Refugee Return without *Refoulement*:
Considerations for the Research Agenda on
Refugee Policy in the Global South and International Asylum Norms

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September 13, 2022

Draft: Not for distribution without author's permission

Word Count 8547

1. Introduction

Asylum as we know it today hinges on agreement among states that returning those in need of refuge to places where their lives or liberty are in danger is both immoral and illegal. This prohibition, known as *non-refoulement*, is one of the world's strongest international norms and human rights laws. It is widely recognized as customary international law applicable to all states (Goodwin-Gill and McAdam 2021), and some advocates, including the United Nations Refugee Agency, argue it has even achieved *jus cogens* status as a fundamental principle akin to prohibitions against slavery and state acts of aggression (Costello and Foster 2016; Allain 2001). Indeed, there is no international right to asylum, rather, in theory, *non-refoulement* effectively forces states to allow people who require international protection (according to the definition outlined in the 1951 Convention on the Status of Refugees[1]) in and provide them with haven (Hathaway 2005b).

This puts states in a difficult position, admitting refugees and migrants is often domestically unpopular. At the same time, states may not want to violate international law and accepted moral principle, and risk attendant reputational and fiscal consequences. As a result, many states have found ways to manipulate liberal asylum policy towards illiberal ends. The most well studied of these strategies is known as '*non-entrée*', in which states construct elaborate systems to prevent migrants and asylum seekers from reaching their borders. (Gammeltoft-Hansen 2014; Gammeltoft-Hansen and Hathaway 2015; Gammeltoft-Hansen and Tan 2017a; FitzGerald 2019). By engaging in *non-entrée* tactics like requiring migrants to await their asylum case decisions offshore or making bilateral arrangements with neighboring states to externalize migration enforcement, states do not deny the moral imperative of *non-refoulement*, they simply prevent it from being invoked on their territory.

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[1] Heretofore referred to as the Refugee Convention.

Non-entrée tactics, however, are largely a tool of rich democracies. Conventional wisdom holds that whereas states in the Global North have the resources and power to engage in tactics that allow them to evade their asylum obligations while (arguably) upholding international law, states in the Global South cannot. Per this logic, faced with mass, rapid, displacement at their borders, states in the Global South have neither the geographic distance nor the resources or capacity to similarly evade their asylum obligations under the guise of legality. This has exacerbated the disproportionate hosting of refugees in the Global South.

I argue, however, that just as rich democracies can feign compliance with liberal international law while also avoiding hosting refugees, states in the Global South manipulate liberal asylum policies towards illiberal ends. However, the strategy for doing so is shaped by the differences in the on-the-ground process of gaining asylum in the Global South as compared to the Global North.

This research note describes how one key difference in the process of gaining refuge in the Global South, the use of *prima facie* or group refugee status determination (RSD) processes, changes the political strategies available to host states looking to avoid their refugee hosting obligations. *Prima facie* recognition is the process whereby states facing a mass, rapid, influx of displaced persons across their borders recognize individual members of a designated group as refugees based on readily apparent objective circumstances in the displaced's country-of-origin. This effectively eliminates the period of asylum-seeking common in rich democracies in which migrants seeking refuge wait in legal limbo to find out whether the host state has granted them refugee status based on their individual circumstances. As such, many states in the Global South cannot as easily engage in tactics that exclude refugees by impeding migrants' access to territory (*non-entrée*) or disqualify asylum-seekers on a case-by-case basis (*non-recognition)*. Their hands, however, are not tied.

I identify and describe a common strategy states use to avoid their refugee hosting obligations, which I call 'return without *refoulement'*. As described in full below, return without *refoulement* refers to the set of tactics states use to send back refugees already on their territory (return) while not technically violating international law (without *refoulement*). Return without *refoulement* can and has been used worldwide. It is far more common and affects more people, however, in the Global South. This is due in part to geographic coincidence — states in the Global South are more likely to share borders with refugee-sending states making *non-entrée* a more difficult strategy. It is also enabled by the much more widespread use of *prima facie* recognition and related group protection mechanisms in the Global South, which I argue operate more like temporary protection and make it easier for states to effectively (if not technically) cease refugee status *en masse*, turning previously recognized refugees into asylum-

seekers, to whom states can deny protection and legally eject or otherwise coerce into returning 'voluntarily'.

In so doing, this research note makes three primary contributions to advancing the research agendas on state responses to asylum-seeking, refugee return, and international norms. First, I identify a widespread but underrecognized strategy that states use to avoid their asylum obligations through the governance of refugee return, rather than admittance or recognition. I am certainly not the first to recognize that states coerce refugees to 'voluntarily' return, despite *non-refoulement's* prohibition against it (e.g. Hammond 1999; Rutinwa 2002; Barnett and Finnemore 2004; Chimni 2004; J. C. Hathaway 2005a; Blitz, Sales, and Marzano 2005; Bradley 2014; Sieff 2017). However, identifying these actions as part of a common political strategy, rather than simply malevolent repressive action points to a different analysis of the pathologies in the global asylum system. Rather than exclusively an issue of rich democracies letting more refugees in, identifying the parallel incentive structures in the strategy of return without *refoulement* suggests that scholars may need to examine how the international advocacy community's emphasis on upholding *non-refoulement* over all other requirements for refugees' treatment outlined in the Refugee Convention may have produced perverse consequences for refugees.

Second, identifying and describing return without *refoulement* as a political strategy has implications for how we conceptualize the relative liberality of state policy towards refugees. New datasets examining national legislation in the Global South has found that state policies have become more liberal over time (Blair, Grossman, and Weinstein 2021b; 2021a). The practice of return without *refoulment,* however, evinces how states manipulate *de jure* liberal refugee policy (e.g. national legislation that gives the executive discretion to recognize refugees *prima facie*) to restrict access to asylum and repress refugees. This suggests that evaluations of state policy based exclusively *de jure* laws are likely to misrepresent the state asylum practices in the Global South. Consequently, there is a need in the growing literature on state responses to displacement in the Global South for data collection on *de facto* state behavior.

Finally, describing how return without *refoulement* operates as a political strategy shows how compliance with the letter of the law can lead to perverse outcomes for asylum seekers. While some analysts have argued that the widespread use of *non-entrée* to evade *non-refoulement* demonstrates the asylum norms are becoming weaker over time (Benhabib 2004; Ghezelbash 2018; Nyabola 2020; Crisp 2020), identifying the similarities in how states take costly action to uphold *non-refoulement* while evading their asylum obligations shows how strong *non-refoulement* is in shaping state behavior, even while

eroding the actual provision of refuge. Building on Búzás (2017) and Cronin-Furman (2020) this suggests that analyses of the strength of international human rights law based on compliance are likely to miss the bigger picture of how norms shape state behavior and human rights outcomes.

The rest of this research note proceeds as follows. Section 2 provides an overview of established mechanisms through which states evade their asylum obligations while arguable upholding *non-refoulement,* namely *non-entrée* and non-recognition. Section 3 provides a description of how *prima facie* recognition and other forms of group protections operate and shift the moment of state action to avoid refugee hosting to the governance of refugee return. In Section 4, I use descriptive examples from Tanzania, Pakistan, Kenya and Syria to illustrate the return without *refoulement* strategy and develop a typology of states responses to asylum-seeking. Section 5 outlines the implications of recognizing return without *refoulement* as a parallel strategy to *non-entrée* and non-recognition on conceptualization and measurement in the research agendas on state refugee policy in the Global South, refugee return, and international human rights norms.

2. Upholding *non-refoulement* without providing refuge

A robust literature documents how rich democracies obstruct and circumspect *non-refoulement* by using strategies of *non-entrée* and 'remote control' to prevent refugees from reaching their territory or applying for asylum from within their borders (FitzGerald 2019; Gammeltoft-Hansen 2011; Betts 2009; 2010; Gammeltoft-Hansen 2014; Hammerstadt 2014; Hansen 2014; Gammeltoft-Hansen and Hathaway 2015; Gammeltoft-Hansen and Tan 2017b; Hathaway 2019). Tactics of *non-entrée* and remote control are multifarious, including offshore processing, visa controls, interdiction at sea, safe third country designations, and bi- or multilateral arrangements to externalize states borders into others' territory (Gammeltoft-Hansen and Hathaway 2015). For example, the United States has provided funds and other assistance to the Mexican government to increase immigration control (Hiemstra 2019; Congressional Research Service 2022), Australia infamously worked with the island states of Nauru and Papua New Guinea to house asylum seekers 'offshore' with devastating human rights consequences (Hirsch 2017; Fleay and Hoffman 2014; Human Rights Watch 2021a; Refugee Council of Australia 2020), and amid the rapid cross-Mediterranean displacement in 2016 the EU struck a deal with Turkey to send any migrants who 'irregularly'[2] arrived in Greece to Turkey (Zaragoza-Cristiani 2017; Terry 2021).

[2] 'Irregular migrant' is a label frequently used to discredit migrants' deservedness to cross borders and receive aid (Zetter 2007; Mourad and Norman 2019; Hamlin 2021; Janmyr and Mourad 2018). I use quotes around the term, because, per

Non-entrée tactics require financial and technical resources as well as institutional investment. In other words, states must go out of their way to keep refugees out while still appearing to uphold *non-refoulement*. By investing in these strategies, states do not deny the importance of *non-refoulement* or that the right to seek asylum should exist; they simply prevent *non-refoulement* from being invoked within their borders (Gammeltoft-Hansen and Hathaway 2015; FitzGerald 2019).

Conventional wisdom holds that whereas rich democracies have the power, geographic position, and resources to engage in tactics that keep refugees out without violating international law, states in the Global South do not have the capacity or advantages of geographic distance to do so, and therefore have no choice but to allow refugees in or violate international law. Indeed, new scholarship on *de jure* asylum policy in the Global South finds that whereas asylum policies in the Global North have become more restrictive over time, asylum policies in the Global South have become more liberal (Blair, Grossman, and Weinstein 2021b; 2021a).

However, just as states in the Global North can restrict asylum access while arguably upholding international law, states in the Global South can also use liberal *de jure* policy towards illiberal ends. For example, Blair et al find Tanzania's national legislation with respect to refugees has gotten more liberal over time, by (among other things) codifying the 1951 Refugee Convention definition of a refuge (Blair, Grossman, and Weinstein 2021a; 2021b). Yet, it is well documented that Tanzania's refugee policy has gone from a dedicated pan-Africanism in 1960s welcoming of refugees, to a policy dedicated to having 'zero refugees' on Tanzanian soil in the 2000s (Whitaker 2002; Milner 2009; 2013), culminating in widespread mistreatment of certain refugee populations (Human Rights Watch 2019; 2009; 2020). This transformation was endogenous to Tanzania's experience in the 1990s as a destination for refugees fleeing civil wars in neighboring Rwanda, Burundi and the Democratic Republic of Congo. While there have occasionally been liberal successes, such as the naturalization of tens of thousands of Burundian refugees who had lived in Tanzania since 1972, any *de facto* liberal progress has been accompanied by several steps backward towards restriction and repression (Milner 2013; Kuch 2016). How is it that Tanzania's national refugee legislation may have become more liberal on paper, while their actual treatment of refugees has become repressive? Indeed, many other states have similarly transformed their international legal obligations into domestic legislation, but that transformation has not translated to increased protection for refugees. I argue that the answer is

article 31 of the Refugee Convention, asylum-seekers cannot be penalized for illegal entry or presence on territory (Goodwin-Gill 2003) .

evident when considering some of the major differences between how refugee admission and recognition functions in practice in the Global North and Global South.

In the Global North, the provision of refugee most often operates as a process whereby migrants must first reach a country's border (access territory), apply for asylum for their individual case (asylum-seeking via individual refugee status determination (RSD)), and then await a decision on their refugee status (recognition). The literature has documented two primary tactics common worldwide that states can use to avoid recognizing these asylum-seekers as refugees. States can leverage the bureaucratic administration of refugee status determination (RSD) to refuse refuge to those who might arguably qualify (Neumayer 2005; Zetter 2007; Betts 2009; 2010; Sharpe 2018b; Mourad and Norman 2019; Hamlin 2014; 2021; Ramji-Nogales 2016; Sharpe 2018b; Janmyr and Mourad 2018); or states can use bureaucratic delays in the process of making asylum claims to prolong the amount of time asylum-seekers must remain in legal limbo. Denying recognition enables states to legally expel individuals whose asylum claims are denied, while preventing status recognition creates legal precarity around asylum-seekers' continued residence in the host country, rendering migrants in need of refuge vulnerable, without access to adequate work, shelter, mobility or physical security such that refugees may choose to leave the host country 'voluntarily' (Mourad 2019; Braithwaite, Ghosn, and Hameed 2021).

As described in full in the following section, most refugees worldwide – and particularly in the Global South – are not recognized through individual RSD, but instead through some form of group RSD (also known as *prima facie recognition*) or temporary protection that expedites the time from arrival to recognition, precluding the use of these tactics. Because the on the ground process of gaining asylum in the Global South is different in the Global North, we cannot expect all states to use the same strategies to evade their asylum obligations, but that does not mean that their hands are tied. Instead, recognizing the variation in refugee status recognition processes begs the identification of alternative *political* strategies that states can use to skirt their asylum obligations while feigning compliance with *non-refoulement*.[3]

3. *Prima Facie*/Group Refugee Status Determination (RSD) and Temporary Protected Status (TPS)

[3] Gerring (2012) characterizes this descriptive contribution as making a claim "that diverse attributes of a topic revolve around a central theme which unifies the attributes , lending coherence to an otherwise disparate set of phenomena" (p 727).

3.1 Granting Group Protections for Displaced Persons

Protection against *refoulement* applies to all individuals who meet the definition of a refugee outlined in the Refugee Convention (Hathaway 2005b; Goodwin-Gill and McAdam 2021). However, individuals' legal residence status in a host country often depends on formal recognition through a Refugee Status Determination (RSD) process whereby designated state or international bodies evaluate whether a person's reasons for flight and current circumstances qualify them for refugee status.[4] RSD processes vary across countries and even sub-nationally (Hamlin 2014; Sharpe 2018a).[5]

Most rich democracies have robust bureaucracies and are geographically removed from large-scale displacement flows, and as such often choose to assess asylum claims on a case-by-case basis, otherwise known as individual RSD. For example, all individuals arriving at the US border must make their case for why they qualify for refugee status, regardless of whether there are other people fleeing similar circumstances from the same country of origin at the same time who also qualify for refugee status for the same reasons. States and international organizations classify these individuals as 'asylum-seekers'. Asylum-seekers often wait months –even years– until their RSD case is decided. States in the Global North have traditionally granted refugees recognized through individual RSD a pathway to citizenship (Arar 2017). This is made possible, in-part, by how few asylum-seekers reach rich democracies' borders and the low rates of success in individual RSD.

Most refugees, however, live in low or middle income countries (85%) neighboring their country of origin (75%) (UNHCR 2021). Having little time to escape escalating political unrest, many refugees arrive as part of rapid, mass population movement (Arar & Fitzgerald Forthcoming). In these cases, host states often chose to use *prima facie* RSD or an alternative temporary protected status which allows these migrants refuge on their territory.

Prima facie recognition, also known as group RSD, is the process whereby a state chooses to regard individual members of a specified group as refugees based on 'readily apparent, objective circumstances in the country of origin, absent any evidence to the contrary.'[6] States may recognize refugees *prima facie* because it would be impractical to conduct individual RSD due to the size and

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[4] States' choice of *who* to protect has been studied at length (Betts 2013; Miller 2000; Norman 2020; Abdelaaty 2021; Hamlin 2012, more cites). This section focuses on equally important administrative questions of how states recognize refugees (Hamlin 2014; Sharpe 2018a).

[5] UNHCR refers to two types of RSD processes: individual RSD and group determination of refugee status UNHCR. "Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection." (2019) sec. B(2) 44).

[6] UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (24 June 2015) HCR/GIP/15/11, para 1.

rapidity of cross-border displacement, or because those fleeing qualify under the expanded refugee definitions outlined in regional protection treaties, rather than an individuals' fear of persecution based on membership in a social group as laid out in the Refugee Convention (Sharpe 2018a).[7] In practice an executive, ministerial, or parliamentary representative of the host state or an international organization will authorize the use of PFRSD, allowing for expedited refugee recognition. For example, in 2013 when thousands of South Sudanese fled to Kenya, Uganda and Ethiopia, each of these countries declared that South Sudanese crossing their border would be regarded *prima facie* as refugees. Alternatively, Zambia's policy is to *prima facie* recognize individuals who cross into the borderlands seeking refuge, but to refer migrants who might qualify for recognition based on the stricter requirements outlined in the Refugee Convention to the capital for individual RSD (Sharpe 2018a). Under PFRSD, the time to recognition is expedited relative to individual RSD, though in some cases it may involve multiple stages of vetting by both state and international bodies (Albert 2010; Rutinwa 2005; 2002). Importantly, when interpreting UNHCR data on displacement, UNHCR does not record those seeking refuge who are recognized *prima facie* within the same year as 'asylum-seekers'. PFRSD is almost exclusively used in the states in the Global South.

States in the Global North tend to deal with rapid, mass displacements through an explicitly temporary process distinct from refugee status often called "Temporary Protected Status" (TPS) (Goodwin-Gill and McAdam 2021, 292). TPS allows designated migrants to remain in the host country for a pre-determined period due to unsafe conditions in their country of origin, including conditions that would qualify migrants for refugee status as well as other humanitarian or political emergencies that would not. This was the European Union's approach, for example, at the outset of the Ukrainian displacement crisis.

Non-State signatories of the Refugee Convention have also taken advantage of temporary group protections to find a middle ground in refugee recognition. *Non-refoulement* is largely widely regarded as customary international law, meaning it applies to all countries regardless of whether they have signed on to particular treaties (Goodwin-Gill and McAdam 2021). Some advocates, including the UN Refugee Agency, argue that *non-refoulement* is so strong that it has reached *jus cogens* status as a principle from which there can be no derogation(Allain 2001; Costello and Foster 2016). This places non-signatory states in a difficult position, as they have made it clear that they do not recognize the

[7] Such obligations include article I(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, may also apply under the expanded definition of a refugee in the 1984 Cartagena Declaration on Refugees.

global refugee regime as outlined by the Refugee Convention, but they are still obliged to comply with *non-refoulement*. As a result, some non-signatories have used alternative categorizations for refugees. For example, with the onset of the civil war in Syria, many host countries in the Middle East and North Africa innovated protected status labels that allowed displaced persons to stay without formally recognizing them as refugees, essentially a *de facto* form of *prima facie* recognition (Janmyr and Mourad 2018; Janmyr 2018). Similarly, in 2017 Bangladesh refused to label displaced Rohingya fleeing Myanmar as refugees, instead insisting on using the category of "Forcibly Displaced Myanmar Nationals." The international community still views these populations as refugees given the readily apparent conditions they fled and have pushed back against host states' threats to repatriate the displaced as violations of *non-refoulement*. While these categories are not necessarily time contingent, given their irregularity, UNHCR categorizes them as a form of temporary international protection.

Figures 1 through 3 show the total number of newly recognized refugees by individual RSD, group (*prima facie*) RSD, or temporary protected status from 2010 to 2019.[8] Figure 1 shows that between 2010 and 2019 most newly arriving refugees worldwide were either recognized *prima facie* or provided alternative group temporary protection. Figures 2 and 3 demonstrate that individual RSD has been the dominant mode of recognition in the Global North, while *prima facie* RSD and alternative group TPS has far outpaced individual RSD in the Global South. The spikes in TPS in 2013 and 2017 reflect displacement from Syria and Myanmar to host states' using alternative protected status categories.

[8] Data on refugee and asylum-seeking flows categorized by individual or group recognition was provided by UNHCR directly to the author, but was only available for 2010-2019. Global North is proxied by UNHCR regions of Europe, Oceania and Northern Americas; Global South is all other regions. The data are bad but are the best approximate.

Figure 1

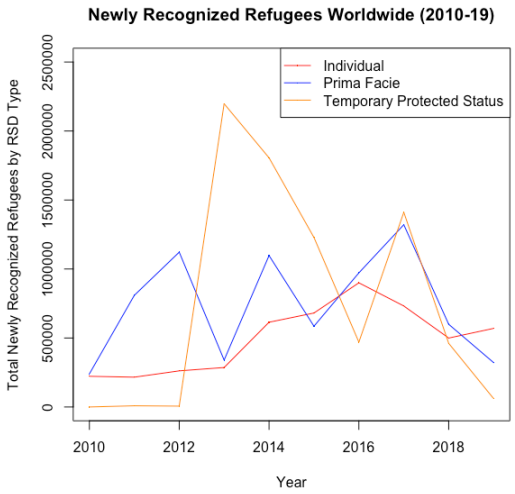


Figure 2

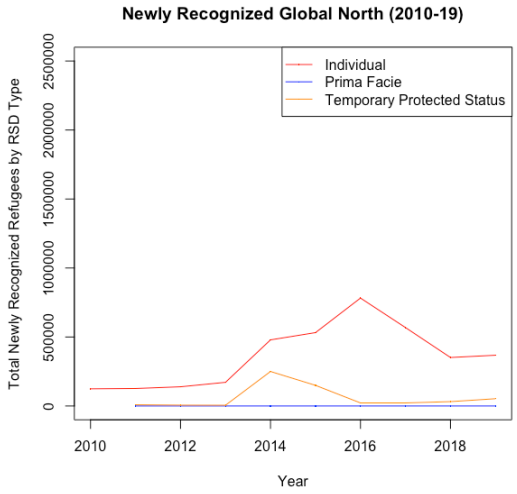
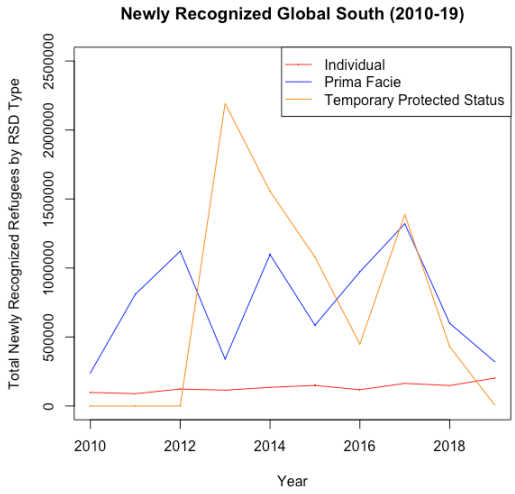


Figure 3



3.2. The nature of protection refugee granted *prima facie*

Despite UNHCR's guidelines to the contrary, I join others in arguing that, in practice, there is a difference in how protection plays out for refugees recognized *prima facie* as opposed to through individual RSD. First, in many cases, states grant refugees recognized *prima facie* a minimum level of protection rather than the full gamut of protections outlined in the Refugee Convention (Durieux and McAdam 2004; Rutinwa 2002; 2005; Crisp 2003).[9] As such, in cases of mass influx, particularly in sub-

[9] ExCom Conclusion No 22 (XXXII), 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981) outlines sixteen standards of treatment for asylum seekers temporarily admitted to a host-country. This list excludes certain rights guaranteed by the 1951 Convention. Sharpe (2018a) notes that despite Ex Com Conclusion 22, however, refugees recognized on a *prima facie* basis do not *de jure* enjoy fewer rights than their counterparts recognized via ordinary status

Saharan Africa, state imposed restrictions — including limitations on freedom of movement, physical security, civil & political rights — creates situations whereby refugees' protection from *refoulement* "is bought at the cost of almost every other right," (Crisp 2003, 11).

Second, unlike individual RSD which often leads to permanent residence, I argue that in practice refugee status recognized *prima facie* is temporally precarious (See also Rutina 2002). Like temporary protected status, PFRSD is most often used when there is an emergency in a particular country of origin. Should those circumstances change, states and international organizations not only have the power to stop *prima facie* processing of any newly arriving refugees – they can cease the refugee status for those already in country.[10] By declaring a fundamental change to circumstances in the country-of-origin, states are then legally within their right to deport now-former refugees as their return would no longer constitute *refoulement* (Hathaway 2005a). Before they are kicked out, however, UNHCR guidelines hold that all former-refugees recognized *prima facie* be given an opportunity submit an individual asylum application.

Formal cessation of refugee status is rare, and the policies for how to do so are opaque. Ending *prima facie* RSD on the grounds of improved circumstances in refugees' country of origin, on the other hand, is an easy administrative policy change. In so doing states can then take advantage of the opacity in formal cessation processes and UNHCR's preference for refugees' voluntary repatriation to make a public case that that recognized refugees should no longer qualify for international protection given the improved conditions in their country of origin. As described in full in the following section, because voluntary refugee return is the preferred solution of the international community (Barnett and Finnemore 2004; Long 2013; Schwartz 2019), states can then manipulate hosting conditions to coerce the return of these displaced persons under the guise of voluntary repatriation or legal removal considering the improved conditions.[11]

4. Adding Return without *Refoulement* to the Typology of State Evasion of Asylum Obligations

4.1 Return without Refoulement

determination. Instead, Ex Comm's circumscription applies to cases of temporary protection. In practice, however, this circumscription of rights is precisely what takes place (Crisp 2003), leading to protracted situations in which refugees recognized *prima facie* enjoy only the most basic rights and freedoms.

[10] Article 1C(5)-(6) of the Refugee Convention allows for the cessation of refugee status due to 'changed circumstances' in the country of origin.

[11] This is not to say that all repatriation is involuntary or that it cannot serve important and positive purposes. Indeed refugee-let repatriation can be a way for displaced citizens to reconstitute their renegotiate their relationship with the state (Bradley 2013).

When unable to use *non-entrée* or non-recognition strategies at scale at the outset of a displacement situation, many states use a strategy I call 'return without *refoulement'* to repatriate recognized refugees on their territory while arguably upholding their legal obligations of *non-refoulement.* Rather than externalizing the point of asylum recognition beyond their borders, states use executive discretion to end *prima facie RSD,* or similar group protections, based on changed circumstances in refugees' country of origin. This opens the door for states to engage in a of number of non-mutually exclusive tactics to expel recognized refugees. Some of these tactics were previously unavailable due to the expedited recognition, including non-recognition tactics of bureaucratic delay in asylum case adjudication and use of non-refugee labels to exclude certain groups. Other tactics are specific to the governance of refugee return, including effectively turning refugees into asylum-seekers in preparation for status cessation, pressuring international actors to facilitate mass voluntary return, and coercing refugees to choose to return by offering direct payment and/or creating untenable living conditions. Because, as described in section 3.2 above, in-country protections offered under PFRSD are often limited, states can more easily use repressive tactics against refugees to pressure them to return 'voluntarily.'

Return without *refoulement* can and has been used worldwide. However, because the strategy involves a rhetorical or formal reconsideration of refugees' need for international protection it is more common and likely to affect a greater number of refugees in the Global South where *prima facie* RSD or other forms of temporary group protections are more widespread. While there has been increased interest among states in the Global North to take advantage of the cessation clause to return refugees (Shultz 2020; O'Sullivan 2021), *non-entrée* tactics far outpace return without *refoulement* in rich democracies.

For many human rights observers, the tactics involved in return without refoulement *should* constitute violations of international law. Two factors, however, help states feign legal compliance with *non-refoulement*. First, whereas the simplest route to repatriate refugees would be to deport all refugees, a return without *refoulement* strategy is designed to be at least one step removed from direct refugee expulsion – either by arguing that improved conditions negate the need for international protection, or by using tactics that pressure refugees to 'voluntarily' repatriate.[12]

Second, because the international community is invested in voluntary return as the best solution for refugees, and the definitions of voluntariness and the process of legal status cessation are so opaque, international organizations often become partners in states' efforts to return refugees,

[12] Deportation may still occur within the context of a return without *refoulement* strategy, but within the context of a formal or quasi-formal status cessation.

lending legitimacy to efforts (Hathaway 2005a). UNHCR, for example, may establish trilateral agreements to coordinate voluntary return or provide host- and home- states with funding to provide cash incentives for returnees. UNHCR and the International Organization for Migration (IOM) may organize the logistics of transporting those refugees who are choose to 'voluntarily' repatriate due to coercive tactics to their home countries. Even if UNHCR declares that conditions in refugees' home country are not entirely safe, the agency often states that they will nonetheless assist 'truly voluntary' return or organize 'go and see' visits for refugees to get further information about conditions in their home country.

Table 1. State strategies to avoid providing asylum without violating *non-refoulement*

Strategy	*Moment of Compliance*	*Compliance tactics that evade the spirit of the law*
Non-entrée	Approaching a border, recognition	• Prevent asylum-seekers from reaching border • Require asylum-seekers to remain 'offshore' while awaiting asylum decisions establishing onerous visa regulations, etc. (Gammeltoft-Hansen and Tan 2017b; Gammeltoft-Hansen and Hathaway 2015; FitzGerald 2019; Hansen 2014b)
Non-recognition	Recognition & in-country protection	• Using alternative and exclusionary labels to preclude refugee recognition (Zetter 2007; Mourad and Norman 2019; Janmyr 2018) • Delaying asylum decisions • Narrow legal interpretations leading to failed applications (Hamlin 2014) • Strategic refusal to engage with displaced populations (Norman 2020) • Delegation of recognition and/or service provision to international organizations (Abdelaaty 2021).
Return without *Refoulement*	In-country protection and return	• Halting *prima facie* recognition or other temporary protections • Threatening to cease or actually ceasing refugee status • Creation of hostile living conditions • Incentivizing voluntary return

4.2 Return without Refoulement Tactics in Practice

Turning refugees into asylum-seekers based on changed circumstances:

One of the quasi-formal tactics states use is to end PFRSD for newly arriving refugees, and then threaten to (or actually) cease refugee status of those already in-country. Because the process of how to cease refugee status under the changed circumstances clause is unclear, states can use the guidance that all refugees be given the opportunity to apply for asylum individually to create legal precarity; should a refugee's individual application for asylum be denied, they can be legally deported.

This was one of the tactics the government of Tanzania used to force Burundian refugees who fled the 1993-2005 civil war to return, despite refugees' resistance (Rema Ministries 2012; UNHCR 2012a). In 2009, Tanzania announced that given the improved political conditions in Burundi, the government planned to close refugee camps housing Burundians who fled the civil war in the 1990s. The government of Tanzania then entered a tripartite agreement with UNHCR and the government of Burundi to facilitate this return. Despite the claims of improved conditions, many Burundians did not want to return and refused to leave. In 2011, Tanzania then worked with international actors to interview all the refugees in designated camps to evaluate if any refugees still qualified for international protection strongly implying that formal cessation of refugee status was imminent and that all refugees recognized in the 1990s *prima facie* were to be re-evaluated as individual asylum-seekers required to prove that they still qualified for international protection. In the end, roughly 2,700 Burundian refugees living in camps were deemed in need of continued international protection, whereas approximately 37,000 refugees had their status formally ceased.

In the lead up to and following cessation Tanzania violently coerced the refugees to return. While many of these refugees had compelling reasons to fear they would be persecuted upon return (Schwartz 2019), international organizations participated in this 'orderly return' process on the grounds that not participating could result in more severe human rights violations (UNHCR 2012b; 2012a; Rema Ministries 2012). Still the process was riddled with repressive tactics, from intimidation, the withholding of food, aid and education, to alleged burning of refugees' homes and violently forcing them on to buses back to Burundi (Rema Ministries 2012; Amnesty International 2009).

Pressuring refugees to 'choose' to return

States also engage in a variety of tactics to coerce refugees to repatriate 'of their own accord'. These tactics are not mutually exclusive to cessation of refugee status or threat thereof as described above. States may employ these tactics immediately following ending PFRSD or wait several months or years before initiating them. Such tactics include, but are not limited to, intimidation campaigns informing refugees they must return or be subject to future deportation, reduction of government aid, restricting

access to international aid, limiting refugees' ability to participate in the local economy, restricting refugees' freedom of movement through stricter encampment or curfews, restricting refugees access to education, predatory policing, closing or threatening to close refugee camps, and physical abuse.

For example, in 2006 and early 2007 Pakistan registered Afghans arriving on their territory as refugees in a process UNHCR considered PFRSD in everything but name (UNHCR 2015a, 40; Human Rights Watch 2017). In February 2007, Pakistan changed its policy, no longer recognizing newly arriving Afghans as refugees, but not ceasing the status of those already recognized. Years later in 2016 in response to several international and domestic developments, the Pakistani government engaged in a violent campaign culminating in a concerted effort to pressure refugees to return. The government subjected Afghan refugees to police abuse and detention, made persistent threats of deportation in the media, raided refugee shelters, excluded Afghan refugee children from state schools and closed refugee schools (Human Rights Watch 2017).[13] Still, UNHCR lent legitimacy to Pakistan's efforts, publicly stating that most of the returns were 'voluntary'.

Many states also incentivize refugees return by offering aid packages to those who choose to leave. These packages may be solely state sponsored, as is the case in Germany, or administered in coordination with UNHCR.[14] In the case of Pakistan described above, UNHCR worked with the government on a massive cash incentive program, offering approximately $400USD to Afghan refugees in Pakistan who chose to return. Between the coercive tactics and cash incentives, human rights organizations estimate that 365,000 of Pakistan's 1.5 million were coerced into returning.[15] Other examples include Kenya working with UNHCR to offer cash incentives to Somali refugees to 'voluntarily' return, and Australia offering payment to Rohingya refugees detained on Manus Island to return to Myanmar. In Kenya, for example, the government had been angling to reduce the Somali refugee population on their territory for many years, and in 2016 the government threatened (once again) to close down Dadaab Refugee Camp, one of the largest refugee camps in the world. Despite UNHCR's statement that conditions in many parts of Somalia were not safe, following Kenya's threats to close Dadaab UNHCR worked with the Kenyan government to step up voluntary repatriation and cash incentive programs for refugees. Though UNHCR required returnees who took the cash

[13] The government signed a tripartite agreement with UNHCR and Afghanistan in 2003 to facilitate refugee returns, and in 2013 revised their National Policy on Afghan Refugees to increase return efforts in anticipation of NATO withdrawal from Afghanistan (Khan 2014).

[14] Germany offered asylum-seekers, migrants, and failed asylum-seekers cash incentives to return. See (Associated Press 2017; Rebecca Seales 2017)

[15] 200,000 undocumented migrants were also coerced into returning. Some of these migrants may have qualified for refugee status, while others did not, however Pakistan refused to recognize Afghan refugees after 2007.

advances to sign a form stating their choice to repatriate was entirely voluntary, investigative reports have demonstrated how the restriction of aid to Dadaab, intimidation of the refugee population by Kenyan authorities, and the prospect of losing out on the $400USD payment coerced many Somalis to enlist in the program (UNHCR 2015b; Sieff 2017; Human Rights Watch 2016). Others have documented how Somalis used the funds to re-migrate from Somali to Uganda, where it was thought to be a more hospitable environment for refugees (Betts 2021).

4.3 Why Practice Return without *Refoulement*?

For host-states, return without *refoulement*, is a response to competing incentives to simultaneously expel refugees while maintaining international legitimacy. Host states may want to maintain a reputation as a good faith actor in the refugee regime, they may not want to jeopardize foreign economic assistance by violating human rights norms, or they may see accepting/ejecting certain refugee populations as a strategically beneficial foreign policy (Norman 2020; Hamlin 2012; Abdelaaty 2021; Greenhill 2010). On the other hand, governments may also face domestic pressure to eject refugees when the public perceives certain migrants as economic or social threats, due to influential elite-level preferences, or due to widespread xenophobia or racism (Betts 2013; Norman 2020; Abdelaaty 2021).

Beyond the host-state, refugee-sending states may also have incentives to encourage the return of those receiving international protection abroad, either as a way to improve their international reputation or to control their citizens abroad (Turner 2013; Tsourapas 2020). Large-scale voluntary refugee return can be a useful public relations tactic to improve the country of origin's reputation and legitimacy, providing 'evidence' that the situation has improved enough that people are willing to return. At the same time, coercing return allows for increased state surveillance of civilians who may oppose the regime. A return without *refoulement* strategy, therefore, may function as a form of mutually beneficial migration diplomacy (Adamson and Tsourapas 2019).

Beyond the host-state, refugee sending states may also have incentives to encourage the return of those receiving international protection either as a way improve their international reputation or control their citizens abroad (Turner 2013; Tsourapas 2020). Return without *refoulement* can serve both purposes. On the one hand, the appearance of large-scale voluntary refugee return can improve a country of origin's international reputation and legitimacy, providing 'evidence' that the situation has

improved enough that people are willing to return. For example, in 2016 following a violent crisis in Burundi, Foreign Minister Willy Nyamitwe went before the United Nations General Assembly to claim that all was well in Burundi, using the alleged return of 90,000 refugees as evidence. In 2017 he tweeted "#Tanzania Minister for Home affairs says thousands of #burundi refugees went back home but #UNHCR doesn't want it to be known."[16] In his 2017 visit to Tanzania, Burundian President Nkurunziza called on refugees to return, insisting that conditions in Burundi were peaceful, and returnees would therefore be safe (Okiror 2017; Nkundikje 2017). This tactic can have some success. In 2020, the UN Special Envoy for the Great Lakes region noted "the prospects for greater regional stability, as illustrated by the return of Burundian refugees from Rwanda and the United Republic of Tanzania" (United Nations Security Council 2020). In the same meeting both Russia and China used the same litmus test to praise Burundi's progress towards peace, claiming the country should no longer be on the Security Council's agenda.

At the same time, coercing return allows for increased the country-of-origin to surveil civilians who they believe oppose the regime. Syria's President Bashar al-Assad, for example has made repeated calls for refugees to repatriate, in which he touts the safety he brought to the country by defeating ISIS and encourages Syrians abroad to come return. President Assad even hosted a lavish two-day conference in Damascus in November 2020 with representatives from more than 20 countries including Russia and China to encourage refugee return, in which he argued that any remaining economic or infrastructure-related insecurity discouraging return was the result of Western sanctions.[17] Human rights organizations, on the other hand, have found that many of the refugees who have returned have been subject to surveillance, torture, extra-judicial killing and kidnapping upon arriving in Syria (Vohra 2019; Human Rights Watch 2021b).

While return without *refoulement* is a host-state strategy, when host- and home-state preferences align, it is increasingly likely that host states will opt for a return without *refoulement* strategy. Because ending *prima facie* recognition, cessation of refugee status, and coercion of 'voluntary' return are more

16 See tweets: https://twitter.com/willynyamitwe/status/779855005058752512?s=20
https://twitter.com/willynyamitwe/status/888006603236151298?s=20

17 See Hubbard 2020

likely than *non-entrée* to be interpreted as a violation of *non-refoulement,* it is easier for host states to engage in return without *refoulement* when they can make a plausible argument that the situation in the refugee-sending country is safe enough for refugees' return. A return without *refoulement* strategy, therefore, may function as a form of mutually beneficial migration diplomacy (Adamson and Tsourapas 2019). The refugee host state benefits by improving their popularity among a domestic audience critical of refugees and without jeopardizing international aid or reputation, while countries of origin get to project the appearance of 'safe conditions' for return. Unilateral use of these tactics is by no means absent; however unilateral enforced return is riskier reputationally.

Importantly, I am not arguing that host-states' use of return without *refoulement* tactics fully complies with *non-refoulement* or states' many other obligations to refugees. Nor am I arguing that states comply with *non-refoulement* based solely fear of future international sanction. Instead, I argue states have reputational and economic incentives to maintain a veil of acquiescence to the principles of asylum and refugee projection. Just as rich democracies go out of their way to be seen as upholding *non-refoulement* while avoiding their asylum obligations, states looking to expel large refugee populations already on their territory go out of their way to incentivize 'voluntary' return rather than deport refugees directly. As such, the strength of the *non-refoulement* norm is evident in how it shapes the ways in which states go about avoiding their asylum obligations.

Moreover, many of return without *refoulement* tactics violate standards of treatment outlined in the Refugee Convention and regional treaties, including the ability to work, freedom of movement and access to public education once refugees are on a states' territory.[18] However, many states hosting large refugee populations, like Pakistan, are not party to the Refugee Convention, and are thus bound only by *non-refoulement* due to its status as customary international law. While some of the state behavior described above also violates other aspects of international human rights law, because of the primacy of *non-refoulement* in the refugee protection regime, tactics used to make it harder for refugees in-country to access adequate shelter, food, medical care, education, or states' actions incentivizing 'voluntary' refugee return prior to substantial amelioration of conditions in the country of origin, are not as aggressively monitored or sanctioned by the international community. While some nations' domestic courts have found that such tactics violate *non-refoulement* by inducing return, and human rights advocates similarly argue that policies that create unlivable situations should constitute *refoulement,* the

[18] Several articles in the convention require states protect certain rights and provide access to certain public goods in a manner at least as favorable as is granted to nations and/or no less favorable than is granted to other foreigners in the country.

lack of broad-based international agreement as to where to draw the '*refoulement'* line, the common circumscription of rights in-country for refugees recognized *prima facie,* and the frequent participation of the international community in so-called voluntary repatriation efforts, allows for these coercive policies to thrive.

4.4 Alternatives & Scope:

Return without *refoulement* refers to host-state action to repatriate recognized refugees on their territory by inducing less-than-voluntary refugee return. To further clarify the scope of this strategy, however, it is useful to contrast return without *refoulement* to alternative strategies.

First, return without refoulement involves coercion of less-than-voluntary refugee return – repatriation that is neither deportation nor truly voluntary. While return without *refoulement* may involve the use of repressive tactics to orchestrate the repatriation of refugees, not all organized refugee repatriation or repressive policies constitute return without *refoulement*. For example, a host-state policy directly ejecting refugees without any attempt to legitimize the action on the grounds of changed circumstances in the home country is not return without *refoulement*. Similarly, state facilitation of truly voluntary refugee repatriation is not return without *refoulement*. Importantly, however, voluntary return and return without *refoulement* may occur simultaneously, as there is likely to be a heterogeneity of migration preferences among the refugee population. I do not wish to discount the agency of those refugees who choose to repatriate voluntarily. However, I argue that return without *refoulement* still applies if a significant proportion of refugee population would not return due to perceived insecurity, even if other refugees are interested in returning for reasons unrelated to the host-states' coercion.

While in theory there may be cases where objectively improved circumstances render refugees' interpretations of their safety legally moot, in practice the decision to declare changed circumstances is a political one in which state and international actors' evaluations of the situation in refugees' country of origin are considered objective and supersede refugees' evaluations, which are considered subjective (Barnett 2001, 262). It is in this grey zone in which states portray the situation in the country of origin as peaceful while refugees aver that they fear for their lives upon return, that return without *refoulement* thrives.

Second, return without *refoulement* is a state strategy. Repressive tactics designed to pressure refugees to return are often part of a return without *refoulement* strategy. However, return without *refoulement* is not describing the phenomenon of refugees feeling psychic pressure to go home. For example, the pressure Braithwaite et al. (2021) describe among Syrian refugees in Lebanon who had

fewer network connections in their host-country or who may have felt monitored because they registered with UNHCR speaks to social integration and individual-level fears that may or may not be connected to a host government policy. Return without *refoulement,* on the other hand, is a proactive host-state policy, which may operate in coordination with the country of origin and international organizations, to orchestrate refugee repatriation.

Finally, return without *refoulement* is a form of both strategically engineered migration and migration diplomacy. However, return without *refoulement* is not aimed at inducing policy changes from an outside audience (Greenhill 2010), or gaining electoral or battlefield advantages (Lichtenheld 2020; Steele 2017). The primary goal is the population movement itself; how the host state goes about engineering the movement is influenced by the dynamics of the global asylum and refugee protection regime. The design of the strategy may also align with preferences to improve relations between the host state and refugees' country of origin, improve the country of origin's international reputation, and prevent international humanitarian intervention the country of origin.

5. Implications for Research on Refugee Return & International Human Rights Norms

Recognizing the prevalence *prima facie* RSD and use of other temporary group protections reveals how states unable or unwilling to prevent refugee admittance or recognition at-scale can avoid continuing to host refugees by manipulating the legal grey areas of "improved conditions" and "voluntary repatriation" to coerce refugee return – or return refugees without 'refoul-ing' them. While such tactics can and have been used worldwide, they are far more prevalent in the Global South given states' geographic proximity to refugee-sending states, and the widespread use of *prima facie* RSD in the face of mass, rapid displacement.

The identification and illustration of return without *refoulement* as a common state strategy in the Global South carries several important implications for the research agendas on refugee return, state responses to displacement, and international human rights norms. First, recognizing return without *refoulement* as a parallel strategy to *non-entrée* and non-recognition complicates the conceptualization and measurement of the relative liberality of a state's asylum policy. Whereas studies index the relative liberality of refugee policy in the Global South based on national legislation, a state's actual treatment of a given refugee population is unlikely to be evident in that legislation, nor is there necessarily a gap between *de jure* liberal policy and *de facto* implementation. Indeed, executive discretion to recognize refugees *prima facie,* including those who do not qualify under the 1951 convention definition but instead under broader definitions included in regional conventions, is both a liberal

policy on paper and in practice leads to refugee admittance and recognition. But the same policy also allows for executive discretion to end *prima facie* recognition at will, allowing leaders to take advantage of the opacity of international practice on ending refugeehood, and the international community's preference for voluntary return. In so doing, states begin to build a case for ceasing refugee status based on improved circumstances in refugees' home country, enabling states to use intimidating or incentivizing tactics to coerce refugees to return *en masse* while arguably still upholding *non-refoulement*. Thus states manipulate liberal asylum policy towards illiberal ends. Identifying this pattern, however, in the Global South requires a recognition of some of the differences in the on-the-ground process of gaining asylum in the Global South and an analysis of the governance of refugee return rather than admittance or recognition.

Relatedly, there is subside (Alrababah et al. 2020; Braithwaite, Ghosn, and Hameed 2021). Recognizing return without *refoulement's* widespread use, however, suggests that any measurement of refugees' individual- and group-level decision-making vis a vis return must take state practice into account. Without denying refugees' agency in deciding where they want to live, questions of 'who returns? and 'why?' cannot be answered exclusively at the level of individual choice but must acknowledge that host and home-states have their own strategic incentives to shape the available choices and likely outcomes for individuals.

Finally, the widespread use of return without *refoulement* speaks to a broader discussion in the study of human rights and international law on what it means to comply with human rights norms and legal obligations (Martin 2011; Búzás 2018; Cronin-Furman 2020; Putnam 2020). Whereas many analyses of the strength international human rights law focus on whether states comply with the related rights (e.g. whether signatories to the Convention against Torture do or do not engage in torture) (see e.g. Simmons 2010; Neumayer 2005; Hafner-Burton and Tsutsui 2007; O. A. Hathaway 2002; Downs, Rocke, and Barsoom 1996) states can comply with the letter of a law, while evading its intended spirit (Búzás 2017; 2018), or comply 'just enough' to satisfy external audiences without providing meaningful accountability to those whose rights have been violated (Cronin-Furman 2020). Similarly many measures of norm strength focus on the internalization of the principle the norm espouses, whether that principle is contested, and subsequent domestic enforcement (e.g. Bloomfield 2015; Coen 2019; Kutz 2014; Ben-Josef Hirsch and Dixon 2020; Sandholtz 2019; Finnemore and Sikkink 1998; Risse, Ropp, and Sikkink 1999).

However, measuring norm strength in international human rights law by whether a state agrees and complies with the given norm or law elides the multifarious, and potentially perverse ways in

which international laws and norms shape state behavior. In this case, the strength of *non-refoulement* is evidenced in states' costly efforts to facilitate refugee expulsion while still arguably upholding *non-refoulement*. This contrasts with the relative weakness of all other protections the Refugee Convention lays out for standards of refugee treatment in which states do not take costly measures to appear one-step removed from violation, as evidenced through the widespread and legal use of policies like encampment, employment restrictions, and curfews. Scholars looking to understand the strength of asylum norms, therefore may need to invest in further data collection on state behavior towards displaced persons in-country in addition to states' on the books policies or admittance/recognition of refugees. Moreover, this suggests that the international advocacy community's emphasis on upholding *non-refoulement* over all other requirements outlined in the Refugee Convention may have produced unintended and perverse consequences for refugees.

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