

Note

Securing the Borders Against Syrian Refugees: When Non-Admission Means Return

Elizabeth Leiserson[†]

INTRODUCTION.....	185
I. THE BLURRED LINE BETWEEN ADMISSION AND RETURN: <i>NON-REFOULEMENT</i> AND <i>NON-ENTRÉE</i>	190
A. Non-Refoulement and Its National Security Exception	191
B. The Theory of Non-Entrée	193
II. THE TREATY DRAFTERS' BARGAIN: OPEN BORDERS IN RETURN FOR ASSISTANCE AND LATER ADMISSION	195
A. Legality of National Security-Based Non-Entrée Policies is Ambiguous Under the Ordinary Meaning of Article 33	195
B. Object and Purpose and Subsequent Practice Are of Limited Use in Interpreting the Scope of Refoulement.....	197
C. The Travaux Préparatoires Clarify that the Goal Is Collaboration To Admit, Not Collaboration To Deny	199
1. Convention Circumstances: Confronting the Problem of Statelessness	200
2. Drafting Decisions: Considering an Article Requiring Admission	202
3. Ratification Debates: Explaining the Contours of Non-Refoulement and the National Security Exception	204
D. Assuming Entry in Early Practice.....	206
III. A CASE STUDY IN CHALLENGING <i>NON-ENTRÉE</i> POLICIES: EUROPE'S ATTEMPTS TO BAR SYRIAN REFUGEES	208
A. The European Union's Use of Turkey to Halt the Flow of Syrian Refugees	208
B. Establishing Jurisdiction Over EU Actions Abroad.....	210
C. The EU's Political Bargain to Bar Access Amounts to Aiding or Assisting Refoulement	211
CONCLUSION	213

INTRODUCTION

In September 2015, the countries of the European Union seemed ready to allow Syrian refugees to cross into their borders. Prime Minister David Cameron said that the United Kingdom had a “moral responsibility” to refugees

[†] Yale Law School, J.D. 2017. I'm grateful to Professor Oona Hathaway for her thoughtful guidance and supervision of this research. Many thanks as well to Hope Metcalf and Gregory Cui for their comments on early versions of this Note, and to my parents for their constant support not only of this project but of my entire academic career. For their wonderful feedback and endless patience, I'd also like to thank Arjun Ramamurti, Valerie Comenencia Ortiz, and the rest of the *YJIL* editing staff.

and that the country would accept 20,000 refugees by 2020.¹ German Vice-Chancellor Sigmar Gabriel announced the next day that his country could accept half a million asylum seekers each year for several years.²

But on November 13, 2015, 130 people were killed in Paris in a terrorist attack for which ISIS claimed responsibility.³ The debate about whether one of the attackers might have been a Syrian refugee was instantaneous and heated.⁴ The next day a top German politician posted on Twitter: “#parisattacks change everything. We cannot allow any illegal and uncontrolled immigration.”⁵ The governors of Bavaria and Saxony immediately called for tighter border controls.⁶ Europe backed up its threats with actions. Later that same month, Turkey and the European Union passed a new agreement, according to which Europe provided the funding for Turkey’s increased border security, in return for Turkey’s pledge to stop more refugees before they arrived on European shores.⁷

Europe reeled over the next year as the Paris attacks were followed with the Brussels airport bombings, the Bastille Day truck rampage in Nice, and a late summer church shooting in Normandy.⁸ In response, the rhetoric and actions aimed at Syrian refugees escalated. In March 2016, the European Union (“EU”) and Turkey announced a new policy to curb “illegal migration.”⁹ Under its terms, “[i]n order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk,” all “new irregular migrants” who crossed from Turkey into Greece would be returned to Turkey; for each individual so returned, “another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.”¹⁰ In the spring of 2016, European leaders pushed for¹¹ and eventually received¹² an expansion of

1. See *UK to Accept 20,000 Refugees from Syria by 2020*, BBC (Sept. 7, 2015), <http://www.bbc.com/news/uk-34171148>.

2. See *Migrant Crisis: Germany ‘Can Take 500,000 Asylum Seekers a Year’*, BBC (Sept. 8, 2015), <http://www.bbc.com/news/world-europe-34185353>.

3. See Rukmini Callimachi, *ISIS Claims Responsibility, Calling Paris Attacks ‘First of the Storm’*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/2015/11/15/world/europe/isis-claims-responsibility-for-paris-attacks-calling-them-miracles.html>.

4. See, e.g., Ishaan Tharoor, *Were Syrian Refugees Involved in the Paris Attacks? What We Know and Don’t Know*, WASH. POST (Nov. 17, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/were-syrian-refugees-involved-in-the-paris-attacks-what-we-know-and-dont-know>.

5. See Anton Troianovski, *Paris Attacks May Unsettle EU’s Debate on Migration*, WALL ST. J. (Nov. 14, 2015), <http://www.wsj.com/articles/paris-attacks-may-unsettle-eus-debate-on-migration-1447510975>.

6. *Id.*

7. Valentina Pop, *EU To Pay \$3 Billion for Turkey’s Help in Stemming Migrant Crisis*, WALL ST. J. (Nov. 12, 2015), <http://www.wsj.com/articles/eu-leaders-approve-migrant-trust-fund-for-africa-but-divisions-remain-1447327556>.

8. See, e.g., Alice Foster, *Terror Attacks Timeline: From Paris and Brussels Terror to Most Recent Attacks in Europe*, SUNDAY EXPRESS (July 27, 2016), <http://www.express.co.uk/news/world/693421/Terror-attacks-timeline-France-Brussels-Europe-ISIS-killings-Germany-dates-terrorism>.

9. Press Release, EU-Turkey Statement (Mar. 18, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement>.

10. *Id.*

11. Rowena Mason & Patrick Kingsley, *David Cameron: Send More Patrol Ships To Turn Refugee Boats back to Libya*, GUARDIAN (Mar. 18, 2016), <https://www.theguardian.com/world/2016>

Operation Sophia, the EU naval operation designed to intercept and return refugees and other migrants being smuggled between Libya and Europe. By 2016, European countries had surrounded themselves with 1,200 kilometers of fences—mostly begun in 2015 amidst growing political furor about refugees and migrants—and had even more fences in the works.¹³ Hungary’s notoriously anti-immigrant prime minister declared its expanded fence was necessary because “[i]mmigration and migrants . . . are a threat to people and bring terrorism upon us.”¹⁴

The threat so many Europeans are hoping to keep out is a refugee population. The United Nations High Commissioner for Refugees (UNHCR) “characterizes the flight of civilians from Syria as a refugee movement” and “considers that most Syrians seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees.”¹⁵ And once Syrian refugees have entered EU territory or arrived at its borders, they are, at least occasionally, afforded protections owed to refugees. EU courts actively review refugees’ asylum claims, sometimes overruling government recommendations in issuing decisions that forbid removal.¹⁶ But Syrian refugees who cannot get to Europe cannot access those protections—and access is now made difficult indeed.

Europe is not alone in this attitude. Many politicians in the United States have made clear that they would have the United States follow Europe’s example, precisely because of the security concerns refugees supposedly raise. The week after the Paris attacks, thirty-one governors publicly declared that Syrian refugees were not welcome in their states.¹⁷ Greg Abbott, governor of Texas, wrote in a letter to President Obama, “Given the tragic attack in Paris and the threats we have already seen in Texas . . . Texas cannot participate in any program that will result in Syrian refugees—any one of whom could be

/mar/18/refugee-boats-david-cameron-early-intervention-libya-migrants-mediterranean-eu-leaders.

12. Press Release, European Council, EUNAVFOR MED Operation Sophia: Mandate Extended by One Year, Two New Tasks Added, European Council (June 20, 2016), http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-eunavfor-med-sophia/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EUNAVFOR%20MED%20Operation%20Sophia%3A%20mandate%20extended%20by%20one%20year%2C%20two%20new%20tasks%20added.

13. See Gabriela Baczyńska & Sara Ledwith, *How Europe Built Fences To Keep People Out*, REUTERS (Apr. 4, 2016), <http://www.reuters.com/article/us-europe-migrants-fences-insight-idUSKCN0X10U7>; Lizzie Dearden, *Hungary Planning “Massive” New Border Fence To Keep Out Refugees as PM Vows To “Hold Them Back by Force,”* INDEPENDENT (Aug. 27, 2016), <http://www.independent.co.uk/news/world/europe/hungary-massive-new-border-fence-to-keep-out-refugees-prime-minister-orban-turkey-eu-hold-them-back-a7212696.html>.

14. Dearden, *supra* note 13.

15. U.N. High Comm’r for Refugees, *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update III*, ¶¶ 21, 26 (Oct. 2014).

16. See, e.g., *L.M. & Others v. Russia*, App. No. 40081/14 (Eur. Ct. H.R. Oct. 15, 2015); see also *M.S.S. v. Belgium & Greece*, App. No. 30696/09 (Eur. Ct. H.R. Jan. 21, 2011) (protecting non-Syrian refugees from deportation).

17. See Ashley Fantz & Ben Brumfield, *More Than Half the Nation’s Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015), <http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash>.

connected to terrorism—being resettled in Texas.”¹⁸ On November 19, 2015, the U.S. House of Representatives passed a bill titled the “American Security Against Foreign Enemies Act of 2015.”¹⁹ What sounds like a declaration of war was designed “[t]o require that supplemental certifications and background investigations be completed prior to the admission of certain aliens as refugees.”²⁰ In the words of presidential candidate Marco Rubio, “[W]e won’t be able to take more refugees. It’s not that we don’t want to, it’s that we can’t. Because there’s no way to background check someone that’s coming from Syria.”²¹ Donald Trump won the November 2016 presidential election after campaigning for “a total and complete shutdown of Muslims entering the United States”²²—which would include most Syrians.²³ President Trump’s official justification for the policy centered on the security threat from Muslim immigrants: “Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims [sic] of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life.”²⁴

Nor are these none-shall-pass systems unique to Syrian refugees.²⁵ President Trump’s other famous campaign pledge on immigration was to build a wall at the United States’ southern border to keep out all migrants, including refugees.²⁶ His predecessor in office, Barack Obama, signed off on other, albeit less blatant, refugee-blocking plans. When the United States was faced with a daunting Central American refugee crisis in 2014, it outsourced much of the work of intercepting refugees to Mexico. The Southern Border Plan, which the *New York Times* called a “ferocious crackdown on refugees fleeing violence in Central America,”²⁷ has operated to fortify Mexico’s southern border against refugees from the Northern Triangle. According to one advocacy group, “U.S. assistance has thus far been focused on equipment deliveries, such as US \$6.6 million for Non-Intrusive Inspection Equipment and US \$3.5 million for biometric kiosks and training for Mexican military forces involved in border

18. Letter from Greg Abbott, Governor of Tex., to Barack Obama, President of the U.S. (Nov. 16, 2015), http://gov.texas.gov/files/press-office/SyrianRefugees_BarackObama11162015.pdf.

19. H.R. 4038, 114th Cong. (2015).

20. *Id.*

21. John McCormick, *Rubio: U.S. Can’t Take More Syrian Refugees*, WKLY. STANDARD (Nov. 15, 2015), <http://www.weeklystandard.com/rubio-u.s.-cant-take-more-syrian-refugees/article/1064381>.

22. *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALD J. TRUMP (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

23. According to the CIA World Factbook, 87% of Syrians are Muslim. See *The World Factbook: Syria*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (last visited Nov. 12, 2016).

24. *Donald J. Trump Statement on Preventing Muslim Immigration*, *supra* note 22.

25. For a catalog of admission-thwarting policies enacted over the last twenty years, see Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT’L L. 235, 248-58 (2015).

26. *Immigration*, DONALD J. TRUMP, <https://www.donaldjtrump.com/policies/immigration> (last visited Nov. 12, 2016).

27. Sonia Nazario, *The Refugees at Our Door*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/2015/10/11/opinion/sunday/the-refugees-at-our-door.html>.

security operations.”²⁸ The plan’s goal is simple. In the words of the Chairman of the House Homeland Security Committee, “If we can close the southern border of Mexico, that stops 99 percent of our problems here.”²⁹ Similarly, Australia has come under heavy international criticism for its “Stop the Boats” policy, under which boats carrying refugees from Asia and the Pacific are stopped in international waters and escorted to Papua New Guinea or other Pacific islands, where the refugees are placed in indefinite detention.³⁰ Tony Abbott, Australia’s prime minister from 2013 to 2015, maintained the refugees were a “challenge to our national security” and that his government was right to put aside “moral posturing” in crafting its response.³¹

While national security is not the only rationale for programs like the EU-Turkey deal, Operation Sophia, the Southern Border Plan, and Stop the Boats, it is clearly a central concern for many of these policymakers. In the modern, security-conscious era, public dialogue around refugee resettlement—both for³² and against³³—is intrinsically linked to issues of national security. Allowing refugees to cross borders is portrayed as a balancing act. On the one hand, governments express a real willingness to help in moments of humanitarian crisis.³⁴ On the other hand, officials live in fear of being the one who lets the architect of the next major terrorist attack enter the country.

This balancing act plays out in international law as well as international policy debates. *Non-refoulement*, the widely accepted international legal principle that refugees cannot be returned to countries where they face persecution, sits in constant tension with another widely accepted principle: Every state has the right to police its borders and to deny entry to anyone who threatens the security of that state. The text of the Refugee Convention itself points to this tension. The sole textual exception to *non-refoulement* grants host countries permission to expel refugees who pose security risks.³⁵

28. Clay Boggs, *Five Questions About Mexico’s New Southern Border Program*, WOLA (Aug. 20, 2014), http://www.wola.org/commentary/five-questions_about_mexicos_new_southern_border_program.

29. *Unaccompanied Minors: Hearings Before the H. Comm. On Homeland Sec.*, 113th Cong. (2015) (statement of Rep. Michael McCaul), <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg91929/html/CHRG-113hhrg91929.htm>.

30. See HRC Communication No. 2094/2011, CCPR/C/108/D/2094/2011 (Oct. 28, 2013); Editorial, *Australia’s Brutal Treatment of Migrants*, N.Y. TIMES (Sept. 3, 2015), <http://www.nytimes.com/2015/09/03/opinion/australias-brutal-treatment-of-migrants.html>.

31. Tony Abbott, *Abbott: I Was Right on National Security*, QUADRANT ONLINE (Mar. 26, 2016), <https://quadrant.org.au/opinion/qed/2016/03/abbott-right-national-security>.

32. See, e.g., David Mednicoff, *More Syrian Refugees: Good for National Security*, CONVERSATION (Sept. 10, 2015), <https://theconversation.com/more-syrian-refugees-good-for-national-security-47347>.

33. Ben Riley-Smith, *Thousands of ISIL Fighters Could Use Migrant Crisis to “Flood” into Europe*, Nigel Farage Warns, TELEGRAPH (Sept. 4, 2015), <http://www.telegraph.co.uk/news/politics/nigel-farage/11844290/Thousands-of-Isil-fighters-could-use-migrant-crisis-to-flood-into-Europe-Nigel-Farage-warns.html>.

34. As President Obama put it, “Many of these refugees are the victims of terrorism themselves, that’s what they’re fleeing. Slamming the door in their faces would be a betrayal of our values.” Editorial, *After Paris Attacks, Vilifying Refugees*, N.Y. TIMES (Nov. 17, 2015), <http://www.nytimes.com/2015/11/17/opinion/after-paris-attacks-vilifying-refugees.html>.

35. See *infra* note 49 and accompanying text.

Concern about threats to national security has naturally increased in the years since September 11, 2001, and increased again in the wake of attacks like those in France and Belgium. With such increased concern comes an increased will to use all legal tools available to minimize perceived security risks. This Note enters the fray to explain that the national security exception to *non-refoulement* is not such a tool.³⁶ To the contrary, when destination countries invoke national security rationales to deny refugees entrance, they violate international law. Security-centered responses amount to what international legal scholars have described as a policy of *non-entrée*: “The refugee shall not access our community.”³⁷

This Note uses Europe’s response to Syrian refugees as a case study to showcase the way overly broad interpretations of national security provisions in international refugee law are invoked to create systems that deny refugees the opportunity to enter their destination countries. Through an in-depth analysis of the text, preparatory materials, and early practice of the Refugee Convention, this Note demonstrates that these national-security-based *non-entrée* systems do not adhere to the narrow intended meaning of the security exception to *non-refoulement*. Rather, overly capacious readings of the national security exception violate the principle of *non-refoulement* and may be challenged under international law.

This Note proceeds in three parts. Part I introduces the principle of *non-refoulement* and its accompanying national security exception, and describes the contours of the systems of exclusion that provide the case study for this Note. After showing that the treaty language governing *non-entrée* regimes is ambiguous, Part II provides a thorough exercise in treaty interpretation, analyzing the sources relevant to the Refugee Convention to explain the contours of the *non-refoulement* obligation and the accompanying obligation to admit. Part III returns to the situation of Syrian refugees, explaining how their exclusion from the European Union could be challenged as a matter of international law.

I. THE BLURRED LINE BETWEEN ADMISSION AND RETURN: *NON-REFOULEMENT* AND *NON-ENTRÉE*

The countries of the European Union—like the United States and Australia—have ratified and are bound by the terms of the 1951 Convention Relating to the Status of Refugees (Refugee Convention).³⁸ They are forbidden

36. To date, politicians and policymakers have justified non-admission policies with reference to the general idea of protecting national security, *see supra* notes 24-31 and accompanying text, but have not specifically invoked the national security exception in Article 33(2) of the Refugee Convention. This Note anticipates that their legal advisors may believe or come to believe that the exception provides legal cover for their actions.

37. James C. Hathaway, *The Emerging Politics of Non-Entrée*, 91 REFUGEES 40, 40-41 (1992). The term *non-entrée* was first used in this article.

38. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; *see also* Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. Australia and all members of the European Union have ratified both the Convention and the Protocol. The United States has ratified the Protocol only, which incorporates the Convention by reference. *See Convention Relating to the*

to expel or return any refugee to a country where she faces persecution unless she poses a threat to the security of the country where she seeks refuge. This Part first describes the breadth of the prohibition on return and then explains how national-security-based *non-entrée* policies appear, at least at first glance, to avoid triggering such a prohibition.

A. *Non-Refoulement and Its National Security Exception*

The principle of *non-refoulement* is the core tenet of the Refugee Convention and the accompanying 1967 Protocol Relating to the Status of Refugees.³⁹ Article 33 states: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴⁰

According to the UNHCR, the “principle of *non-refoulement* is the cornerstone of asylum and of international refugee law.”⁴¹ *Non-refoulement* is incorporated, either explicitly or by later interpretation, into many other human rights instruments, including, among others, the Convention Against Torture,⁴² the International Covenant on Civil and Political Rights,⁴³ the Charter of Fundamental Rights of the European Union,⁴⁴ and the American Convention on Human Rights.⁴⁵ *Non-refoulement* is now so firmly established that legal scholars⁴⁶ and international courts⁴⁷ have argued for many years that it has attained the status of customary international law because it is “accepted and recognized by the international community of States as a whole as a norm from

Status of Refugees, U.N. TREATY COLLECTION [hereinafter *Status of the Refugee Convention*], https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=V-5&chapter=5&lang=en.

39. Refugee Convention, *supra* note 38, arts. 33(1)-(2); *see also* Refugee Protocol, *supra* note 38, art. 1.

40. Refugee Convention, *supra* note 38, art. 33(1).

41. U.N. High Comm’r for Refugees, *UNCHR Note on the Principle of Non-Refoulement* (Nov. 1997), <http://www.refworld.org/docid/438c6d972.html>; *see also* Guy S. Goodwin-Gill, *Introductory Note, Convention Relating to the Status of Refugees*, AUDIOVISUAL LIBRARY INT’L L., <http://legal.un.org/avl/ha/prsr/prsr.html>; *Note on Non-Refoulement (Submitted by the High Commissioner)*, UNHCR, EC/SCP/2, ¶ 1 (Aug. 23, 1977), <http://www.unhcr.org/3ae68ccd10.html>.

42. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

43. *See* Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, U.N. Doc. HRI/GEN/1/Rev.9, ¶ 9 (Mar. 10, 1992).

44. Charter of Fundamental Rights of the European Union art. 19, 2000 O.J. (C 364) 1.

45. Organization of American States, American Convention on Human Rights, art. 22(7), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

46. *See* Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533 (2001); *see also* GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 69 (1983); Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1 (2008); Arthur C. Helton, *Asylum and Refugee Protection in Thailand*, 1 INT’L J. REFUGEE L. 20 (1989).

47. *See, e.g.*, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R., ¶ 221 (Aug. 19, 2014), http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf.

which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁴⁸

In the text of the Refugee Convention, *non-refoulement* is subject to one major exception:

(2) The benefit of the present provision [“Prohibition of Expulsion or Return (‘Refoulement’)”] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.⁴⁹

As interpreted by the UNHCR, this exception is narrow. Article 33(2) “should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, to any mitigating factors and the possibilities of rehabilitation and reintegration within society.”⁵⁰ Moreover, “[N]ational security exceptions to *non-refoulement* are not appropriate in local or isolated threats to law and order.”⁵¹ But in a world where more and more immigrants and refugees are being labeled terrorists or threats to national security,⁵² a moment’s thought suffices to engender the serious worry that

48. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. According to the UNHCR, *non-refoulement* has in fact attained the status of customary international law: “[T]he principle of *non-refoulement* is universally recognized [such that] States that have not yet acceded to [the Convention and Protocol] should nevertheless apply the principle of *non-refoulement* in view of its universal acceptance and fundamental humanitarian importance.” *Note on Non-Refoulement (Submitted by the High Commissioner)*, *supra* note 41, ¶ 18; see also U.N. High Comm’r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Jan. 26, 2007), <http://www.unhcr.org/4d9486929.pdf>. The 2001 declaration of states party to the Convention and Protocol acknowledging the “core . . . principle of non-refoulement, whose applicability is embedded in customary international law” provides strong support for this view. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 4, UN Doc. HCR/MMSP/2001/09 (Dec. 13, 2001), <http://www.unhcr.org/419c74d64.pdf>. But not all commentators agree. One respected scholar of international refugee law has stated strongly that “just because most countries have accepted some kind of *non-refoulement* obligation, applying to at least some kinds of cases, and in at least some contexts,” it cannot be concluded that *non-refoulement* is a universal duty. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 365 (2005). For the purposes of this Note, it is not necessary to resolve this debate. It is enough to note that even among those who resist applying the *jus cogens* label to *non-refoulement*, the principle is nonetheless widely respected and vehemently defended.

49. Refugee Convention, *supra* note 38, art. 33(2). The entire Convention has a similar exception, in Article 1F, excluding those convicted of war crimes and crimes against humanity from refugee status. Refugee Convention, *supra* note 38, art. 1F. As the application of the exclusion clauses is not specific to *non-refoulement*, a full examination of them is beyond the scope of this Note. However, it should be noted that these clauses have been and continue to be used in a manner that parallels the invocation of the national security exception. See U.N. HIGH COMM’R FOR REFUGEES, *Note on the Exclusion Clauses*, EC/47/SC/CRP.29 ¶ 5 (May 30, 1997), <http://www.unhcr.org/3ae68cf68.html>; European Council on Refugees and Exiles, *Position on Exclusion from Refugee Status*, PPI/03/2004/Ex/CA, 16 INT’L J. REFUGEE L. 257 (2004); William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT’L L. 94 (2012).

50. *Note on Non-Refoulement*, *supra* note 41, ¶ 14; see also UNHCR *Note on the Principle of Non-Refoulement*, *supra* note 41 (using the same language).

51. UNHCR *Note on the Principle of Non-Refoulement*, *supra* note 41.

52. See Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827 (2007); Donald Kerwin, *The Use and Misuse of “National Security” Rationale in Crafting U.S. Refugee and Immigration Policies*, 17 INT’L J. REFUGEE L. 749 (2005).

“[t]hese exceptions have the potential to gut *non-refoulement* and leave refugees vulnerable to violations of underlying human rights.”⁵³

B. The Theory of Non-Entrée

The term *non-entrée* was coined in 1992 to describe increasingly common practices under which refugees were not technically returned (which would constitute *refoulement*), but were instead systematically refused entry into their destination countries.⁵⁴ While the term has yet to be firmly defined, it has become understood to encompass a large variety of “strategies specifically designed to discourage and sometimes prevent would-be asylum seekers from accessing their asylum and other refugee status determination processes.”⁵⁵

Phil Orchard has pinned the development of the *non-entrée* “regime” to the end of the Cold War.⁵⁶ By the early 1990s, not only had numbers of refugees begun rising dramatically, but the types of refugees also began to change; most refugees were no longer anti-communist dissidents who fit neatly into the Refugee Convention’s definitions—nor were they white or European.⁵⁷ The national security-based *non-entrée* policies at issue in this Note belong to a universe of similar regimes by which sophisticated states in the Global North have created complex interdependent webs of policies that serve to deny admission to distant refugees.⁵⁸

Among the most concerning *non-entrée* programs—and the type at issue in this Note—are the so-called “‘interception’ programs.”⁵⁹ In a 2000 paper, the Executive Committee of the UNHCR acknowledged that there was no internationally accepted definition even of “interception,” but put forth a working definition:

For the purpose of this paper, interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.⁶⁰

While that Executive Committee paper stopped short of declaring that interception is necessarily a form of *refoulement*, it emphasized that interception increases the risk of indirect *refoulement*, that is, the “removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution . . . , for which several

53. Alice Farmer, *supra* note 46, at 2 (referring to both the 1F and the 33(2) exceptions).

54. See Hathaway, *supra* note 37, at 40–41.

55. Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT’L J. REFUGEE L. 677, 677 (2006).

56. PHIL ORCHARD, A RIGHT TO FLEE: REFUGEES, STATES AND THE CONSTRUCTION OF INTERNATIONAL COOPERATION 203–29 (2014).

57. *Id.*

58. See Gammeltoft-Hansen & Hathaway, *supra* note 25, at 248–57.

59. Legomsky, *supra* note 55, at 678.

60. Exec. Comm. of the U.N. High Comm’r for Refugees, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, U.N. Doc. No. EC/60/SC/CRP.17, ¶ 10 (June 9, 2000), <http://www.unhcr.org/4aa660c69.pdf>.

countries may bear joint responsibility.”⁶¹ The Executive Committee’s 2000 treatment of the legality of interception policies was cautious. This Note pushes that treatment forward, joining a body of scholarly work that seeks to explain that *non-entrée* policies can and do violate the principle of *non-refoulement*, even when such policies are implemented in the name of protecting national security.

The Refugee Convention was designed as a functional compromise based on international cooperation.⁶² The immediate neighbors of the country in crisis—disproportionately poorer, developing countries—were to keep their borders open; in return, more distant, richer countries would provide funding to support the refugees in the near term and create resettlement places to integrate the refugees into society in the long term.⁶³ But the cooperative system has broken down. Developed countries are not shouldering their share of the resettlement burden.⁶⁴

The Syrian refugee crisis exhibits this pattern. Despite all the media discussion about the “flood” of Syrian refugees into Europe,⁶⁵ the European Union is not bearing the brunt of the crisis. Germany, for example, received 173,100 applications for asylum during 2014.⁶⁶ In the same year, Turkey hosted one million refugees, the most of any country in the world.⁶⁷ Lebanon and Jordan currently host the world’s third and sixth largest refugee populations, respectively, in spite of being comparatively tiny in terms of population.⁶⁸ And while the United States leads the world in resettling refugees, its total of 73,000—even when combined with the 121,200 submitted claims for asylum—pales in comparison.⁶⁹

This disproportionate statistical picture is, by and large, the result of the Global North’s use of *non-entrée* measures. A Syrian refugee who wishes to leave Turkey cannot simply board a plane to New York; even if she has the funds, she does not have the paperwork required to pass through immigration. She might try to travel by car, foot, or boat to Greece or Bulgaria, but if border patrols catch her, she will be turned back. She can apply for refugee status with the UNHCR and hope her application is submitted for resettlement, but she probably hopes in vain; less than one percent of refugees “of concern to

61. *Id.* ¶ 22.

62. See Refugee Convention, *supra* note 38, Preamble.

63. See T. Alexander Aleinikoff & Stephen Poellot, *The Responsibility to Solve: The International Community and Protracted Refugee Situations*, 54 VA. J. INT’L L. 195 (2014).

64. See Gammeltoft-Hansen & Hathaway, *supra* note 25, at 242.

65. See, e.g., Dan Harris & Jackie Jesko, *Anti-Immigrant Protests Grow as Thousands of Refugees Flood Europe*, ABC NEWS (Dec. 21, 2015), <http://abcnews.go.com/International/anti-immigrant-protests-grow-thousands-refugees-flood-europe/story?id=35888428>; Alastair MacDonald, *E.U. Talks Tough on Deportations Amid Flood of Syrian Refugees*, REUTERS (Oct. 7, 2015), <http://www.reuters.com/article/us-europe-migrants-eu-idUSKCN0S12OE20151007>.

66. U.N. HIGH COMM’R FOR REFUGEES, WORLD AT WAR: GLOBAL TRENDS, FORCED DISPLACEMENT IN 2014, at 3 (2015), www.unhcr.org/556725e69.html.

67. *Id.* at 11-12.

68. *Id.* at 12.

69. *Id.* at 3.

UNHCR” are referred for resettlement each year.⁷⁰ These systems—visa controls, border patrols, providing few or no spaces for resettlement—are all examples of *non-entrée* policies.⁷¹

Importantly, not all such systems are illegal. Greece, for instance, does not violate the Refugee Convention by requiring visas for entry. But interception programs, which catch refugees before they can cross a border and claim the rights to which they should be due, are uniquely problematic under the system envisioned by the authors and implementers of the Refugee Convention.

II. THE TREATY DRAFTERS’ BARGAIN: OPEN BORDERS IN RETURN FOR ASSISTANCE AND LATER ADMISSION

This Part asks two critical questions about *non-entrée* systems. First, is it possible for *non-entrée* systems—and in particular, interception programs—to rise to such a level that they amount to *refoulement*? And second, if so, is the general invocation of national security concerns sufficient to bring that *refoulement* within the Article 33(2) exception?

Section II.A demonstrates that the plain text of the Refugee Convention is insufficient to answer either of these questions. Sections II.B, II.C, and II.D use alternate sources of treaty interpretation to explain that refusal to admit can amount to *refoulement* and emphasize the very narrow intended scope of the Article 33(2) exception. As this Part shows, the Refugee Convention was designed to protect uniquely vulnerable populations of refugees by balancing the interests of initial reception countries with more distant resettlement countries. The Convention put in place a cooperative system under which these countries would work together to offer refugees homes. Refusing to work cooperatively toward admission violates this central principle. The national security exception was to be construed narrowly—not read so widely that it could risk dismantling the entire edifice of the Convention.

A. Legality of National Security-Based Non-Entrée Policies is Ambiguous Under the Ordinary Meaning of Article 33

According to the Vienna Convention on the Law of Treaties, which lays out the definitive rules of treaty interpretation, the first step in answering any question about the meaning of a treaty provision is its ordinary meaning.⁷² The relevant phrase when interpreting *non-refoulement* is, of course, Article 33(1), which forbids any state to “expel or return (‘refouler’) a refugee in any manner whatsoever.”⁷³ The national security exception declares that “the present provision . . . may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he

70. U.N. HIGH COMM’R FOR REFUGEES, *Resettlement: A New Beginning in a Third Country*, <http://www.unhcr.org/pages/4a16b1676.html>.

71. See Gammeltoft-Hansen & Hathaway, *supra* note 25, at 241.

72. Vienna Convention, *supra* note 48, art. 31(1).

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

is.”⁷⁴ The ordinary meaning of the second provision is thus dependent on the ordinary meaning of the first—and flaws in the ordinary meaning of the first are readily apparent. Both “expel or return (‘refouler’) . . . in any manner whatsoever” and “reasonable grounds” are unhelpfully ambiguous.

A tragic historic example, one which predates the Refugee Convention itself, helps us show how *non-entrée* policies have the potential to constitute *refoulement*. In 1939, 907 Jews fled the Third Reich aboard the M.S. *St. Louis*. After the Cuban authorities forbid them from disembarking, the U.S. government denied them access to the New York Harbor.⁷⁵ The ship had no option but to return to Europe, where 254 of its passengers died during the Holocaust—most of them in Auschwitz and Sobibór.⁷⁶

The Refugee Convention was enacted in the wake of World War II to protect people just like the Jews on the *St. Louis*.⁷⁷ But if the Refugee Convention had been in place in 1939, would it have forbidden the United States’ actions? Technically, denying access to the harbor was a particularly blatant *non-entrée* decision, not *refoulement*. Upon return to Europe, the Jews’ lives were threatened on account of their race—but the U.S. government at least has a claim that it did not “expel” or “return” them to Germany. Yet if Article 33’s language prohibiting return “in any manner whatsoever” does not prohibit this treatment of the Jews on the *St. Louis*, it is meaningless.⁷⁸

As such, the view that *non-refoulement* extends at least as far as the country’s borders has been universally accepted. The UNHCR is clear on this in its own publications.⁷⁹ The same understanding is reflected in the European Court’s decision in *Hirsi Jamaa*⁸⁰ and in the United States Supreme Court’s acknowledgment in *Sale v. Haitian Centers Council* that refugee protection under U.S. domestic law extends to refugees who have reached the border.⁸¹ However, the text of the Refugee Convention contains no explicit right of

74. *Id.* art. 33(2).

75. See IRVING ABELLA & HAROLD TROPER, *NONE IS TOO MANY: CANADA AND THE JEWS OF EUROPE, 1933-1948*, at 63-64 (2000).

76. See SARAH A. OGILVIE & SCOTT MILLER, *REFUGE DENIED: THE ST. LOUIS PASSENGERS AND THE HOLOCAUST* 174 (2006); see also *id.*, at 63-64; Vienna Convention, *supra* note 48, art. 32(b).

77. Before the addition of the 1967 Protocol, the Refugee Convention applied only to those who had a fear of persecution “[a]s a result of events occurring before 1 January 1951,” and signatories were given the option of further limiting its impact to events “occurring in Europe” in the same date range—a euphemism for those persecuted by the Third Reich. Refugee Convention, *supra* note 38, art. 1.

78. See HATHAWAY, *supra* note 48, at 315 & n.177 (citing UNHCR Executive Committee Conclusion No. 6, “Non-Refoulement” (1977), <http://www.unhcr.org/3ae68c43ac.html>; Gregor Noll et al., *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, DANISH CTR. FOR HUM. RTS. 36 (2002); Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 AM. J. INT’L L. 661 (2002)). Because of this illogical result, there is also an argument that Article 32(b) of the Vienna Convention, which allows recourse to supplementary methods of treaty interpretation where the ordinary meaning “[l]eads to a result which is manifestly absurd or unreasonable,” should be invoked.

79. See, e.g., Executive Committee, *supra* note 60, ¶ 21.

80. See *infra* notes 173-174 and accompanying text.

81. See *Sale v. Haitian Centers Council*, 509 U.S. 155, 160 (1993) (noting that provisions of the INA forbidding *refoulement* protection apply only to “aliens who reside in or have arrived at the border of the United States”).

admission, at the border or otherwise—only the Article 33 prohibition on *refoulement*. The “ordinary meaning” of “expel or return (*refouler*) . . . in any manner whatsoever” has already been expanded. The question that remains is how much further it must go.

Imagine that the U.S. Coast Guard had intercepted the *St. Louis* and turned it around in international waters, rather than at the entrance of the New York Harbor. The immediate moral intuition is that this action is equally wrong and should be equally prohibited. But the ordinary meaning of the Refugee Convention provides no assistance in deciding where to draw that line.

With respect to the national security exception, the ordinary meaning of “reasonable grounds” is similarly ambiguous. This ambiguity is evident in the different treatments the phrase has received in different courts. The German domestic courts, for example, have been clear that the grounds for exclusion derived from Article 33(2) cannot be invoked unless a specific individual is shown to have “a share of the responsibility for the acts committed by the organisation.”⁸² However, the U.S. federal appellate courts have upheld the material support provision, which requires no such showing, arguing that it “adheres to [the Refugee Convention and Protocol’s] specific *non-refoulement* exception.”⁸³ While the simple fact that two courts do not agree is not enough to definitively prove that the text is ambiguous, the disagreement opens the door for further, in-depth analysis.⁸⁴

Since the “ordinary meaning” of Article 33 is ambiguous as to the breadth of the admission requirement and may be ambiguous as to the nature of the national security exception, this Part will turn to supplementary methods of treaty interpretation to clarify the meanings of the two sections. Following the Vienna Convention, I look in turn to the treaty’s “object and purpose,”⁸⁵ to “subsequent practice in the application of the treaty,”⁸⁶ and finally, to “the preparatory work of the treaty and the circumstances of its conclusion.”⁸⁷

B. Object and Purpose and Subsequent Practice Are of Limited Use in Interpreting the Scope of Refoulement

The Refugee Convention’s object and purpose are not clearly stated in its text, although its preamble provides some hints.⁸⁸ According to the UNHCR, a “close reading of the preamble leads to the conclusion that the object and purpose of the [Refugee Convention] is to ensure the protection of the specific

82. Joined Cases C-57/09 & C-101/09, Fed. Republic of Ger. v. B & D, 2010 E.C.R. I-000, ¶ 95.

83. Khan v. Holder, 584 F.3d 773, 784 (9th Cir. 2009).

84. See HATHAWAY, *supra* note 48, at 60 (“[T]here is quite a low threshold for deeming the text of a treaty to be ambiguous or obscure.”).

85. Vienna Convention, *supra* note 48, art. 31(1).

86. *Id.* art. 31(3)(b).

87. *Id.* art. 32. Note that the treaty interpretation in this Part will focus exclusively on the Refugee Convention, rather than the 1967 Protocol. The Protocol expanded the time frame of the definition of refugee but added no new substantive rights to the international legal regime.

88. The Vienna Convention specifically notes that the preamble to a treaty is one of the sources of context for treaty interpretation. *Id.* art. 31(2).

rights of refugees, to encourage international cooperation in that regard . . . and to prevent the refugee problem from becoming a cause of tensions between states.”⁸⁹ Others disagree slightly on the wording, but not on the sentiment.⁹⁰

Here, it suffices simply to note that the Refugee Convention aims to give rights to refugees. Given that the prohibition on *refoulement* is universally recognized as a central provision of the Convention, any reading of the prohibition which undermines refugee rights is immediately suspect. As Hathaway put it, “[I]f states were able with impunity to reach out beyond their borders to force refugees back to the risk of being persecuted . . . the entire Refugee Convention—which is predicated on the ability of refugees to invoke rights of protection in state parties—could, as a practical matter, be rendered nugatory.”⁹¹ The same is true if states needed only to declare that security risks exist to make such a move. While this object-and-purpose analysis affirms that *refoulement* cannot be strictly limited to only state action within a country’s borders, it cannot prove how far *refoulement* can be extended. One could argue that refugees’ rights would be better protected if, for example, the United States invaded Syria or if Turkey became a member of the European Union, but the Refugee Convention cannot oblige either action.

Next, the Vienna Convention requires that treaty interpretation take into account “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁹² This careful phrasing makes clear that the goal of the inquiry is not to catalog all practices by all parties to a treaty. Rather, it is important to consider only practice which “establishes the agreement of the parties.” For multilateral treaties, this is a high bar.⁹³ The simple fact that the United States and the EU have at various points in recent history considered themselves obligated to admit large numbers of refugees or felt free to establish *non-entrée* policies do not establish agreement. It might be relevant that most of the countries in the Global North are now participants in a network of *non-entrée* policies, if such policies were shown to be consistent and concordant.⁹⁴ But that fact is of dubious importance when countries in the Global South, which are disproportionately burdened by the job of hosting refugees, are still calling on their richer counterparts to take more of the burden.⁹⁵ “Less-than-unanimous state practice is at best an awkward source of guidance on the meaning of

89. U.N. High Comm’r for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, 20 REFUGEE SURV. Q. 77 (2001).

90. See, e.g., KEES WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 35 (2009).

91. HATHAWAY, *supra* note 48, at 163-64.

92. Vienna Convention, *supra* note 48, art. 31(3)(b).

93. See RICHARD GARDINER, TREATY INTERPRETATION § 4.3.3 (2d ed. 2015) (“The interpretative value of subsequent practice, which by definition is not a formal, textual agreement, is wholly dependent on the practice being concordant, the agreement being that of all parties and the resultant interpretation being a single autonomous one.”)

94. See Gammeltoft-Hansen & Hathaway, *supra* note 25.

95. See, e.g., *Queen Rania’s Speech at the Walther Rathenau Prize Ceremony – Berlin*, QUEEN RANIA MEDIA CTR. (Sept. 17, 2015), <http://www.queenrania.jo/en/media/speeches/queen-ranias-speech-walther-rathenau-prize-ceremony-berlin>.

multilateral treaties,”⁹⁶ and concordant practice among wealthy countries is insufficient to prove agreement among all the parties to the Refugee Convention.

As to the universality of employing security-based justifications, even countries in the Global South which host large numbers of refugees express concerns about national security in their decisions to admit, deny, or return refugees. In January 2016, media outlets estimated that 16,000 Syrian refugees were waiting at the Jordanian border, refused admission because of the government’s concerns that they had been infiltrated by ISIS.⁹⁷ In 2015, in the wake of a mass shooting at a Kenyan university, Kenya gave the United Nations three months to move the Dadaab refugee camp across the border into Somalia, citing concerns about fighters hiding in the camp.⁹⁸ These types of episodes may serve as evidence of a consistent practice of taking national security concerns into account in processing refugees. This minimal level of agreement would likely be uncontroversial, but it also proves unhelpful in defining the limits of the obligation to admit. Any such obligation could not be a blanket rule that all refugees must be admitted at all times regardless of security concerns.

It might be that a more in-depth analysis of state practice could define particular principles that are universally accepted and could usefully define the intended breadth of the obligation to admit, the national security exception, or both. Such an analysis has not, to my knowledge, been done, and it would be beyond the scope of this Note to embark on it here. The available evidence of state practice shows only that an obligation to admit can never be absolute and that, at a minimum, states must be able to consider national security in denying entrance to individuals. While both of these propositions are correct, they do not helpfully advance the debate.

C. The Travaux Préparatoires Clarify that the Goal Is Collaboration To Admit, Not Collaboration To Deny

Under the Vienna Convention, when plain text, object and purpose, and subsequent practice all prove insufficient to clarify the nature of a provision, the next step is looking to the “preparatory work of the treaty and the circumstances of its conclusion.”⁹⁹ The Refugee Convention did not emerge out of a vacuum. In the search to determine the nature of the obligation to admit and the national security exception, the first step will be to find which of the reams of papers left by the Convention drafters are most critical to develop an understanding of their intentions and circumstances. To that end, this Section

96. HATHAWAY, *supra* note 48, at 73.

97. See Emma Gatten, *Jordan Blocks Syria Border Leaving Thousands of Refugees in the Desert—Including Hundreds of Pregnant Women*, INDEPENDENT (Jan. 22, 2016), <http://www.independent.co.uk/news/world/middle-east/jordan-blocks-syrian-border-to-leave-thousands-of-refugees-trapped-in-the-desert-including-hundreds-a6828471.html>.

98. See *Kenya Orders UN To Move Massive Somali Refugee Camp*, AL JAZEERA (Apr. 11, 2015), <http://www.aljazeera.com/news/africa/2015/04/kenya-orders-move-massive-somali-refugee-camp-150411190428267.html>.

99. Vienna Convention, *supra* note 48, art. 32.

proceeds chronologically through the three main events in the drafting of the Refugee Convention, analyzing first its foundational documents, second the committee drafting decisions, and third the final conference's ratification debates.

Only two scholars have reviewed the portions of the Refugee Convention's *travaux préparatoires* dealing with Article 33. First, Paul Weis wrote the general commentary on the collected *travaux*, including in the commentary his broad conclusions on the nature of *refoulement* and its exceptions.¹⁰⁰ Second, James Hathaway analyzed various sections of the *travaux* in his explanation of the reach of Article 33.¹⁰¹ To those two works, this Note adds a systematic, national-security-centered view of the development of the two provisions at hand.

1. *Convention Circumstances: Confronting the Problem of Statelessness*

From its earliest stages, the Refugee Convention was designed to decrease the number of refugees by increasing international cooperation. Entry was assumed but not the center of debate. In 1948, the Economic and Social Council commissioned a "study of the existing situation in regard to the protection of stateless persons."¹⁰² The resulting report, *A Study of Statelessness*, is considered a "key document in the modern history of international protection of refugees," already containing the "main elements of the 1951 Convention."¹⁰³ The study concludes that the phenomenon of illegal entry may only be solved through international cooperation, by "encouraging the appropriate distribution of stateless persons and by that very fact making their presence less burdensome."¹⁰⁴ The focus on cooperation among reception countries to admit refugees is in the DNA of the Refugee Convention, there from its earliest conception.

To the extent the study is concerned with admission, it is only in the context of "reduc[ing] the number of existing stateless persons by giving them a nationality or restoring it to them, after permitting them to settle in a country and integrating them in its national life."¹⁰⁵ Where travel and the right to entry are mentioned, it is usually in the context of providing documents to stateless

100. See PAUL WEIS, *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED* (1995).

101. HATHAWAY, *supra* note 48, at 300-35.

102. Economic and Social Council Res. 116(VI)D (Mar. 1-2, 1948).

103. Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT'L REV. RED CROSS 727, 733-34 (2001).

104. UNITED NATIONS DEP'T OF SOCIAL AFFAIRS, *A STUDY OF STATELESSNESS* 20 (1949). The category of "stateless persons" includes many individuals who would currently be called refugees. According to the *Study*, "[R]efugees are . . . de facto stateless persons if without having been deprived of their nationality they no longer enjoy the protection and assistance of their national authorities." *Id.* at 9. But it assumed that all the stateless refugees who needed to be considered already existed. The study declared that statelessness "resulted from the Nazi and Fascist regimes [and] disappeared with their fall." *Id.* at 150.

105. *Id.* at 12.

persons.¹⁰⁶ The vast majority of the study, like the vast majority of the Refugee Convention, is devoted to improving conditions for affected individuals already in a state's territory. Because of this focus on in-country conditions, it is not surprising that the Secretary-General's accompanying recommendations focus on discrimination and the provision of legal status, rather than admission, expulsion, or *refoulement*.¹⁰⁷ Admission had already happened, and entry was assumed.

National security, by contrast, was of minimal importance. The study notes in passing that "[e]xpulsion and reconduction are universally recognized measures of order and security" and expresses concern that the "desire to guarantee order and security leads to the creation of outlaws."¹⁰⁸ The study warns against using denationalization as a punishment.¹⁰⁹ The dual rationalizations of national security and public order are periodically invoked but never examined in any detail. The study does not usefully explain the breadth of the national security exception.

In the period from the composition of the study in 1948 to the passage of the Refugee Convention in July 1951,¹¹⁰ the recognized refugee problem was one of discrimination and assimilation, not of denied entry. As the Secretary-General noted in his recommendations to the drafting committee, the proposed changes "will herald a new phase of the refugee problem. . . . This will be a phase of the settlement and assimilation of the refugees."¹¹¹

This is not to say, of course, that admission was not considered in the course of the debates about the Refugee Convention. The treaty drafters drew heavily from the 1933 Convention relating to the International Status of Refugees, a League of Nations convention dealing with the rights of Russian and Armenian refugees.¹¹² Article 3 of the 1933 Convention provided:

106. *See id.* at 54.

107. *Id.* at 73.

108. *Id.* at 21.

109. *Id.* at 159.

110. In 1949, armed with the results of the study, the U.N. Economic and Social Council appointed the *Ad Hoc* Committee on Statelessness and Related Problems to "consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention." Economic and Social Council Res. 248 (IX) B (Aug. 8, 1949). The Secretary-General then furnished the *Ad Hoc* Committee with a memorandum on the recommended outlines of the new convention, including in its annex a draft convention. Memorandum from the Secretary-General to the *Ad Hoc* Committee on Statelessness and Related Problems, *Status of Refugees and Stateless Persons*, U.N. Doc. E/AC.32/2 (Jan. 3, 1950) [hereinafter Memorandum from the Secretary-General to the *Ad Hoc* Committee], <http://www.unhcr.org/3ae68c280.html>. Soon after, the *Ad Hoc* Committee circulated a report that included another draft convention which would serve as the basis for the committee's drafting debates. Rep. of the *Ad Hoc* Committee on Statelessness and Related Problems, U.N. Doc. E/1618, at 61 (1950), <http://www.refworld.org/docid/40aa15374.html>. The Committee's first session was held in New York in January and February of 1950; its second session took place in Geneva in August of the same year. *See* WEIS, *supra* note 100, at 2-3. The Economic and Social Council accepted the *Ad Hoc* Committee's draft, the General Assembly convened a Conference of Plenipotentiaries to finalize the Convention, and, in July 1951, the Conference adopted the final text of the Refugee Convention. *See* Goodwin-Gill, *supra* note 41.

111. Memorandum from the Secretary-General to the *Ad Hoc* Committee, *supra* note 110.

112. Convention of 28 October, 1933 relating to the International Status of Refugees, 159 U.N.T.S. 3663 [hereinafter 1933 Convention]. The 1933 Convention was ratified by nine countries, including France and the United Kingdom. *See* Jaeger, *supra* note 103, at 730.

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, *such as expulsions or non-admittance at the frontier (refoulement)*, refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

*It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.*¹¹³

Under the 1933 Convention, admission was required.

In the Secretary-General's draft convention, he made clear that he hoped to expand the right of entry even further. His draft Article III provided that the "High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to [refugees seeking asylum]. They shall do so, *inter alia*, by agreeing to receive a certain number of refugees in their territory."¹¹⁴ The commentary attached to this Article elaborated on the nature of the right that was contemplated:

Owing to their geographical position and liberal traditions, some States are destined to become the initial reception countries for refugees. It is but just that other countries should not allow these to bear the whole burden and by agreeing to admit a certain number of refugees to their territory should assume their equitable share.

Clearly no binding and precise obligations can be imposed on Governments – for example by specifying the extent to which they must agree to receive refugees on their territory. It is for this reason that the Article includes the deliberately vague form of words: "a certain number of refugees."¹¹⁵

The Secretary-General's framing of the issue animated the committee's debates over what would become Article 33. Members of the drafting committee would come to identify themselves as initial reception countries or resettlement countries. In trying to reach a workable compromise between the two groups, however, the article requiring admission foundered.

2. *Drafting Decisions: Considering an Article Requiring Admission*

The Ad Hoc Committee devoted two hours on the morning of January 23, 1950, to discussing the possibility of introducing an article on admission. In that morning's debate, the continental Europeans—representing that era's initial reception countries—emerged as the champions of the requirement for admission. In the words of the French representative, "The provisions on the admission of refugees embodied the essence of international policy with regard to refugees."¹¹⁶ The Belgian and Danish representatives agreed.¹¹⁷

No one present at the meeting expressed disagreement with the spirit of the proposed article—but the resettlement countries quibbled with its placement. As the Brazilian representative put it, the "only disagreement

113. 1933 Convention, *supra* note 112, art. 3 (emphases added).

114. Memorandum from the Secretary-General to the Ad Hoc Committee, *supra* note 110.

115. *Id.*

116. Ad Hoc Comm. on Refugees and Stateless Persons, 1st Sess., 7th mtg. ¶ 14, U.N. Doc. E/AC.32/SR.7 (Jan. 23, 1950).

117. *Id.* ¶¶ 30, 47.

seemed to be on a purely technical matter: where and how the principle in question should be stated.”¹¹⁸ The strongest statement against including a requirement for admission in the Refugee Convention was voiced by the U.S. representative, who maintained that the “convention dealt with refugees who had already been granted asylum and with their legal protection. The admission of refugees, however, was connected with the problem of assistance, which was not part of the Committee’s business.”¹¹⁹ In the end, the participants voted six to three with two abstentions not to include an article on admission.¹²⁰

The U.S. representative’s view that admission was not relevant to the Convention did not take the day. As the Committee Chairman noted, the “vote only excluded the clause from the operative part of the convention, and . . . the Committee would subsequently have to find another place for it, either in the preamble or in a resolution of the General Assembly.”¹²¹ This was precisely what happened. By the time the question of admission reached the Conference of Plenipotentiaries, it had morphed into a unanimously adopted recommendation that “Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.”¹²² The treaty adopters were not rejecting the argument for admission. The parties involved were concerned that an article requiring admission in the body of the Convention would be over-read and difficult to enforce. The ethos of admission and the drive to find paths for cooperation between initial reception countries and resettlement countries remained an animating principle.

One might argue that because the Committee considered and rejected an admission requirement, no obligation to admit can ever be read into Article 33. This is true in two limited senses. First, Article 33 does not and cannot be read to require states to admit all refugees who reach or attempt to reach their borders. And second, Article 33 does not require states to admit any set number of refugees. But the Committee was clear that admission of refugees was critical to the success of the treaty’s framework of refugee rights. Admission *was* included in the framing of the Convention, just as it has been included in judicial interpretations of the Convention’s application to border admissions,¹²³ because it was necessary for a system of refugee rights to exist at all.

The summary of the Ad Hoc Committee’s debates on Article 28, which would eventually be re-numbered to Article 33, was succinct and to the point: “While some question was raised as to the possibility of exceptions to Article 28, the Committee felt strongly that the principle here expressed was

118. *Id.* ¶ 25.

119. *Id.* ¶ 39.

120. *Id.* ¶ 49.

121. *Id.* ¶ 50.

122. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at 9, U.N. Doc. A/CONF.2/108/Rev.1 (July 25, 1951).

123. *See supra* notes 79-81 and accompanying text.

fundamental and that it should not be impaired.”¹²⁴ The Committee believed the issue of return was fundamental, and simply debated—exactly as this Note will continue to do—under what circumstances admission might be necessary.

3. *Ratification Debates: Explaining the Contours of Non-Refoulement and the National Security Exception*

It is in the context of this appreciation of the general principle in favor of admission that the national security exceptions which would become Article 33(2) should be read. The Ad Hoc Committee’s proposed article on *non-refoulement* had no national security exception.¹²⁵ It was only at the latest possible stage, during the Conference of Plenipotentiaries, that France and the United Kingdom introduced a draft amendment to Article 28 that would become the national security exceptions.¹²⁶ On the same day, Sweden introduced a similar amendment.¹²⁷ When debate over the proposed amendments began, the Canadian representative reminded the Conference that the Ad Hoc Committee

had regarded article 28 as of fundamental importance to the Convention as a whole. In drafting it, members of that Committee had kept their eyes on the stars but their feet on the ground. Since that time, however, the international situation had deteriorated, and it must be recognized, albeit with reluctance, that at present many governments would find difficulty in accepting unconditionally the principle embodied in article 28.¹²⁸

It is unclear what this deterioration was, but two likely candidates emerge. First, between the publication of the final report of the Ad Hoc Committee in August 1950 and the introduction of these amendments in July 1951, the Korean War had hardened into an international crisis and begun to produce large numbers of refugees.¹²⁹ Second, in April 1951, Julius and Ethel Rosenberg were sentenced to death for espionage.¹³⁰ Regardless of the precise historical event that occasioned this change in opinion, by 1951, only the representatives from Switzerland and the Holy See voiced support for an unamended version of Article 28.¹³¹ The British representative captured the mood of the room most succinctly when he stated, “Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and

124. Report of the Ad Hoc Committee on Refugees and Stateless Persons, 2nd Sess. ¶ 30, U.N. Doc. E/1850 (Aug. 25, 1950).

125. Report of the Ad Hoc Committee on Statelessness and Related Problems, *supra* note 110, at 23.

126. Conference of Plenipotentiaries, France/United Kingdom: Amendment to Article 28, U.N. Doc. A/CONF.2/69 (July 11, 1951).

127. Conference of Plenipotentiaries, Sweden: Amendment to Article 28, U.N. Doc. A/CONF.2/70 (July 11, 1951).

128. Conference of Plenipotentiaries, 16th mtg., U.N. Doc. A/CONF.2/SR.16 (Nov. 23, 1951). The U.K. representative made a similar statement at the same meeting. *Id.*

129. See Sahr Conway-Linz, *Beyond No Gun Ri: Refugees and the United States Military in the Korean War*, 29 *DIPLOMATIC HIST.* 49 (2005).

130. See William R. Conklin, *Atom Spy Couple Sentenced to Die; Aide Gets 30 Years*, N.Y. TIMES (Apr. 6, 1951), <http://www.nytimes.com/learning/general/onthisday/big/0405.html#article>.

131. Conference of Plenipotentiaries, 16th mtg., *supra* note 128.

it would be unreasonable to expect the latter not to safeguard itself against such a contingency.”¹³² No further elaboration was provided as to the nature of the national security threat envisaged by the first portion of the amendment.¹³³

In clarifying the breadth of the admission requirement, the initial reception countries once again took the stage, just as they had in the committee’s drafting debates. The Swiss representative noted during the debates that, when large-scale migrations of refugees occur, all contracting states will have to assist the overburdened initial reception countries by agreeing to resettle some of the arriving refugees, lest a small country’s very existence be threatened.¹³⁴ The Swiss representative was concerned about requiring admission in the initial reception countries, worried that countries next door to war zones might be forced to accept more refugees than they could hold. He called on resettlement countries to assist the overburdened initial reception countries. In the final meeting before the Conference of Plenipotentiaries adjourned, the representative from the Netherlands brought up what he called the “Swiss interpretation,” declaring that he “wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.”¹³⁵ Some commentators have interpreted this reading into the record too generously, saying that it means admission is not necessarily required.¹³⁶ But its context must be understood. The Swiss representative spoke for initial reception countries whose very existence was threatened by floods of refugees, demanding that resettlement countries work with them to counter that existential threat. The Swiss interpretation does mean that when a state’s very existence is called into doubt because of the number of refugees entering, it may refuse them. But it also means that resettlement countries must share the burden of providing homes for refugees before they become such a threat.

Commentator Paul Weis drew two relevant conclusions from his analysis of the Convention’s *travaux*. First, Weis noted that the “words ‘in any manner whatsoever’ would seem to indicate that” Article 33(1) “‘applied to non-admittance at the frontier.’”¹³⁷ Second, he concluded that Article 33(2) “has, like all exceptions, to be interpreted restrictively. Not every reason of national security may be invoked[;] the refugee must constitute a danger to the national security of the country.”¹³⁸ The national security exceptions were introduced only belatedly and intended to be read as a specific national safeguard to allow

132. *Id.*

133. *Id.*

134. Conference of Plenipotentiaries, 3rd mtg., U.N. Doc. A/CONF.2/SR.3 (July 3, 1951) (“*Toutefois, la délégation suisse pense qu’il va sans dire que les Etats contractants devront s’engager à se prêter appui mutuellement et à aider leur pays où pénétrerait une masse de réfugiés en raison de sa situation géographique, en prenant chez eux certains de ces réfugiés. Il tombe sous le sens qu’un petit pays ne saurait accepter un nombre illimité de réfugiés sans mettre en danger son existence.*”)

135. Conference of Plenipotentiaries, 35th mtg., U.N. Doc. A/CONF.2/SR.35 (Dec. 3, 1951), <http://www.refworld.org/docid/3ae68ceb4.html>.

136. See, e.g., WEIS, *supra* note 100, at 342.

137. *Id.* at 341.

138. *Id.* at 342.

removal of those who threatened the “country of their asylum,”¹³⁹ not to allow for broad-based refusal to give access to asylum proceedings.

There are further conclusions to be drawn in the specific context of this Note. The treaty drafters assumed that receiving refugees into states’ territories, while not a binding obligation as to any individual refugee, was a governing principle that animated the spirit of the treaty itself. In addition, while the precise way in which *non-refoulement* obligations were intended to function in the context of mass migrations was the subject of some debate, the core concern voiced by initial reception countries was desire for reassurance that larger and more distant countries would be required to assist in situations that threatened to overwhelm them.

It should be emphasized that the addition of Article 33(2) makes clear that any obligation to admit cannot ever be absolute. No state is required to admit refugees who it reasonably believes to be, for example, planning terrorist attacks within its borders. States may have border fences, visa requirements, and background checks. While arguably *non-entrée* policies, they are legitimately and intimately related to the security interests Article 33(2) seeks to protect. But neither can a state seize upon Article 33(2) and declare it may intercept refugees abroad because they are, categorically, security risks. As the “Swiss interpretation” makes clear, the premise of the two clauses of Article 33 is that states will work with one another to relieve the burden on initial reception countries. When states instead work with one another to ensure no refugees may leave the initial reception countries—whether national security is invoked as a justification or not—the agreement is broken.

D. Assuming Entry in Early Practice

Analysis of the international community’s response to the Hungarian refugee crisis of 1956, the first large-scale refugee crisis handled under the auspices of the Refugee Convention and the UNHCR, confirms this reading.¹⁴⁰ Over the course of only a few months in late 1956 and early 1957, 200,000 refugees fled from Hungary into Austria and Yugoslavia.¹⁴¹ The first weekend in November alone, 10,000 people crossed the Austrian border.¹⁴² A week after the first refugees began arriving, the Austrian interior minister sent a telegram to the UNHCR requesting financial assistance and aid in securing resettlement.¹⁴³ Resettlement began two days later,¹⁴⁴ and 100,000 people were

139. See *supra* note 132 and accompanying text.

140. See Rupert Colville, “A Matter of the Heart”: *How the Hungarian Crisis Changed the World of Refugees*, 144 REFUGEES 4, 9 (2006); Marjoleine Zieck, *The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement*, 5 AMSTERDAM L. FORUM 45, 46 (2013).

141. See YEARBOOK OF THE UNITED NATIONS 1957, at 232 (1958); Zieck, *supra* note 140, at 49.

142. See Colville, *supra* note 140, at 6.

143. Zieck, *supra* note 140, at 50-51.

144. See *id.* at 49; see also Colville, *supra* note 140, at 9.

resettled in the first ten weeks.¹⁴⁵ By the end of 1957, more than 160,000 refugees had been resettled.¹⁴⁶

In response to the crisis, receiving countries waived or sped up admission procedures, sometimes requiring as little as three days from admission to resettlement.¹⁴⁷ In the end, refugees were resettled in thirty-seven different countries—almost half the countries that were then members of the United Nations.¹⁴⁸ Admission and cooperation were the order of the day.

It would be an overstatement to say that the response to the Hungarian refugee crisis was a perfect implementation of the admission and resettlement scheme in the Refugee Convention. First, of the thirty-seven resettlement countries, only seventeen had ratified the Convention as of October 1956.¹⁴⁹ (All but one have since ratified the Convention, the Protocol, or both; the lone holdout is Cuba.¹⁵⁰) And second, although admission was clearly the order of the day, a number of countries were criticized for restrictive or discriminatory admission criteria. Only a very few states indicated they would accept all refugees who wished to travel there.¹⁵¹ By contrast, Portugal and Denmark, for example, offered resettlement exclusively to mothers and children.¹⁵² And while governments expressed concern about the possibility of Soviet spies hiding among the masses,¹⁵³ the biggest concern of most resettlement countries was that the refugees they took in should be productive members of the economy. To this end, Austrian officials requested that other states “take not only the young, the strong, the skilled, but also the lame, the sick, the handicapped, the uneconomic families.”¹⁵⁴ Their request was largely, but not entirely, successful. By the end of 1957, the Yearbook of United Nations reported that “[a]pproximately 11,000 of the 19,000 [Hungarian refugees remaining in Austria] either wished to remain in Austria or were considered likely to do so through failing to meet the selection criteria of countries of resettlement.”¹⁵⁵

In early practice, admission, though not automatic, was not a hotly contested issue. National security was not a blanket excuse to dodge

145. Rupert Colville, *Fiftieth Anniversary of the Hungarian Uprising and Refugee Crisis*, U.N. HIGH COMM’R FOR REFUGEES (Oct. 23, 2006), <http://www.unhcr.org/453c7adb2.html>.

146. See YEARBOOK OF THE UNITED NATIONS 1957, *supra* note 141, at 233.

147. UNITED NATIONS, THE EXODUS FROM HUNGARY 10-12 (1957).

148. See Colville, *supra* note 140, at 10; Zieck, *supra* note 140, at 59-60.

149. The seventeen countries are Australia, Austria, Belgium, Denmark, Ecuador, France, Germany, Iceland, Ireland, Israel, Italy, Luxembourg, Netherlands, Norway, Sweden, Switzerland, and the United Kingdom. For the dates that each country ratified the Refugee Convention, see *Status of the Refugee Convention*, *supra* note 38.

150. See *id.*; see also *Refugee Protocol*, *supra* note 38. The Federation of Rhodesia and Nyasaland and the Union of South Africa each received Hungarian refugees for resettlement; their present-day successor states, Zimbabwe and South Africa, have ratified the Refugee Convention.

151. See Zieck, *supra* note 140, at 55 (noting the willingness of France, Belgium, Luxembourg, and Switzerland to accept all refugees).

152. *Id.*

153. Johanna Granville, *Of Spies, Refugees and Hostile Propaganda: How Austria Dealt with the Hungarian Crisis of 1956*, 91 HIST. 62 (2006).

154. UNITED NATIONS, *supra* note 147, at 11.

155. YEARBOOK OF THE UNITED NATIONS 1957, *supra* note 141, at 233.

resettlement. That the United States and the European Union have changed their tunes in the last fifty years is perhaps unsurprising. European countries are no longer initial reception countries, and modern refugees are not Europeans, sharing a racial and cultural history with their destination countries. And neither the United States nor the European Union has any interest in giving up the control over migration policy built over the last several decades.¹⁵⁶

III. A CASE STUDY IN CHALLENGING *NON-ENTRÉE* POLICIES: EUROPE'S ATTEMPTS TO BAR SYRIAN REFUGEES

The response to Hungary's crisis in 1956, the sort of international cooperation envisioned in the *travaux*, is not the response refugees are witnessing today. Rather than working together to admit as many refugees as they safely can, countries in the Global North today have implemented interception programs under which refugees may be stopped before they ever arrive at their destination countries' borders, often in the name of protecting national security.¹⁵⁷

The foregoing analysis of the Refugee Convention's preparatory materials and the earliest practice after it was drafted leads to two conclusions: first, that admission was intended to be an animating principle of the Refugee Convention, and second, that the national security exceptions were never intended to sweep so broadly as to permit the wholesale barring of refugees. Countries that have signed the Refugee Convention should not be permitted to invoke broad national security arguments to avoid their responsibilities to admit and care for refugees. This Part explains in further detail why and how those policies violate international law and could be challenged in courts of law.

This Part picks out a single case study in the web of interception policies Europe has put into place: the European Union's deal with Turkey to increase border security on routes refugees travel. It explains that the deal is a cooperative policy designed expressly to deny refugees the benefit of admission into Europe, and shows how it could be challenged.

A. *The European Union's Use of Turkey to Halt the Flow of Syrian Refugees*

In 2014, Syrians crossed land and sea borders to file more asylum petitions than Europe had received at any time in the previous twenty years, and numbers rose even more in 2015.¹⁵⁸ The UNHCR estimated that between April 2011 and December 2016, 1,177,914 Syrians applied for asylum in the European Union.¹⁵⁹

156. See Guy S. Goodwin-Gill, *The Continuing Relevance of International Refugee Law in a Globalized World*, 10 INTERCULTURAL HUM. RTS. L. REV. 25, 32 (2015).

157. See *supra* notes 3-31 and accompanying text.

158. See Shekhar Aiyar et al., *The Refugee Surge in Europe: Economic Challenges*, IMF 9-10 (Jan. 2016), <https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf>.

159. See *Syria Regional Refugee Response*, U.N. HIGH COMM'R FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/regional.php>. Meanwhile, more than 4.7 million Syrian refugees

Responding to this increase, in October 2015, Turkey and the European Union released a Joint Action Plan to “step up their cooperation on . . . migration management in a coordinated effort to address the crisis created by the situation in Syria.”¹⁶⁰ Turkey agreed to increase humanitarian aid to refugees, to “strengthen the interception capacity of the Turkish Coast Guard,” and to “[s]tep up cooperation with Bulgarian and Greek authorities to prevent irregular migration across the common land borders.”¹⁶¹ A month later, EU leaders announced that they had agreed to pay Turkey US\$3.23 billion to support its efforts to increase border patrols and “stem[] the unprecedented migration influx into Europe.”¹⁶² In March 2016, the governments announced a new policy to curb “illegal migration.”¹⁶³ Under its terms, “[i]n order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk,” all “new irregular migrants” who crossed from Turkey into Greece would be returned to Turkey; for each individual so returned, “another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.”¹⁶⁴

Turkey has since been accused of a number of human rights violations, including closing its border to Syrian refugees, killing and injuring Syrians at the border, and illegally detaining and deporting refugees.¹⁶⁵

Human rights advocacy groups have warned that that the EU-Turkey agreement could make the European Union complicit in these and other human rights violations committed by Turkey against refugees.¹⁶⁶ As a matter of international law, that sense of moral responsibility could translate into illegality according to a number of different theories. First and most simply, it may be the case that returning refugees to Turkey is itself either *refoulement* or impermissibly degrading treatment.¹⁶⁷ Second, a refugee returned to Turkey may in turn be removed to Syria or to another country where she faces persecution, a process called “chain *refoulement*” and for which international

were registered in Turkey, Egypt, Iraq, Jordan, and Lebanon during the same period. *Id.* Note that of these countries, only Turkey and Egypt are parties to the Refugee Convention.

160. *EU-Turkey Joint Action Plan*, EUR. COMM’N (Oct. 15, 2015), http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

161. *Id.*

162. Pop, *supra* note 7.

163. Press Release, EU-Turkey Statement, *supra* note 9.

164. *Id.*

165. See *Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, AMNESTY INT’L (Dec. 16, 2015), <https://www.amnesty.org/en/documents/eur44/3022/2015/en>; *Turkey: Border Guards Kill and Injure Asylum Seekers*, HUM. RTS. WATCH (May 10, 2016), <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>; *Turkey: Syrians Pushed Back at the Border*, HUM. RTS. WATCH (Nov. 23, 2015), <https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>.

166. See, e.g., *Turkey: E.U. Risks Complicity in Violations as Refugees and Asylum-Seekers Locked Up and Deported*, AMNESTY INT’L (Dec. 16, 2015), <https://www.amnesty.org/en/latest/news/2015/12/turkey-eu-refugees-detention-deportation>.

167. See Sergio Carrera et al., *The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities*, CTR. FOR EUR. POL’Y STUD. 18 (Dec. 2015), https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf.

courts have assigned liability.¹⁶⁸ The topic of this Note, however, is a third theory of liability, designed to protect the refugees who were denied access to Europe. But there is a jurisdictional problem that must be addressed before such liability can be assigned.

B. Establishing Jurisdiction Over EU Actions Abroad

The diabolical brilliance of interception programs is that they occur outside the reception country's borders. The EU-Turkey deal happens outside Europe, such that European governments can plausibly deny responsibility for what happens to those refugees. As this Section will show, though, courts are already developing the tools to ensure that countries cannot simply operate at a remove from the harms their policies create and disavow responsibility.

The UNHCR Executive Committee is quite clear that the "international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law."¹⁶⁹ But bringing a challenge on behalf of refugees outside the destination country's borders faces a legal hurdle; the refugees challenging the destination country's laws would not be physically present in that country and so may be unable to claim the benefit of its legal obligations and protections.

The problem is one of jurisdiction. Jurisdiction in public international law is not the harsh procedural bar that is familiar to U.S. civil procedure students; it is a "remedial, as opposed to a substantive, notion of jurisdiction. Its function is to ensure that breaches of the Convention are duly attributed to the relevant contracting state and that therefore responsibility is assumed and remedies implemented."¹⁷⁰ Jurisdiction is a matter of accountability. As the International Court of Justice (ICJ) put it in determining South Africa's responsibility for acts committed in Namibia, "South Africa, being responsible for having created and maintained [this] situation . . . has the obligation to put an end to it. . . . It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia."¹⁷¹

The European Court of Human Rights has joined with the ICJ and other international courts to create a thriving jurisprudence of jurisdiction. The European Court's best-known doctrine of extraterritorial jurisdiction hinges on the exercise of "effective control" over a foreign territory. According to the European Court, effective control is "exceptional," occurring when, "as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, [a foreign State] exercises all

168. See, e.g., *T.I. v. United Kingdom*, App. No. 43844/98, 2000-III Eur. Ct. H.R. 435.

169. Exec. Comm. of the U.N. High Comm'r on Refugees, *supra* note 60, ¶ 23.

170. Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 540 (2003).

171. Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, ¶ 118 (June 21); see also *Coard et al. v. United States*, Case No. 10,951, Inter-Am Comm'n H.R., Report No. 109/99, ¶ 37 (1999).

or some of the public powers normally to be exercised by that Government.”¹⁷² For effective control to be found in the case of Syrian refugees, litigants would have to show that, for example, EU assistance to Turkish security forces rises to the level of exercising a government’s public powers.

However, in the context of claims of extraterritorial *refoulement*, the European Court has applied a less stringent test than the effective control standard. The European Court has been clear that there is no requirement of physical presence in an EU country in order to claim the benefit of *non-refoulement*. In *Hirsi Jamaa v. Italy*, the European Court declared that when an Italian ship intercepted refugees in international waters in order to return them, that “constitute[d] a case of extraterritorial exercise of jurisdiction by Italy capable of engaging that State’s responsibility under the Convention.”¹⁷³ The court based this finding of jurisdiction on the international law principle that a “vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying.”¹⁷⁴ Whether jurisdiction might be similarly available to refugees on land in foreign countries is discussed further below;¹⁷⁵ for now, it suffices to show that the simple fact that refugees are outside their European destination country does not bar them from seeking relief.

C. The EU’s Political Bargain to Bar Access Amounts to Aiding or Assisting Refoulement

But to hold Europe responsible for intercepting refugees abroad, a court would not only need to satisfy the jurisdictional requirements, but also to prove that substantively, such interception violates Article 33.

Thomas Gammeltoft-Hansen and James Hathaway have provided the first outlines of the path by which a country can be held accountable for the *non-entrée* bargains it strikes with another country.¹⁷⁶ Their analysis begins with Article 16 of the International Law Commission’s Draft Articles on State Responsibility:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.¹⁷⁷

They note that, while Article 16 is not formally binding, the ICJ “consider[s] the article to be an expression of customary international law,”¹⁷⁸

172. *Banković v. Belgium*, App. No. 52207/99, 2011-XII Eur. Ct. H.R. ¶ 71.

173. *Hirsi Jamaa & Others v. Italy*, App. No. 27765/09, ¶ 78 (Eur. Ct. H.R. Feb. 23, 2012).

174. *Id.* at ¶ 77.

175. See *infra* Section III.C.

176. Gammeltoft-Hansen & Hathaway, *supra* note 25, at 276-82.

177. U.N. Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 16, in Rep. of the Int’l Law Comm’n, U.N. GAOR, 53d Sess., Supp. No. 10, A/56/20 (2001).

178. Gammeltoft-Hansen & Hathaway, *supra* note 25, at 277-78 (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb.*), 2007 I.C.J. 43, 420 (Feb. 26)).

the Venice Commission of the Council of Europe has considered it applicable when European states have contributed to *refoulement*,¹⁷⁹ and the European Court of Human Rights similarly maintains that “international human rights law is to be interpreted taking into account the law on state responsibility.”¹⁸⁰ These courts and international bodies have used Article 16 to expand jurisdiction over human rights violations, thereby implicating both the states that commit the violations and the states that assist in such a violation.

Applying this Article to the principle of *non-refoulement*, Gammeltoft-Hansen and Hathaway conclude that it is possible to hold destination states liable for *non-entrée* policies undertaken in coordination with other governments:

[A] state which takes steps such as providing maritime patrol vessels or border control equipment, which seconds border officials, or which shares relevant intelligence or directly funds migration control efforts that assist another country to breach its non-refoulement or other protection obligations is taking action that can fairly be characterized as within the ambit of aiding or assisting.¹⁸¹

They do not conclude that implementing *non-entrée* policies inherently aids or assists other countries in violating their *non-refoulement* obligations, nor do they conclude that *non-entrée* policies are inherently illegal. Rather, they explain that certain types of *non-entrée* policies may fall under the general heading of aiding or assisting, and as such would be impermissible under Article 16. This Section uses this framework to analyze the legality of the European Union’s arrangement with Turkey.

To begin, two background facts must be established. First, as previously discussed, Syrians are considered by the UNHCR to be “likely to fulfil the requirements” to be considered refugees under the terms of the Refugee Convention.¹⁸² While this does not prove that all Syrians fleeing their country are refugees from persecution, it does provide notice to the states involved that the population should as a whole be given access to assistance and protection until such time as certain individuals are shown not to meet the Convention’s definition. Second, as both Turkey and the member states of the European Union are parties to the Refugee Convention and Protocol,¹⁸³ for any of these states to return refugees to face persecution would be an “internationally wrongful act.”

179. *Id.* at 278 (citing European Commission for Democracy Through the Law (Venice Commission), *On the International Legal Obligations of Council of Europe Members States in Respect of Secret Detention Facilities and Inter-State Transport Of Prisoners*, Op. No. 363/2005, at 44-45 (2006), <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282006%29009-e>).

180. *Id.* (citing *Jaloud v. Netherlands*, App. No. 47708/08, ¶ 151 (Eur. Ct. H.R. Nov. 20, 2014); *Al-Jedda v. United Kingdom*, App. No. 27021/08, ¶ 84 (Eur. Ct. H.R. July 7, 2011); *Bankovic*, App. No. 52207/99, at ¶ 57)).

181. *Id.* at 279.

182. *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update III*, *supra* note 15, ¶¶ 21, 26.

183. *See Status of the Refugee Convention*, *supra* note 38; *Status of the Refugee Protocol*, *supra* note 38.

The next step in assigning the European Union responsibility under Article 16 would be to prove first, that *refoulement* is actually occurring in Turkey and second, that the European Union entered into or continued to participate in the agreement in spite of knowledge of that *refoulement*. To prove both of these, a court of law would need to perform a very detailed fact-finding, requiring more resources and information than is publicly available at this time. However, such a fact-finding would likely draw on the credible accusations of human rights organizations that Turkey is committing *refoulement*, accusations the EU leadership has almost certainly heard.¹⁸⁴

Finally, Article 33(2) may not be invoked as a possible exception to the rule of *non-refoulement* in these (or any similar) cases. As discussed in Part II, the national security exceptions were envisioned as narrowly constrained and only available for invocation after an individualized finding of a threat. They were not intended or originally used in justifying large-scale admission or deportation regimes like the Turkey-EU deal.

CONCLUSION

The countries of the European Union—like the United States and other nations in the Global North—believe that their efforts to shield themselves from the refugee crises are immune from challenge. This Note has shown that, as a matter of international law, this is not the case. Refugees are entitled under the Refugee Convention not to be returned to countries where they face persecution, and the different, interlocking types of *non-entrée* systems detailed in this Note risk precisely that result for Syrian refugees. Increased militarization and patrolling of borders and coasts under EU mandates and funding leaves many Syrian refugees with no choice but to remain in Turkey, where they do not have access to real resettlement opportunities and risk *refoulement*. The EU does not have an obligation to admit all refugees who might wish to travel to their borders, but they do have an obligation not to actively take *non-entrée* measures which, by intercepting refugees abroad, lead to *refoulement* or which encourage other countries to commit *refoulement*.

The same is true of the other countries whose *non-entrée* policies have been mentioned only briefly in this Note. Australia's refusal to allow boats of refugees to reach its waters is impermissible, and the United States' deal with Mexico to stop Central American refugees may be similarly problematic.

Even those *non-entrée* policies which are not explicit interception programs may violate the framework discussed here. For example, the United States' willingness to deny refugees entrance on national security grounds without an individualized finding of threat is likely inconsistent with the spirit of cooperation to admit that the *travaux* and early practice make clear is necessary.¹⁸⁵

184. See, e.g., *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*, AMNESTY INT'L (Apr. 1, 2016), <https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal>.

185. See *Barahona v. Holder*, 691 F.3d 349, 353-56 (4th Cir. 2012); *Khan v. Holder*, 584 F.3d 773, 784 (9th Cir. 2009); see also Kristine A. Huskey, *The U.S. "Material Support" Bar to Refugee*

The challenges to *non-entrée* policies detailed in this Note are at the cutting edge of international law. It will take time before domestic courts accept the reasoning laid out here. And in the meantime, the Syrian refugee crisis, and other, similarly tragic crises are ongoing. Refugee camps are in their third generation. More refugees are living their lives without access to resettlement opportunities than at any other point since the UNHCR was founded. Challenges in courts are certainly an important avenue to challenge the way those refugees are received and treated, but cases brought one by one are too slow, too particular, and too resource-intensive to fix the enormous problem.

In 1951, participants at the General Conference of Plenipotentiaries believed the world was a more frightening place, more full of threats and danger, than had been the case in 1950—but when tragedy struck five years later in the form of the suppressed Hungarian Revolution, almost half the countries in the United Nations stepped up to receive and resettle fleeing refugees. In recent years, the European Union and other admission-denying countries like Australia and the United States have shrunk into themselves, erecting distant barriers and procedural mazes to protect themselves from the threats of young and desperate families packed into over-crowded boats in the Mediterranean. These were reflexive reactions to an emergent crisis, but they should no longer be tolerated. The strategies they have employed are not permissible under the Refugee Convention and it is time for the European Union, the United States, and Australia to reverse course and to show the Global North the way back.