRAFT CHARTER ON HUMAN RIGHTS IN THE ARAB WORLD, *supra* note 27, at 15.

108. International Covenant on Civil and Political Rights, *supra* note 25, art. 7.

109. United Nations Human Rights Committee, General Comment 20/44 of 3 Apr. 1992 [Prohibition of Torture] para. 9, reprinted in NOWAK, *supra* note 25, at 872 (emphasis added).

110. GRAHL-MADSEN, *supra* note 5, at 42. See also 1977 Conclusion No. 6 (XXVIII), *Non-Refoulement*, adopted by the Executive Committee on International Protection of Refugees of the UNHCR Programme ("EXCOM") in CONCLUSIONS, *supra* note 100, at 14 (noting that "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."); 1979 Conclusion No. 15 (XXX), *Refugees Without an Asylum Country*, adopted by EXCOM in CONCLUSIONS, *id.*, at 31 (listing under the heading "General principles": "(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of *non-refoulement*.").

111. Compare Kay Hailbronner, *Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Thinking?*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 123, 128 (David A. Martin ed., 1988) ("Commentators have taken the view that the principle of *non-refoulement* must be considered today as a rule of customary international law.

status of the *non-refoulement* principle in customary international law. Even though many of the states that are bound by the *non-refoulement* provision of the Refugee Convention and Declaration observe this provision and refrain from returning home those fleeing persecution,<sup>112</sup> the United Nations High Commissioner for Refugees recently expressed concern that, “[a] number of countries, where the admission or presence of certain groups of refugees have been perceived as incompatible with national interests or domestic concerns, have ignored or undermined the principle of non-refoulement.”<sup>113</sup> In particular, the High Commissioner has identified rejection at frontiers, interceptions, push-offs, and forcible return of asylum-seekers as current threats to *non-refoulement*.<sup>114</sup> Although the principle of *non-refoulement* provides a duty not to return an asylum-seeker to a place where he would be persecuted, it does not provide a duty to grant him asylum or a duty not to send him elsewhere. In practice, the principle of *non-refoulement* often amounts to little protection from persecution.<sup>115</sup>

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Whether this view finds sufficient support in a virtually uniform and extensive state practice accompanied by the necessary *opinio juris* is doubtful.” (citations omitted) and Sinha, *Anthropocentric View*, *supra* note 8, at 93 (“customary international law gives the state complete freedom to expel an alien. . . . States are under no duty of *non-refoulement* under this law.”) with GOODWIN-GILL, *supra* note 9, at 97 (noting that the principle of *non-refoulement* “forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent.”) and THE AMERICAN SOCIETY OF INTERNATIONAL LAW, *THE MOVEMENT OF PERSONS ACROSS BORDERS* 123 (Louis B. Sohn & Thomas Buergenthal eds., 1992) (“The general prohibition against a State’s return of a refugee to a country where his or her life would be threatened . . . has become a rule of customary international law.”).

112. *United Nations High Commissioner for Refugees, Note on International Protection*, submitted to Executive Committee of the High Commissioner’s Programme on Aug. 31, 1993, at 4, U.N. Doc. A/AC.96/815 (1993).

113. *Id.* at 5 (emphasis added).

114. *Id.* at 4. See also Oldrich Andrysek, Statement before Council on Security and Cooperation in Europe Implementation Meeting on Human Dimension Issues (Sept. 27 - Oct. 15, 1993) (“While the overwhelming majority of democratic States demonstrate a commitment to the principle of *non-refoulement* and continue to practice generous asylum policies, rejection at frontiers, interceptions and push-offs, forcible returns to danger and expressions of xenophobia do occur with increasing frequency.” *Id.* at 5).

115. An example on point here is the case of the Haitian asylum-seekers whom, until June 1994, were systematically interdicted by the United States in international waters. The Haitians were then returned to their homeland where many of them feared persecution. See Symposium, *The Haitian Refugee Crisis: A Closer Look*, 7 GEO. IMMIGR. L.J. 1 (1993) (discussing in detail the U.S. policy of interdictions on the high seas). On May 9, 1994, U.S. President Bill Clinton announced a change in this interdiction policy. See *Transcript of Remarks by President Clinton in Press Conference on Haiti*, U.S. NEWSWIRE, May 9, 1994, available in LEXIS, Nexis Library, Wires File. The new policy still includes U.S. interdictions of all Haitians found at sea but

### III. REFLECTIONS ON THE STATE OF THE RIGHT OF ASYLUM IN INTERNATIONAL LAW

Professor Grahl-Madsen's three-faceted conception of the right of asylum considers the right of the state to grant asylum, the right of an individual to seek asylum, and the right of an individual to be granted asylum.<sup>116</sup> Under international law, states have a right to grant asylum and a duty not to prevent those who wish to emigrate or seek asylum elsewhere from doing so. States parties to one or more international or regional treaties that prohibit *refoulement* also have a duty under such instruments not to return protected persons to states in which they would face persecution. Additionally, customary international law may impose a duty of *non-refoulement* upon states, although this principle is not, at present, settled law. On the other hand, under international law, individuals have an implied right to seek asylum. People have a right to leave their own country, and in some cases, a right, implied from the *non-refoulement* duty of a state, not to be returned to a place where they would face persecution. However, individuals have no right under international law to be granted asylum.

The duty of a state not to return a person to a place where he would face persecution is presently the closest that an individual comes to a right to asylum in international law. Yet even in the best case with respect to *non-refoulement*—a case where, pursuant to an international or a regional multilateral treaty, a state is obliged not to return a person to a place where he would suffer persecution—the state has no express duty to allow an asylum seeker to enter its territory. This position was recently confirmed by the U.S. Supreme Court in the case of *Sale v. Haitian Centers Council*.<sup>117</sup> *Sale* held that the *non-refoulement* provision of the Refugee Convention/Protocol does not apply extraterritorially.<sup>118</sup> This interpretation allows a state to turn away asylum seekers not yet in its territory,

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affords the interdicted persons asylum interviews aboard U.S. ships. *Id.*

116. GRAHL-MADSEN, *supra* note 5, at 2.

117. 113 S. Ct. 2549 (1993).

118. *Id.* But see Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67, 79 (1993) (arguing that the *non-refoulement* provision of the Refugee Convention/Protocol "applies to refugees wherever they are outside the country of persecution.").

even if these people would face persecution elsewhere.<sup>119</sup> *Salé's* interpretation is the primary threat to the principle of *non-refoulement*. For if there is no right of an individual to admission, the individual's implied right to even an imperfect asylum (by virtue of *non-refoulement*) is illusory. Advocates wishing to insist upon the right of asylum should thus first insist upon the right of admission.

#### IV. THE RIGHT OF ADMISSION

Admission of aliens into the territory of a state has been traditionally regarded to be within the realm of state sovereignty and, in international law, remains so to the present.<sup>120</sup> There does not exist a binding international treaty restricting the authority of states to deny an alien admission. Consequently, states continue to regulate the access of aliens to their territories. At times, states give effect to

119. *But see* Tomuschat, *supra* note 23, at 259 (noting that under the Convention Against Torture, "[s]ince the paramount objective is protection from torture, one will have to conclude . . . that *refoulement* is to be interpreted in a broad sense as comprehending any form of State action, including rejection at the border."). Under Professor Tomuschat's reading of the Convention Against Torture, a state would clearly not be able to turn away to torture those not yet in its territory. For a discussion of possible extraterritorial application of the Convention Against Torture see *supra* part II.D.

120. BROWNIE, *supra* note 79, at 519 ("a state may choose not to admit aliens or may impose conditions on their admission."); GRAHL-MADSEN, *supra* note 3, at 197 ("The several States have jealously guarded their freedom to decide which aliens or categories of aliens they will let enter their territories."); SINHA, *ASYLUM*, *supra* note 1, at 108 ("under customary international law a state is free to admit or not admit aliens."); THE AMERICAN SOCIETY OF INTERNATIONAL LAW, *supra* note 111, at 106 ("There are no international conventions which require the admission of refugees and displaced persons, nor has there arisen any such requirement under customary international law. Consequently States are free to enact their own laws and regulations governing such admission."); Karl Doehring, *Aliens, Admission*, in I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 107-09, 107 (1992) ("State practice [concerning admission of aliens] demonstrates that the discretion of governments in this respect has nearly no limitation."); Morgenstern, *supra* note 7, at 327 ("[t]here is an undisputed rule of international law to the effect that every state has exclusive control over the individuals on its territory." From this rule flows the principle of states' competence over the regulation of admission of aliens into their territories.). *But see* RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 95-96 (1984) (noting that the European Commission on Human Rights' decision on admissibility of *East African Asians* cases showed that "a State's absolute right under traditional international law to decide whether to admit aliens on to its territory is becoming obsolete. Under contemporary international law the right should be deemed to be subject to the important proviso that a State cannot exercise its right of admission in a fashion which is racially discriminatory in effect." (citations omitted)); James A.R. Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 J. L. REFORM 165, 167 (1984) (arguing that, "although a state certainly has no duty to admit all aliens who might seek to enter its territory, it has a qualified duty to admit aliens when they pose no threat to the public safety, security, public welfare, or essential institutions of a recipient state.").



their territorial sovereignty by rejecting asylum-seekers at their borders, forcing the aliens to seek another place of refuge or, in the worst situation, to return to the countries from which they have fled.<sup>121</sup> Although one non-binding international instrument and one binding regional multilateral treaty prohibit rejection of asylum-seekers at the borders, no binding international instrument expressly takes this step. This situation leaves the majority of states without a legal obligation to admit asylum-seekers.

The Universal Declaration of Human Rights<sup>122</sup> declares that, "[e]veryone has the right to leave any country, . . . and to return to his country"<sup>123</sup> and "the right to seek and to enjoy in other countries asylum from persecution"<sup>124</sup> without in any way providing for the right of an individual to be admitted to any country but his own.<sup>125</sup> Similarly, the International Covenant on Civil and Political Rights, binding on states parties to it,<sup>126</sup> provides for the right of everyone to "be free to leave any country"<sup>127</sup> without providing the collateral right of admission to another country.<sup>128</sup>

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121. The recent U.S. policy of interdicting Haitian asylum-seekers on the high seas and returning them to their homeland from which they fled illustrates the latter scenario. *See generally* Symposium, *supra* note 115 (discussing the interdiction policy). Forcing aliens to seek another place of refuge creates a problem known as "refugees in orbit." *See generally* GORAN MELANDER, REFUGEES IN ORBIT (1978).

122. *See supra* notes 23 & 24 and related text (discussing the legal force of the Universal Declaration).

123. Universal Declaration of Human Rights, *supra* note 10, art. 13(2).

124. *Id.* art. 14(1).

125. *See* SINHA, ASYLUM, *supra* note 1, at 109 (noting that the drafting history of the Universal Declaration shows that under its provisions, "refugees would not have a right to be admitted."). *See generally supra* notes 44-48 and related text (discussing the drafting history of article 14(1) of the Universal Declaration).

126. As of May 1, 1994, the Covenant has entered into force for 116 states parties. *See* NOWAK, *supra* note 25, at 886.

127. International Covenant on Civil and Political Rights, *supra* note 25, art. 12(2).

128. The U.N. Human Rights Committee acknowledged this in their General Comments. In General Comment 15/27 of 22 July 1986 [Position of Aliens], the Committee stated: "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory." HUMAN RIGHTS COMMITTEE, GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 40, PARAGRAPH 4 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, General Comment 15/27 of 22 July 1986 [Position of Aliens] para. 5, U.N. Doc. CCPR/C/21/Rev.1 (1989). The Committee, however, did note that "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise." *Id.*

The principal international instrument for the protection of those falling within the scope of its "refugee" definition,<sup>129</sup> the 1951 Convention relating to the Status of Refugees, stipulates the duties of a state of refuge with respect to refugees on its territory but does not impose on states parties to it the duty to admit persons fleeing persecution.<sup>130</sup> Article 31(1) of the Convention provides: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees *who . . . enter or are present in their territory* without authorization."<sup>131</sup> Article 32(1) prohibits states parties to the Convention from expelling, "a refugee *lawfully in their territory* save on grounds of national security or public order."<sup>132</sup> Finally, Article 33(1) prohibits the expulsion or return ('*refouler*') of, "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."<sup>133</sup>

Articles 31 and 32 of the Refugee Convention expressly apply only to refugees present in the territory of the state of refuge—they do not mandate that states allow the entry of refugees. Unlike Articles 31 and 32, Article 33(1) of the Refugee Convention does not by its terms refer only to refugees already present in the territory of the state of refuge. Commentators believe, nevertheless, that at the time of Article 33's drafting, the duty of *non-refoulement* applied only to refugees already present in the territory of the state of refuge.<sup>134</sup> Some commentators are of the opinion, however, that Article 33, through declarations and state practice, at present prohibits the rejection of refugees at a frontier.<sup>135</sup> Nonetheless, state practice

129. See *supra* note 99 (setting forth the "refugee" definition used in the Convention relating to the Status of Refugees).

130. See GRAHL-MADSEN, *supra* note 3, at 196 (noting that "States have no international legal duty to admit refugees who present themselves at their frontiers and ask for asylum."); SINHA, ASYLUM, *supra* note 1, at 109 (stating that the "[Refugee] Convention . . . merely forbids states from imposing penalties for illegal entry or presence, but it does not oblige them to admit refugees.").

131. Convention relating to the Status of Refugees, *supra* note 54, art. 31(1) (emphasis added).

132. *Id.* art. 32(1).

133. *Id.* art. 33(1).

134. GOODWIN-GILL, *supra* note 9, at 74 ("[T]he fact remains that states were not prepared to include in the [Refugee] Convention any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum."); GRAHL-MADSEN, *supra* note 5, at 40 ("Article 33 only prohibits the expulsion or return (*refoulement*) of refugees . . . ; it does not obligate the Contracting State to admit any person who has not already set foot in its territory.").

135. GOODWIN-GILL, *supra* note 9, at 77-78 ("By and large, states in their practice and in their recorded views, have recognized that [the duty of *non-refoulement*] applies to the moment

does not show a uniform acceptance of the prohibition against rejecting refugees at borders.<sup>136</sup> Additionally, *Sale* demonstrates that at least one major state does not accept the proposition that non-rejection of refugees who have not yet set foot in the territory of the state of intended refuge is a part of the principle of *non-refoulement*.<sup>137</sup>

While it is unclear whether Article 33 of the Refugee Convention has evolved through the practice of states so as to include the duty of non-rejection at the border or extraterritorially, the *non-refoulement* provision of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been well argued to include such a duty.<sup>138</sup> It is possible that states parties to

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at which asylum-seekers present themselves for entry. Certain factual elements may be necessary (such as human rights violations in the country of origin) before the principle of *non-refoulement* is triggered, but the concept now encompasses *both* non-return and *non-rejection*." (emphasis added); GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT 176 (1989) ("The majority of authors nowadays clearly agree that Article 33 must be considered to include non-rejection at the frontier.").

This opinion is not, however, universally accepted. For example, Hailbronner points out that in 1976, Sadruddin Aga Khan, then the United Nations High Commissioner for Refugees, "rejected the suggestion that the *nonrefoulement* rule could be considered a general obligation to admit refugees who present themselves at the border." Hailbronner, *supra* note 111, at 127. Hailbronner also notes that based on the Refugee Convention, the duty of *non-refoulement* "is limited to those who have already entered state territory, either lawfully or unlawfully." *Id.* at 126. On the other hand, Hailbronner concedes Goodwin-Gill's point that "[s]tate practice, along with the recorded views of states and the general development of human rights concepts, supports an acceptance of a broad understanding of the *non-refoulement* rule contained in article 33 of the 1951 Refugee Convention." *Id.* at 127 (citation omitted).

136. See *supra* notes 113 & 114 and related text (citing the concerns of the United Nations High Commissioner for Refugees regarding rejection of refugees at frontiers).

137. See *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993). But see *supra* note 100 (listing authorities arguing that the principle of *non-refoulement* applies extraterritorially and thus encompasses non-rejection of refugees at frontiers).

138. See *supra* note 101 and related text (containing Professor Tomuschat's argument that since the principal objective of the Convention Against Torture is protection against torture, "the subtle legal distinction between returning someone who has already put his foot on the territory of the desired host State, and preventing another person from performing that symbolic act becomes immaterial." Tomuschat, *supra* note 23, at 259.). Of course, a similar argument could be made with respect to the *non-refoulement* provision of the Refugee Convention. One could argue that since the principal objective of the Refugee Convention is the protection of refugees from persecution, it should be immaterial for triggering the *non-refoulement* protection of the Refugee Convention whether the refugee fleeing persecution has set foot on the territory of the state. As compelling as this argument is, the extraterritorial effect of the *non-refoulement* provision of the Refugee Convention has already been undermined by state practice and by a judicial decision. See *supra* notes 136 & 137 and related text. Additionally, the drafting history of the Refugee Convention indicates that when written, Article 33 only applied to refugees already in the territory of the state of refuge. See *supra* note 134 and related text.

the Convention Against Torture have a duty not to reject aliens from their frontiers, at least in situations involving "substantial grounds for believing that [those aliens] would be in danger of being subjected to torture"<sup>139</sup> in the state to which they would return. Although the Convention Against Torture does not expressly prohibit the rejection of aliens at frontiers,<sup>140</sup> it nevertheless holds out the most promise among the binding international instruments for the creation of a duty of a state to not reject aliens seeking asylum. This possibility, however, does not change the fact that no binding international instrument expressly prohibits the rejection of aliens at frontiers, even in compelling circumstances involving persecution and torture. States are reluctant to give up their sovereign prerogative to unilaterally decide who to admit to and who to exclude from their territories. When states have agreed to the principle of non-rejection, they have done so only in the form of a non-binding declaration.<sup>141</sup>

On the regional level, the situation is better for the alien seeking admission to an intended state of refuge. In Africa,<sup>142</sup> states parties to the OAU Convention Governing the Specific Aspects of Refugee

139. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 96, art. 3(1).

140. The Convention Against Torture expressly prohibits only expelling, return ("refouler"), and extradition. Article 3(1) stipulates: "No 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." *Id.* The only Article 3 case decided by the Committee Against Torture, *Mutombo v. Switzerland*, involved a Zairian citizen who had already entered into the territory of Switzerland, the state seeking to return him to Zaire. See *supra* note 97 (discussing the *Mutombo* case).

141. The Declaration on Territorial Asylum adopted by the General Assembly of the United Nations in 1967 recommends that states base their practices relating to territorial asylum on principles including non-rejection. In Article 3(1), the Declaration states: "No person . . . shall be subjected to measures such as *rejection at the frontier*." Declaration on Territorial Asylum, *supra* note 13, art. 3(1) (emphasis added). But even in this non-binding Declaration, states did not accept non-rejection as a non-derogable principle and consequently Article 3(2) allows an exception to non-rejection "for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons." *Id.* art. 3(2). But see CONCLUSIONS, *supra* note 100, (stating UNHCR recommendations on admission of asylum-seekers in cases of mass-influx).

The 1977 Conference on Territorial Asylum confirmed the reluctance of states to bind themselves to the principle of non-rejection. At the Conference, "all proposals to commit states to grant refugees a right of entry were defeated." Hailbronner, *supra* note 111, at 127 (citing views of Sadruddin Aga Khan). See generally Weis, *Draft Convention*, *supra* note 13 (discussing the various proposals bearing on the right of entry).

142. See generally STENBERG, *supra* note 135, at 249-52 (discussing the evolution of the principle of *non-refoulement* in Africa).

Problems in Africa<sup>143</sup> have an express duty of non-rejection from their frontiers. This duty applies with respect to any person falling within the "refugee" definition of the OAU Convention<sup>144</sup> who, if rejected, would be compelled to "return to or remain in a territory where his life, physical integrity or liberty would be threatened."<sup>145</sup> Additionally, the normative but non-binding Principles Concerning Treatment of Refugees<sup>146</sup> adopted by the Asian-African Legal Consultative Committee advise:

No one seeking asylum . . . should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as *rejection at the frontier*, . . . which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.<sup>147</sup>

Although under their regional instruments Latin America, Europe, and the Arab states do not presently have a legal duty to refrain from rejecting aliens from their frontiers, positive developments in these regions can be seen in the form of normative instruments. In Latin America, ten states<sup>148</sup> adopted the non-binding Cartagena Declaration on Refugees which in Article 5 states that the

143. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 15.

144. The OAU Convention defines the term "refugee" as:

1. . . . every 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.

2. The term "refugee" shall also apply to 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.

*Id.* art. I. Note that this definition is broader than that of the Refugee Convention/Protocol. See *supra* note 99 (setting forth the "refugee" definition of the Refugee Convention/Protocol).

145. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 15, art. II(3).

146. Principles Concerning Treatment of Refugees, *supra* note 17.

147. *Id.* art. III(3) (emphasis added).

148. Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela. STENBERG, *supra* note 135, at 261.

principle of *non-refoulement* includes the prohibition of rejection at the frontier.<sup>149</sup>

In Europe, the Council of Europe Resolution 14 (1967) seeks to “ensure that no one shall be subjected to *refusal of admission at the frontier, rejection, . . .* 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.”<sup>150</sup> The Committee of Ministers of the Council of Europe adopted a similar recommendation in 1984, linking it to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. While the European Convention itself does not prohibit the rejection of aliens from the frontier, in Article 3 it prohibits torture, inhuman, or degrading treatment or punishment.<sup>151</sup> The 1984 Recommendation of the Committee of Ministers states *inter alia*:

*Bearing in mind* the European Convention on Human Rights, and particularly Article 3; . . . *Recommends* that governments of member states . . . ensure that the principle according to which no person should be subjected to *refusal of admission at the frontier, rejection, . . .* or any other measure which would have the result of compelling him to return to, or remain in, a territory where he has a well-founded fear of persecution . . . shall be applied regardless of whether this person has been recognised as a refugee under the [Refugee Convention/Protocol].<sup>152</sup>

Additionally, The Draft Charter on Human and People’s Rights in the Arab World proposes to grant to, “[e]veryone who is a citizen of an Arab country or of Arab origin . . . the right to leave his own country and return to it and to *enter* any other Arab country.”<sup>153</sup> Despite

149. Article 5 of the Cartagena Declaration on Refugees states: “to reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees.” *Id.*

150. Resolution 14 (1967) on Asylum to Persons in Danger of Persecution, art. 2, in COLLECTION OF INTERNATIONAL INSTRUMENTS, *supra* note 17, at 305 (emphasis added).

151. Article 3 of the European Convention stipulates: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 28, art. 3.

152. Recommendation No. R (84) 1 adopted by the Committee of Ministers of the Council of Europe on 25 Jan. 1984, *reprinted in* STENBERG, *supra* note 135, at 257 (emphasis added). *See also* Einarsen, *supra* note 65 (arguing that jurisprudence under the European Convention indicates an emerging implied right to *de facto* if not *de jure* asylum).

153. Draft Charter on Human and People’s Rights in the Arab World, 1987, art. 8(2), in DRAFT CHARTER ON HUMAN RIGHTS IN THE ARAB WORLD, *supra* note 27, at 9. Note, however, that the Draft Arab Charter is not yet in force.

these positive regional developments, and with the exception of the express duty of non-rejection imposed on states parties to it through the OAU Convention, states still have no legal duty to admit asylum-seekers.

## V. RECOMMENDATIONS FOR IMPROVED PROTECTION OF PERSONS FLEEING PERSECUTION

The plight of refugees in the world is not a problem any one state or a group of states should bear alone. The refugee plight is a phenomenon of our modern world community and must be addressed by all states as a global issue. Refusing admission to prevent aliens from seeking asylum is not a just solution of this issue. Borders closed to arriving aliens do not stem the refugee flight, they merely direct the flow of refugees elsewhere.<sup>154</sup> This creates hardship for states and asylum-seekers alike. The states with the least prophylactic admission and asylum policies are forced to bear the burden of refugee care while the refugees are forced to "orbit" among states seeking the one that will offer them refuge. Closed borders, rejections, push-offs, and the like are not solutions that the world community should tolerate.<sup>155</sup> First, these tactics should be rejected because they unjustly burden some members of the world community, upset relationships among states, and internally destabilize those states still admitting refugees. Second, closed borders, rejections, and push-offs should not be tolerated because they are not a humane answer to a call for refuge.

At the same time, it must be recognized that in the exercise of their sovereignty and of their police powers, states have a legitimate interest in the control of their borders and in the maintenance of internal safety, two areas affected by the arrival of aliens. Moreover, the abuse of the institution of asylum for immigration purposes

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154. See, e.g., Gillian Tett & Judy Dempsey, *Refugees Find Doors Bolted: Financial Constraints are Forcing Europe to Tighten Procedures Against Asylum Seekers*, FIN. TIMES, Feb. 10, 1994, at 2 (noting that Western Europe's tightened asylum policy has begun to create a refugee "spill-over" into Eastern Europe).

155. Professor Tomuschat warned against the consequences of prophylactic asylum policies.

There is a clear danger that the liberal asylum regimes of the West are going to collapse if the societies concerned come to the conclusion that around them rudely selfish strategies of rejection are being pursued. The political result of such perceptions might be the beginning of a competitive race for the most illiberal regime.

Tomuschat, *supra* note 23, at 262 (citation omitted).

coupled with the widespread perception of such abuse has given voice to calls for closing borders.<sup>156</sup>

A system of protection for persons fleeing persecution must thus be based on the balance of interests of the world community of states, individuals in need of refuge, and individual states. States should admit into their territories aliens who seek asylum from persecution *for the specific and limited purpose* of determining the merits of the request for asylum. By admitting into their territories those seeking refuge for the purpose of assessing their risk of persecution, individual states would answer both the needs of the individuals and of the world community. On the other hand, states should not feel compelled to offer to asylum-seekers anything more than what is necessary to protect them from persecution. This means that those not legitimately needing protection from persecution should be, in the discretion of the state, either directed to the proper channels for immigration or repatriated. Moreover, the concept of a safe third country, postulating that asylum-seekers are ineligible to apply for asylum in states other than the first safe country where they could have obtained protection, should continue to be applied to prevent "country shopping."<sup>157</sup> Finally, individuals legitimately needing refuge should receive such only for as long as necessary to ensure that they will not be exposed to the risk of persecution in their home countries.

Furthermore, all states in the world community should share equally in the care of those in need of refuge. To this end, it may be appropriate to institute a global fund to which each state would contribute proportionally and out of which each state incurring the costs of care of those in need of protection would receive compensation.

In sum, the system of protection of those fearing persecution at home could be improved by better balancing the interests of the world community, the individuals in need of protection, and the individual states. In recognizing that closed borders, rejections, and push-offs are not a solution to the global issue of refugee flight, we can focus on making the admission policies of individual states more open: (i) to minimize the risk of harm to those in risk of persecution;

156. See, e.g., Tyler Marshall, *No Longer Welcome in Europe*, L.A. TIMES, May 17, 1994, at A1 (noting the developments in Europe giving rise to recent tightening of asylum policies).

157. See THE STATE OF THE WORLD'S REFUGEES, *supra* note 4, at 46 (noting that "[a]lthough people have the right to seek asylum, they do not have the right to pick and choose where they do so.").



(ii) to avoid the problem of “refugees in orbit;” (iii) to spread the responsibility of care for individuals in need of protection from persecution throughout the world community of states; and (iv) to avoid the destabilization of those states that still admit asylum-seekers by forcing upon them disproportionately large groups of aliens. Recognizing that some states find themselves with more asylum-seekers at their frontiers than others, a global system of burden-sharing should be devised and implemented.

