Return without *Refoulement:*
How states avoid hosting refugees after recognition

Stephanie Schwartz[⊥][*]
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Abstract:
How do states avoid hosting refugees? Scholars have identified numerous tactics rich democracies use to evade their asylum obligations. These strategies preclude refugees from recognition, allowing states to avoid hosting refugees without denying the validity of *non-refoulement,* the international legal norm prohibiting states from returning refugees. Conventional wisdom holds that shared borders and rapid mass displacement prevent states in the Global South from likewise evading their refugee protection obligations. By examining the governance of refugee return, however, this article identifies a common but understudied strategy that states use to return recognized refugees on their territory. I illustrate this 'return without *refoulement'* strategy by examining Tanzania's treatment of Burundian refugees between 2015 and 2020. Recognizing the strategic logic of return without *refoulement* complicates our understanding of the pathologies of the refugee protection regime and highlights the potentially perverse effects of the international community's disproportionate emphasis on *non-refoulement* over other refugee protections.

Keywords: Forced migration, refugees, international law

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1. Introduction

What tools do states use to avoid their refugee[1] hosting obligations? International law allows individuals to seek asylum and prohibits states from returning people to places where they may face persecution or torture. This prohibition, known as *non-refoulement,* is among the strongest international human rights norms.[2] However, there are a litany of well-known tactics states use to skirt their *non-refoulement* obligations. The most well-studied of these strategies are those known as '*non-entrée*', whereby states prevent individuals from reaching their borders and applying for asylum. States may, for example, force asylum-seekers to process their claims offshore, prevent passenger boats from docking in their ports, or require those seeking refuge to remain in a so-called 'safe third countries'. These tactics are most common in (though not exclusive to) rich democracies that are geographically removed from most refugee-sending states, see relatively fewer displaced persons reaching their borders *en masse*, and have robust bureaucratic systems to process asylum claims through individual

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[1] A note on terminology: I use the terms 'refugee' and 'asylum-seeker' to refer to people who fall into current, though contested, legal categories. These mirror labels used in the UN Refugee Agency (UNHCR)'s global population database. I use 'migrant' to refer to anyone crossing a border, inclusive of those who may or may not seek asylum. I use 'those seeking refuge/asylum' to refer to displaced persons crossing borders who may need international protection but are not necessarily classified as asylum-seekers during the process of refugee status recognition. I use this terminology as these categories are central to understanding state strategies to avoid hosting refugees. At the same time, I recognize that the continued use of the contested binary of 'refuges' and 'migrants' perpetuates the problematic idea that certain people who cross borders are more deserving of protection in a host state than others (Hamlin 2021). Therefore, the terms here should be interpreted to reflect current categorization realities, not a hierarchy of need.

[2] Article 33 paragraph 1 of the 1951 convention states that "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." (*1951 Convention and 1967 Protocol Relating to the Status of Refugees* 1951). *Non-refoulement* is further codified in Article 3 paragraph 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which states that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."(*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984). *Non-refoulement* applies both to asylum seekers and those who may face torture, cruel, inhuman, or degrading treatment or punishment, or arbitrary deprivation of life. Overwhelming legal consensus is that *non-refoulement* is a principle of customary international law such that states not party to relevant treaties remain bound by the principle, however there remains debate on whether it is peremptory or a jus cogens norm (Goodwin-Gill and McAdam 2021, 300–306). The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and Cartagena Declaration on Refugees, which have expanded definitions of refugees, expand states' protection obligations under *non-refoulement* to apply people fleeing "external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of his country of origin or nationality" and "generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed the public order" (Goodwin-Gill and McAdam 2021, 304).

refugee status determination (RSD) processes. Conventional wisdom holds that whereas rich democracies have the resources and geopolitical power to keep asylum-seekers out, states in the Global South — particularly those that share borders with states experiencing civil war — have no choice but to let in those in need of refuge or be found in violation of *non-refoulement*.

I argue, however, that this assertion belies an assumption that the process of seeking asylum in the Global North is the same in the Global South; that is, if an individual overcomes *non-entrée* obstacles and reaches the frontiers of a state, they are considered asylum-seekers and go through an individual adjudication process to be recognized as refugees. However, most refugees in the Global South arrive directly along a shared border with the refugee-sending country and are recognized through group RSD (also known as *prima facie* RSD (PFRSD)) or are granted a related group temporary protected status.[3] This narrows the time in which states can avoid hosting refugees by precluding arrival and recognition. An examination of the governance of refugee return in the Global South, however, reveals an understudied strategy states use to evade to their asylum obligations by returning refugees already on their territory. Whereas the cessation, revocation or cancellation of refugee status granted by individual RSD has been exceedingly rare (Siddiqui 2011), ending[4] *prima facie* refugee status[5]

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[3] There is no 'group refugee status' under international law, only individuals are recognized as refugees (Sharpe 2018a). However, UNHCR refers to two types of RSD processes: individual RSD and so-called 'group determination' of refugee status; group determination of refugee status is essential *prima facie* RSD whereby individual members of a group are recognized as meeting the applicable refugee definition based on readily apparent circumstances in their country of origin. These differing processes are described in full on pp 12-14 below. 'Related group temporary protected status' refers to the common practice in states not party to the 1951 Refugee Convention in which the government uses alternative terms to confer temporary protection against *refoulement* to individual members of a group who qualify as refugees based on circumstances in their country of origin, but without labeling them as refugees. International and state actors often (though not always) concede is a form of *de facto* PFRSD (Janmyr 2018). This includes, for example, certain group categorizations of Syrian refugees in Lebanon following the Syrian civil war and the Bangladeshi government's recent designation of Rohingya refugees as 'Forcibly Displaced Myanmar Nationals'.

[4] By 'ending prima facie refugee status', I mean the process which includes ending PFRSD, and may or may not subsequently include rhetorical and legal preparation for cessation of refugee status. Colloquially, many actors at my research sites, including iNGO and IO staff as well as expert observers, referred to this process as 'revocation of refugee status' or some iteration on this terminology, such as 'withdrawing refugee status'. However, because 'revocation' is also a legal term referring to instances in which a refugee's actions after a valid status determination allow the state to withdraw the refugee's status and deport the individual under article 1F (a) or (c) of the 1951 Convention, I do not use the colloquial terminology here.

[5] I follow Albert (2010)'s use of the term *prima facie* refugee status to delineate refugee status that is recognized through PFRSD as opposed to individual RSD. Given the widespread use of the term "prima facie refugee status" by

is a far more common occurrence.[6] I argue that in cases of large-scale, rapid displacement, states use the process of ending PFRSD and preparation for implied future cessation of refugee status as a tool to return refugees without legally '*refoule*-ing' them — 'return without refoulement'. Return without *refoulement* is therefore a sibling strategy to *non-entrée*, allowing states to avoid hosting refugees without denying the normative validity of *non-refoulement*.

This article identifies and illustrates the return without *refoulement* strategy. In doing so, it makes three primary contributions. First, most of the scholarship on state responses to asylum seeking focuses on ways that states preclude admitting or recognizing refugees (FitzGerald 2019; Gammeltoft-Hansen and Hathaway 2015; Gammeltoft-Hansen and Tan 2017; Zetter 2007). By instead examining the governance of refugee return, I identify a widespread but underrecognized tool that states use to avoid their asylum obligations through inducing refugee return. Importantly, this article does not analyze why states will opt to use return without *refoulement* against some refugees but not others. There is a robust literature exploring why states and sub-national actors prefer to host some refugees but not others (Norman 2020; Abdelaaty 2021; Betts 2013; Hamlin 2014; Fiddian-Qasmiyeh 2019). In cases in which a state's preference is to reduce their refugee hosting obligations with respect to a particular population, this article identifies a common yet underrecognized strategy that states use to this end. In exploring the logic of this strategy, the article identifies several conditions which may make a return without *refoulement* strategy particularly attractive.

Second, whereas much of the debate on *prima facie* RSD focuses on defining its legal nature or on the circumstances for using PFRSD to recognize refugees (Albert 2010; Rutinwa 2002; Durieux 2008; Hyndman and Nylund 1998; Okoth-Obbo 2001), I argue that states use ending PFRSD as a

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international organizations, states, and refugee scholars to describe a unique process, Albert 2010 argues that "the "prima facie" term can comfortably be used to qualify the term "status" in refugee law" (Albert 2010, 71). I do not, however, make the claim that *prima facie* refugee status is legally different than status recognized by other determination processes.
[6] There is growing concern, however, that in recent years rich democracies are increasing their use of cessation to return unwanted refugees (Shultz 2020).

political strategy. Analyzing it as such suggests that it is not only rich democracies that manipulate compliance with *de jure* refugee law to the detriment of *de facto* refugee protection, but states in the Global South as well.

Finally, providing a more complete picture of state tactics to avoid hosting refugees leads to a different diagnosis of the sources of vulnerability in the current refugee protection regime. Recognizing *non-entrée* and return without *refoulement* as two sides of the same coin points to the need not only to allow those seeking asylum entrance to a territory, but also to protect refugees while in the host-country. Future research on the strength of the global asylum regime, therefore, should consider the potentially perverse effects of emphasizing adherence to *non-refoulement* over all other refugee rights.

The rest of the article proceeds as follows: in section two I situate the strategy of return without *refoulement* in relation to other strategic state responses to seeking asylum and use data on group RSD to show the stark geographic differences in use of individual and group RSD processes.[7] I then discuss the existing debate on the legal nature of PFRSD and explain how the differences in RSD matter when considering political tactics to evade asylum obligations. Section three outlines my conceptualization of the return without *refoulement* strategy, delineating what behavior falls under this category and what does not. Finally, I use the case of Tanzania's treatment of Burundian refugees between 2015 and 2020 to illustrate the strategy. I conclude with a discussion of what these observations mean for the research agenda on the evolution of the refugee protection regime and international norm compliance more broadly.

2. State responses to seeking refuge

Whether states are using migration to coerce policy concessions from adversaries, gain information about their domestic population, or as a form of diplomacy to promote bilateral relations and improve

their international reputation, state action with respect to migration and displacement is frequently the result of carefully considered political, military, and economic strategy. Analyzing the logics behind these strategies reveals new and complex information about the causes and consequences of displacement (Adamson and Tsourapas 2019; Greenhill 2010; Lichtenheld 2020; Steele 2017). Return without *refoulement*, is one strategy in this broader family of approaches to migration policy. The logic behind the strategy derives from the primacy of *non-refoulement* in the global asylum and refugee protection regime (the collection of actors, norms, and institutions that simultaneously constitute and regulate asylum governance).[8]

2.1 The centrality of governing return in shaping responses to asylum

Non-refoulement, as enshrined in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (heretofore referred to as the Convention or the Refugee Convention) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (heretofore referred to as Convention against Torture), is considered the bedrock of the modern refugee protection regime.[9] Indeed, rather than an affirmative right to asylum, the lynchpin norm in international human rights law protecting refugees is a negative prohibition against states sending people back to places where their life or liberty are in danger on grounds of persecution, torture, or arbitrary deprivation of life. This prohibition effectively forces states to provide haven to individuals who reach the frontiers of the state's territory who qualify as refugees under the Convention. While *non-refoulement*'s precise categorization in international law is the subject of much debate, the principle is widely accepted as a norm of customary international law, applicable to all states regardless of whether they are party to the Convention (Allain 2001; Costello and Foster 2016;

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[8] This definition builds on Barnett (2013)'s definition of humanitarian governance.
[9] Non-refoulement is further strengthened by its inclusion in the Convention against Torture.

Goodwin-Gill and McAdam 2021; UNHCR 2007; c.f. Hathaway 2005b). Still, the implementation of *non-refoulement* varies widely, with numerous instances of obstruction, violation, and circumspection alongside compliance and transformation of domestic law to align with the norm (Hathaway 2005b; Goodwin-Gill and McAdam 2007).

A robust literature on forced migration documents how rich democracies obstruct, violate and circumspect *non-refoulement* by using strategies of *non-entrée* and 'remote control' to avoid hosting refugees without overtly violating the norm (FitzGerald 2019; Gammeltoft-Hansen 2011; Betts 2009; 2010; Gammeltoft-Hansen 2014; Hammerstadt 2014; Hansen 2014; Gammeltoft-Hansen and Hathaway 2015; Gammeltoft-Hansen and Tan 2017; Hathaway 2019). Tactics of *non-entrée* and 'remote control' are multifarious. Traditionally they have included offshore processing, visa controls, or interdiction at sea. More recently, *non-entrée* tactics have evolved to include bi- or multilateral arrangements that rely on cooperation with transit and sending states to inhibit those seeking asylum from reaching a state's borders. (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 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 return any migrants who 'irregularly'[10] arrived in Greece to Turkey (Zaragoza-Cristiani 2017; Terry 2021).

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

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, powerful 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 such that they do not have to provide asylum to those who seek it (Gammeltoft-Hansen and Hathaway 2015; FitzGerald 2019). Legal scholars argue that some of these tactics will not hold in the long-term as they are already receiving pushback on the grounds that states cannot delimit their territory to avoid legal liability and that their protection duties still apply where states exercise effective control, including on the high seas (Gammeltoft-Hansen and Hathaway 2015). However, Fitzgerald (2019) argues that the efficacy of legal challenges varies and can even encourage more creative and nefarious forms of border externalization.

A central finding in the analyses of *non-entrée* is that compliance with the letter of international asylum law does not always directly translate to more liberal *de jure* national migration policies or *de facto* refugee protection. Instead, we have seen a trend of hyper-legalization, in which states use technical adherence with international refugee law to create more restrictive domestic immigration regulations and circumscribe the provision of refuge (Inder 2010). Using a novel dataset of asylum law from 92 developing countries, Blair, Grossman and Weinstein (2021b; 2021a) find that in, in line with these trends, *de jure* domestic policies towards asylum-seekers in the Global North have become more restrictive over time. However, they also find that *de jure* domestic asylum policies in the Global South have become more liberal. I argue that this finding fails to consider the differences in how asylum is granted in the Global North as compared to the Global South. Just as rich democracies can use the hyper-legalization of international law to create more restrictive administrative policies, states in the Global South can use *de jure* liberal asylum policies toward illiberal ends. However, because the

on-the-ground process of gaining refuge in the Global South often looks very different than it does in the Global North, we cannot expect these states to use the same dominant tactics to do so.

Given rich democracies' widespread use of *non-entrée* policies, the conventional wisdom holds that the central pathology of global asylum governance is the hyper-territorial interpretation of *non-refoulement* which allows wealthy states to avoid hosting refugees without violating international law. The institutionalization of the architecture of the *non-entrée* regime in the Global North exacerbates existing disparities in refugee hosting by further hindering the possibility of migrants reaching destinations in the Global North or creating formal agreements that place a disproportionate 'burden' on developing countries to host refugees. Attendant policy recommendations focus on strengthening access to asylum in wealthy countries by challenging the legality of these tactics, pressuring rich democracies to 'shoulder their burden' in other ways, such as through foreign aid or on strengthening north-south cooperation through issue linkages (Hathaway 2019; FitzGerald 2019; Betts 2008; c.f. Betts 2021).

Indeed, access to territory is critical to asylum in a state system in which territorial sovereignty reigns supreme. However, it is not sufficient. Moreover, the disproportionate emphasis on documenting strategies and institutions of *non-entrée* in the forced migration literature conceptualizes the precarity of refugee protection primarily with a view from the Global North. Given that 85% of refugees live in the developing countries (UNHCR 2021), a diagnosis of the weaknesses in the refugee protection regime is incomplete without also looking at state responses to asylum seeking in the Global South. Indeed, several studies have identified that migration theories developed based on experiences in the Global North do not necessarily hold true in the Global South (e.g. Adida 2014; Onoma 2013; Norman 2020; Sadiq 2009). As such, a more complete understanding of how states avoid their asylum obligations should consider differences in the process of seeking refuge in Global North as opposed to the Global South.

2.2 State Responses to Seeking Refuge in the Global South

Non-entrée and remote-control tactics work best when states are geographically distant from migrants' countries of origin, and when states have the geopolitical power to make ad-hoc agreements with other states to take in asylum-seekers who might otherwise try and reach their borders. By limiting the rapidity with which people approach their borders, it is easier for states to evaluate asylum claims on a case-by-case basis which increases the states' ability to reject claims through exclusionary categorization (individual RSD is explained in full in section 2.3). On the other hand, shared borders and large, rapid cross-border displacement situations makes it less likely – though not impossible – for states in the Global South to take advantage of *non-entrée* tactics without overtly violating *non-refoulement*.[11] Rapid cross border displacement from a neighboring country obliges host states in the Global South to admit far more refugees onto their territory relative to the Global North, at which point they are prohibited under international law from returning those who qualify for asylum. Indeed, while a refugee's legal status in a host country is subject to RSD, the acquisition of core refugee rights and protections under international law is not based on formal status recognition, but instead follows automatically when an individual meets the criteria of the refugee definition (Hathaway 2005b, 11). Given the close proximity, most host countries in the Global South cannot avoid their asylum obligations by preventing entrance, as they would be in violation of *non-refoulement*. Instead, if these states want to decrease their refugee hosting duties, they must consider tactics to deal with refugees already on their territory.

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[11] This is not impossible, but it is less common in the Global South than in the Global North. Cases in which states refused entrance to displaced persons include Jordan, which shut its border to Syrian refugees in 2018 keeping more than 60,000 asylum-seekers stranded at the border (see Alrababa'h and Williamson 2018). Long (2010) and Hathaway 2005 also provide examples of border closures by neighboring countries. I thank Rawan Arar for this point.

In cases where refugees make it to — or across — a border, the literature has documented two primary tactics common worldwide that states can use to avoid hosting these refugees. States can leverage the bureaucratic administration of refugee status determination (RSD) to refuse refuge to those who might arguably qualify, defining out refugees by using legal and rhetorical labels to prevent individuals who flee for multiple reasons from being recognized as refugees (Zetter 2007; Betts 2009; 2010; Sharpe 2018b; Mourad and Norman 2019; Hamlin 2014; 2021; Ramji-Nogales 2016; Sharpe 2018b; Janmyr and Mourad 2018). States can also use bureaucratic delays in the process of making an asylum claim to prolong the amount of time asylum-seekers must remain in legal limbo (Mourad and Norman 2019). Denying recognition enables states to 'legally' expel individuals whose asylum claims are denied, while preventing status recognition creates precarity around asylum-seekers' continued residence in the host country. Precarious legal status can render refugees and asylum-seekers especially vulnerable, without access to adequate work, shelter, mobility or physical security. This may result in asylum-seekers 'choosing' to leave rather than live in that precarity. The legal precarity also enables more predatory tactics such as over-policing, and restricting access to employment, health care and education that may incentivize refugees' to leave the host country 'voluntarily' (see e.g. Mourad 2019).

Other tactics are more common (though not exclusive to) the Global South. For example, Norman (2020) and Abdelaaty (2021) argue that in addition to liberal policies that recognize refugees or restrictive policies that deny recognition, states in the Global South often use 'strategic indifference' and 'delegation' to leverage the resources of the international community and avoid taking an affirmative position of their own. In some cases, these strategies include delegating RSD processing to international organizations like UNHCR. These tactics are likely to be most common in countries that already have international organizations present on their territory, and do not lose reputationally by relying on their services, which largely excludes rich democracies. Similarly, states may take

advantage of legislative ambiguity allowing for ad-hoc governance of asylum and migration at the executive level (Natter 2021).

The strategies above are primarily designed to avoid the recognition of refugees and therefore allow states to reduce the scale of their refugee hosting. In many cases of cross-border displacement in the Global South there is less of a waiting time for state bureaucracies to delay or deny the determination of refugee status. Given the rapidity and size of displacement situations, many states in the developing world, especially those that are Convention signatories, opt to use group or *prima facie* refugee status determination (PFRSD) processes in which the state recognizes displaced persons as refugees 'based on readily apparent conditions' in their countries of origin. As described in full below, this vastly accelerates the recognition process, such that tactics aimed at avoiding recognition are not as viable at scale. As such when considering strategic responses to asylum-seeking in the Global South, in addition to understanding states' decisions whether and how to grant refugee status, it is equally important to examine the prevailing tactics through which states *eject* refugees on their territory. I argue that one dominant tactic is to effectively turn refugees into asylum-seekers by halting PFRSD and ceasing (or preparing to cease) *prima facie* refugee status for those already recognized.

2.3 The Importance of Refugee Status Determination (RSD) Type

The literature conceptualizing the tactics of the *non-entrée* regime draws most of its examples from rich democracies where governments predominantly use individual RSD processes. With few exceptions these studies take for granted a constant RSD type. However, if a state's goal is to avoid their refugee hosting obligations without overtly violating international law, the type of RSD process matters because it shapes how governments can finagle policy to either deny recognition or eject recognized refugees.

As stated above, the protection of *non-refoulement* applies to all individuals whose circumstances satisfy the refugee definition' regardless of state recognition. However, individuals' legal status in the host country may depend on a formal RSD process whereby designated state or international bodies evaluate whether a person is considered a refugee under international, regional, or national law. UNHCR refers to two types of RSD processes: individual RSD and group determination of refugee status.[12] Individual RSD refers to the subset of RSD processes in which refugee status is determined on a case-by-case basis. For example, all individuals arriving at the US border must make their case for why they qualify for refugee status, regardless of whether other people are fleeing similar circumstances from the same country of origin at the same time who also qualify for refugee status for the same reasons. UNHCR classifies these individuals as 'asylum-seekers' in their population database. Asylum-seekers often wait months –even years– until their RSD case is decided. States in the Global North have traditionally granted individuals recognized as refugees through individual RSD a pathway to citizenship (Arar 2017). This is made possible, in-part, by how few asylum-seekers reach rich democracies' borders.

Group determination of refugee status, on the other hand, refers to the process whereby a state chooses to regard individual members of a group as refugees *prima facie*, meaning based on 'readily apparent, objective circumstances in the country of origin, absent any evidence to the contrary.'[13] States use of PFRSD may be both pragmatic and/or a recognition of the nature of flight (Sharpe 2018a). First, states may recognize refugees *prima facie* because it would be impractical to conduct individual RSD due to the size and rapidity of arriving refugees. Second, in cases where those fleeing may not all qualify under the 1951 convention definition, but the receiving state is instead responding

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[12] UNHCR. "Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection." (2019) sec. B(2) 44).
[13] UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (24 June 2015) HCR/GIP/15/11, para 1.

to their obligations under article I(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, individual circumstances need not be considered as refugee recognition is based on general conditions in the country of origin rather than on the individual refugee's fear of persecution (Sharpe 2018a). In both cases, states' use of PFRSD evinces the strength of *non-refoulement* in shaping state behavior, as states admit a large population seeking refuge onto the states territory and allow them to stay.

In practice an executive, ministerial or parliamentary representative in the host state, or an international organization will authorize the use *prima facie* RSD, 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.[14] Alternatively, Zambia's policy is to *prima facie* recognize individuals who cross into the borderlands seeking refuge, but refer individuals who might qualify for recognition based on the Convention definition to the capital for individual RSD (Sharpe 2018a). In some cases, displaced populations arrive at or are taken to transit camps, where they register with designated authorities who recognize them as refugees following an initial screening. 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). As such the assumption that PFRSD is used exclusively due to 'lack of capacity' in the host country's asylum system does not hold. In some cases, the decision to apply PFRSD can also be seen as a form of strategic delegation in which governments benefit from delegating some or all RSD responsibility to UNHCR to insulate itself from conflicting pressures (Abdelaaty 2021, 27). Importantly, when

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[14] https://www-jstor-org.libproxy2.usc.edu/stable/pdf/10.5305/intelegamate.54.6.1115.pdf?refreqid=excelsior%3A666a148e1d0bc84b4eba6fe812ec60e8

interpreting UNHCR data on displacement, UNHCR does not record those seeking refuge who are recognized *prima facie* within the same year as 'asylum-seekers'.

Prima facie RSD is almost exclusively used in the Global South. Group-based protections in the Global North, on the other hand, are temporary and do result in refugee status. Many rich democracies, for example, will grant nationals from a particular country of origin "Temporary Protected Status" (TPS), such that these migrants may remain in the host country for a pre-determined period due to unsafe in their country of origin. TPS is a political instrument to deal with cases of mass influx, rather than a designation under international law (Goodwin-Gill and McAdam 2021, 292). While TPS may be used in situations in which many migrants qualify as refugees, as is the case with the EU's Temporary Protection Directive, some states also use TPS to grant protection to individuals who fall outside the Convention definition, such as people fleeing natural disasters. For example, following the earthquake in Haiti in 2010, the United States granted TPS Haitians allowing for legal residence for one year, subject to reevaluation. While the details of TPS polices vary by host government, in many cases TPS is designed to fulfil the government's *non-refoulement* obligations in mass influx situations by granting designated foreign nationals permission to stay given readily apparent dangers in their country of origin – without recognizing the displaced as refugees *en masse,* as that could lead to permanent settlement under domestic law.

Non-State signatures of the Refugee Convention have also taken advantage of temporary group protections to find a middle ground in refugee recognition. For example, with the onset of the civil war in Syria, many host countries in the MENA region innovated protected status labels that allowed displaced persons from Syria a form of protection from *refoulement* without formally recognizing them as refugees, which in this case was interpreted as a *de facto* rather than *de jure 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 TPS in the agency's population database.

Using data provided by UNHCR to the author, Figures 1 through 3 show the total number of newly recognized refugees by individual RSD, group RSD (*prima facie* RSD), or temporary protected status by region from 2010 to 2019.[15] The data demonstrate that between 2010 and 2019 most newly arriving refugees worldwide were either recognized *prima facie* or provided alternative group TPS. Whereas individual RSD is the dominant mode of recognition in the Global North, for the past 10 years, *prima facie* RSD or alternative group TPS has far outpaced individual RSD in the Global South. The spikes in TPS in 2013 and 2017 are related to the crises in Syria and Myanmar. As discussed above, most host states in the Global South receiving refugees from these crises are not party to the Convention and used alternative protected status categories which UNHCR has labeled here as TPS, though in some countries this was acknowledged to be a form of *de facto* form of *prima facie* recognition.

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[15] 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.
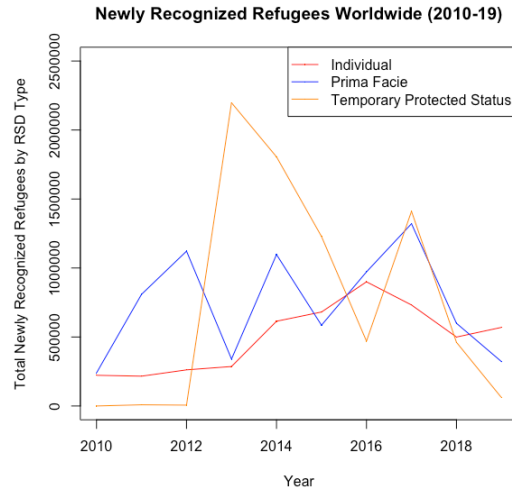
Figure 1

Newly Recognized Refugees Worldwide (2010-19)

Figure 2

Figure 3

Newly Recognized Global North (2010-19)

Newly Recognized Global South (2010-19)
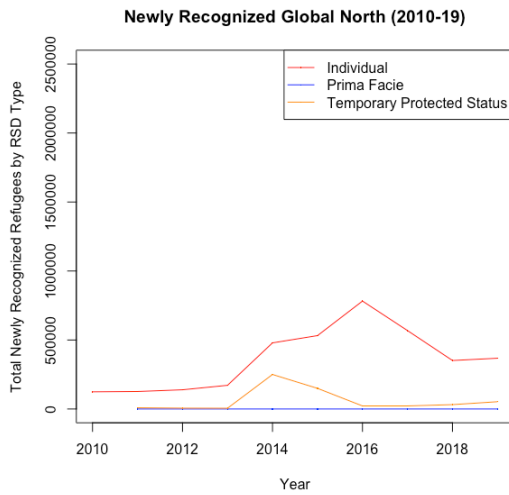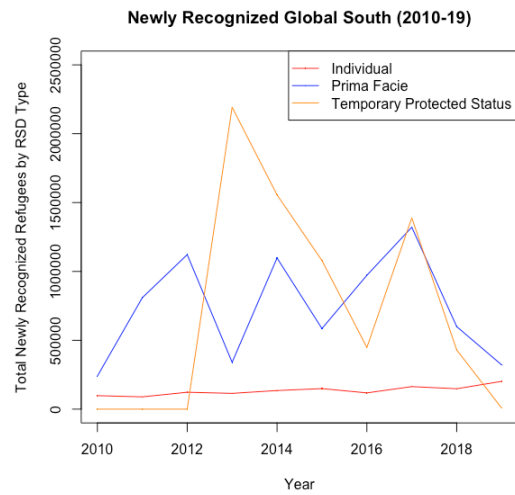

Given the global prevalence of *prima facie* RSD and other forms of group protected status, there is a dearth of academic inquiry on the politics of its use relative to other asylum processes. Several studies have explored the variation in individual RSD processes within and across countries, including the role of political preferences and institutional design in shaping recognition outcomes (e.g. Joppke 1997; Rosenblum and Salehyan 2004; Neumayer 2005; Ramji-Nogales, Schoenholtz, and Schrag 2007; Rehaag 2008; Gould, Sheppard, and Wheeldon 2010; Hamlin 2014). The literature on *prima facie* status, however, largely focuses on its legal nature, duration, initial application and any attendant protection

gaps (Hyndman and Nylund 1998; Okoth-Obbo 2001; Jackson 1999; Rutinwa 2002; Durieux and Hurwitz 2004; Durieux and McAdam 2004; Rutinwa 2005; Durieux 2008; Albert 2010). While there remains disagreement on the precise legal nature of the resultant status, UNHCR's guidelines state that "a *prima facie* approach acknowledges that those fleeing [readily apparently, objective circumstances in the country of origin] are at risk of harm that brings them within the applicable refugee definition," and that "each refugee recognized on *a prima facie* basis benefits from refugee status in the country where such recognition is made, and enjoys the rights contained in the applicable convention/instrument," (UNHCR 2015b, sec. I(1) & I(B)7)."

Despite UNHCR's guidelines, in practice, there is a difference in how protection plays out over time for refugees recognized *prima facie* as opposed to through individual RSD. In many cases, states grant refugees recognized *prima facie* an absolute 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).[16] As such, in cases of mass influx, particularly in Africa, state imposed restrictions — including limitations on freedom of movement, physical security, civil & political rights — create a situation where refugees cannot avail themselves of basic human rights including those outlined in the 1951 convention as well as other international instruments. This leads to situations in mass influxes in which refugees' protection from *refoulement* "is bought at the cost of almost every other right" (Crisp 2003, 11).

Moreover, while the legal nature of refugee status recognized *prima facie* is neither presumptive nor temporary, I argue that this restriction of rights combined with states' ability to manipulate the

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[16] 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 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.

process of ending PFRSD reveals additional temporal precarity of *prima facie* status. Article 1C(5)-(6) of the Refugee Convention allows for the cessation of refugee status due to 'changed circumstances' in the country of origin. Just as *prima facie* RSD is applied based on readily apparent circumstances in the country of origin, states or UNHCR can make official declarations of cessation due to changed circumstances, upon which the general risk to members of a group may be assumed to have ceased. However, individuals must be given an opportunity to argue they qualify for asylum based on their individual circumstances. In declaring a fundamental change to circumstances, states are legally within their right to deport now-former refugees as their return would no longer constitute refoulement (Hathaway 2005a). While legal cancelation, cessation or revocation of refugee status to deport individuals who have been recognized as refugees through individual RSD is rare; cessation of refugee status for those who were recognized *prima facie* is a more common occurrence (Siddiqui 2011). Still, the standards for application of the ceased circumstances clauses are both high and unclear, such that formal cessation of refugee status is rare (Siddiqui 2011; Fitzpatrick and Bonoan 2003; Goodwin-Gill and McAdam 2021, 168–71).

However, ending *prima facie* RSD on the grounds that conditions in the country of origin are improved opens the door to the argument that refugees already in country are no longer in need of international protection and that status cessation may be warranted. This, combined with the generally accepted curtailing of rights and protections in-country for refugees recognized *prima facie,* enables states publicly campaign for cessation and pressure refugees to return voluntarily prior to making formal cessation declarations. As such, states can treat *prima facie* status as a form of temporary protected status, in which they comply with *non-refoulement* upon initial admission, but the duration of protections is subject to their political preferences.

States often work in coordination with UNHCR and other international organizations and NGOs to facilitate 'voluntary' return after ending PFRSD. There remains debate on the ethics of

international cooperation in the orchestration of these types of repatriation efforts. On the one hand, it would seem that these actors are enabling rights violations and *refoulement,* on the other many refugees may be returning voluntarily and organizations' refusal to assist refugees in returning may put them at equal or greater risk in the host country (Gerver 2018). Still, while some of the repatriation may indeed be voluntary, as Hathaway (2005) has noted, UNHCR's ambiguity on the line between voluntary repatriation, state's legal right to deport of former-refugees, and what constitutes *refoulement* creates a conceptual vacuum which can result in the expulsion of those who should qualify for refugee status. Such was the case in 1996 when, aided by portrayals of Rwandans as perpetrators rather than victims of conflict, Tanzania forced thousands of Rwandan refugees to return to Rwanda given the alleged improved conditions (Whitaker 2002). UNHCR did not formally recommend cessation of refugee status for Rwandans, however, until 2013 (IRIN 2013). Building on Whitaker (2002) and Hathaway (2005), I argue that ending *prima facie* RSD has become a tactic states use to return refugees without suffering the wholehearted rebuke of the international community.

3. Conceptualizing Return without *Refoulement*

I argue that when unable to take advantage of *non-entrée* strategies at scale, many states use a strategy of 'return without *refoulement*' to repatriate recognized refugees on their territory. Like *non-entrée,* states use a return without *refoulement* strategy to avoid their refugee hosting obligations while arguably upholding their legal obligations of *non-refoulement.* Rather than externalizing the point of asylum recognition beyond their borders, as is done in *non-entrée* strategies, return without *refoulement* allows states to recreate the moment of asylum-seeking on their territory effectively turning refugees into asylum-seekers. This opens the doors to numerous tactics through which the host state can expulse refugees. States may cease refugee status (or engage in preparations for implied future cessation) while engaging in repressive tactics aimed at making daily life inhospitable for refugees.

Return without *refoulement* can and has been used worldwide. However, because the strategy involves a formal or rhetorical 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 ending *prima facie* RSD or other forms of group status makes the invocation of the changed circumstances clause of the Refugee Convention easier to invoke. That said, following the 2015 Mediterranean displacement situation there has been increased interest among states in the Global North to take advantage of the cessation clause to return refugees or otherwise limit the duration of refugee status protection (Shultz 2020; O'Sullivan 2021). Still, *non-entrée* and remote control far outpace return without *refoulement* as the dominant strategy rich democracies use to avoid their asylum obligations.

3.1 Strategic Logic & Related Tactics

The process of return without r*efoulement* usually begins with an executive or ministerial declaration that newly arriving displaced persons from a designated country will no longer be recognized *prima facie* as refugees. Any displaced persons from this country of origin who arrive after *prima facie* RSD has ended must submit their case for asylum through individual RSD. Importantly, the state justifies ending group recognition based on their assessment that conditions have improved in refugees' country of origin. At the same time the state is likely to engage in a public relations campaign aimed at an international audience in which officials laud the peaceful conditions in the country of origin and deride refugees who remain as 'economic migrants'. The process of ending PFRSD therefore opens the door for states to engage in any number of formal, quasi-formal and informal tactics to expel refugees while arguing that they remain in compliance with international law and good faith actors in the refugee protection regime. These tactics include formal status cessation, pressuring international actors to facilitate mass voluntary return, and coercing refugees to choose to return by offering positive incentives or using repressive tactics to create untenable living conditions. I elaborate on several of

these tactics below, illustrating them with examples from state action in Tanzania, Pakistan, and Kenya.

       3.1.1   Turning refugees into asylum-seekers based on alleged changed circumstances:

One of the formal or quasi-formal tactics states use following the end of PFRSD is to turn refugees from a specified country of origin into asylum-seekers once again through refugee status cessation, or in preparation for an alleged future cessation. Formal refugee status cessation requires a host state to allow all individuals whose status stands to be ceased the opportunity apply for protection via individual RSD. Therefore, after ending PFRSD and in preparation for cessation of status, the state may work on their own or with international organizations to interview refugees to see if they qualify on individual grounds for asylum. The state can then legally expel all those refugees who are deemed no longer in need of international protection. This also allows the state to use their narrative about the conditions in refugee's country of origin to exclude refugees from protection under the strict standards of the Refugee Convention.

For example, this was one of the tactics the government of Tanzania used to force Burundian refugees who fled the civil war to return, despite refugees' resistance (Rema Ministries 2012; UNHCR 2012a). Tanzania announced plans to close refugee camps housing Burundians who fled the civil war due to the improved political conditions in Burundi and initiated a tripartite agreement with UNHCR and the government of Burundi to facilitate return. Tanzania then worked with international actors to interview all the refugees in designated camps to see who, if anyone, still qualified for international protection. In the end, roughly 2,700 Burundian refugees living in camps were deemed in need of continued international protection, and approximately 37,000 refugees had their status formally ceased. Following the cessation, Tanzania violently coerced the now former-refugees to return. International organizations participated in this process which they called 'orderly return' on the grounds that not participating could result in more severe human rights violations (UNHCR 2012b;

2012a; Rema Ministries 2012). Many of these refugees had compelling reasons to fear they would be persecuted upon return as the government and its agents would assume those who remained abroad supported the political opposition (Schwartz 2019).

3.1.2 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; states use them both in advance of formal cessation or without any intention to cease refugees' status. States may employ these tactics immediately following ending PFRSD or wait several months or years before initiating them. Whereas the simplest route to repatriate refugees with the greatest chance of success would be to directly deport all refugees, repressive tactics that are a part of a return without *refoulement* strategy are designed to be once removed from deportation, pressuring refugees to 'choose' to leave the country.[17] Such tactics include, but are not limited to, intimidation campaigns informing refuges 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 is policy, no longer recognizing newly arriving Afghans as refugees, but not ceasing the status of those already recognized. Years later in response to several international and domestic events, the Pakistani government engaged in a violent return without *refoulement* campaign culminating in a concerted effort to pressure refugees to return in 2016. The government subjected Afghan refugees

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[17] 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.

to increased 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). This was not Pakistan's first attempt to return the Afghan refugee population, but one of the more flagrantly coercive.[18] 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.[19] 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 these tactics resulted in the return of 365,000 of Pakistan's 1.5 million.[20] Kenya similarly worked with UNHCR to offer cash incentives to Somali refugees to 'voluntarily' return. Kenya 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 enough for the agency to facilitate voluntary return, following Kenya's threats to close Dadaab they worked with the Kenyan government to step up voluntary repatriation and cash incentive programs for refugees. Though UNHCR forced returnees who took the cash 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

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[18] 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).

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

[20] 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.

authorities, and the prospect of losing out on the $400USD payment coerced many Somalis to enlist in the program (UNHCR 2015c; 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).

3.1.3   Increased legitimacy by international association

As described above, the international community often participates in return without r*efoulement*. Even if UNHCR declares that the situation has not improved enough to invoke cessation due to changed circumstances, 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. In addition to facilitating trilateral agreements to coordinate voluntary return or partnering with states to provide cash incentives for return, UNHCR and the IOM may organize the logistics of transporting those refugees who are choose to 'voluntarily' repatriate due to coercive tactics to their home countries. As Hathaway (2005a) notes, these actions lend legitimacy to efforts that might otherwise be construed as *refoulement*.

3.2 Incentives

To understand the strategic logic behind return without *refoulement* it is important to identify the incentives states are responding to such that they choose these costly tactics as opposed to deporting unwanted refugees or allowing refugees to stay despite the states' preference for their expulsion. As with any other analysis of displacement dynamics, observed outcomes are not solely the result of a host-state's preferences and incentives. Actors system-wide, including international organizations and refugees' country of origin, have preferences with regards to refugee return that may factor in to a host-states' decision to opt for a return without *refoulement* strategy.[21] It is important to note that in

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[21] On a systems approach to displacement analysis see Arar and Fitzgerald forthcoming.

outlining the incentives that make return without *refoulement* an enticing strategy, this article is not making an argument as to why some states choose to allow some refugees to stay while forcing others to leave. Instead, placing the behaviors described above within a broader incentive structure allows for the identification a pattern of strategic behavior that has otherwise been overlooked or mis-categorized as simply bad faith action or appropriate cessation of refugee status.

For host-states, return without *refoulement*, is a response to competing incentives to simultaneously expel refugees while maintaining international legitimacy. On the one hand, host states may want to maintain a reputation as a good refugee hosting state and good faith actor in the refugee regime and may not want to jeopardize foreign economic assistance by violating human rights norms. Indeed, Norman (2020) demonstrates that international reputational incentives have influenced refugee host states to engage in more liberal migration policy. States may also benefit politically from portraying certain groups from rival/allied countries as in need of international protection or not (Hamlin 2012). Governments may also face domestic pressure to eject refugees. Domestic constituencies may want to withdraw their support for refugees because they are seen as an economic or social threat, due to influential elite-level preferences, or due to widespread xenophobia or racism (Betts 2013; Norman 2020; Abdelaaty 2021). Additionally, host states may have incentives to threaten to expel refugees to gain additional aid commitments from international actors or may face pressure from regional allies not to recognize a population as in need of protection (Greenhill 2010).

Importantly, I am not arguing that 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 on 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.[22] 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, and rich democracies' own use of hyper-legal loopholes to avoid refugee hosting, tactics used to make it harder for refugees in-country to access adequate shelter, food, medical care, education, or states' actions to incentivizing 'voluntary' refugee return prior to substantial amelioration of conditions in the country of origin, are not as aggressively monitored by the international community. While some nations' domestic courts have found that such tactics violate *non-refoulement* by inducing return, and human rights organizations similarly argue that policies that create unlivable situations should constitute *refoulement,* the lack of broad-based international agreement as to where to draw the '*refoulement'* line, the common de facto 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.

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

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[22] 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.

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 image as a legitimate government, 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. 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 reportedly 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.[23] Human rights organizations, on the other hand, have found that many of the refugees who have returned have been subject to 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 group RSD or cessation of refugee status and coercion of 'voluntary' return are more 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 maintaining their international reputation, while countries of origin get to project the

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[23] See Hubbard 2020

appearance of 'safe conditions' for return. Unilateral use of these tactics is by no means absent; however unilateral enforced return is riskier reputationally.

3.3 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.

4.   Illustrating Strategies of Return without *Refoulement* in Tanzania

The following section examines Tanzania's hosting of Burundian refugees between approximately 2015 and 2020 to illustrate the strategic application of return without *refoulement* tactics as compared to other responses to asylum seeking. I draw on qualitative evidence including interviews and field

observations conducted over nine months of fieldwork in Burundi and Tanzania between 2014 and 2017,[24] as well as news media and reports from human rights agencies. I argue that Tanzania uses a return without *refoulement* strategy against refugees, by stopping the use of *prima facie* RSD and coercing those who have attained refugee status to 'voluntarily' return. They do so, however, in a manner that feigns compliance with *non-refoulement*, couching their actions in the international legal dialogue of refugee status cessation and durable solutions as opposed to the least costly and most expeditious fashion: direct deportation. In this case, both Tanzania and Burundi stood to benefit from return: the Burundian government's interests in using refugee return to broadcast the appearance of peace and stability in the country aligned with Tanzania's general policy of lowering the number of refugees on their territory while maintaining its reputation in the international community as a good refugee host. Moreover, Tanzania could gain domestic popularity by kicking out Burundian refugees who were the frequent target of xenophobia.

4.1 Coercing Burundian Refugee Return from Tanzania 2015-2020

Burundians have periodically sought refuge in Tanzania amid a decades-long history of cycles of violence in their country-of-origin. Most recently, political upheaval in advance of Burundi's 2015 election coincided with hundreds of thousands of Burundian refugees arriving *en masse*.[25] International and regional observers' perception of the cause of the flight was singular: President Pierre Nkurunziza's decision to run for an unconstitutional third term in office had sparked a political crisis in which the government carried out a widespread campaign of repression against anyone perceived to oppose them.[26] Nkurunziza's actions even received a direct public rebuke from then-U.S. President

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[24] These interviews and observations were conducted for a separate project under IRB Protocol # IRB-AAAN7454.
[25] See Schwartz 2019 pp 122-125 for an overview of the political crisis in Burundi and associated displacement.
[26] While many observers assumed that the sole dynamic pushing Burundians to flee with the national level political crisis, many refugees who fled early on in 2015, or in the year prior, were repeat-refugees seeking to escape local level violence which emerged as the result of their previous return from Tanzania (Schwartz 2019).

Barack Obama, whose administration subsequently levied sanctions against the Burundian government.[27] This marked a distinct ratcheting up of international pressure against the Burundian government.[28]

In the first years of the crisis, Tanzania allowed Burundians to cross the border, offering them *prima facie* refugee status, but also enforced a strict encampment policy for all these newly arriving Burundian refugees. The camps quickly became overwhelmed, leading to dire conditions at the height of the displacement.[29] Mobility in and out of camp was strictly regulated. Refugees needed official permission from camp officials to exit the camp and visit neighboring towns. While some refugees did manage to sneak out of the camp to work or go to market on occasion, they ran the risk of being accosted by Tanzanian police and either sent back to the camp or arrested and imprisoned.[30]

In 2017, President Nkurunziza visited Tanzanian President John Magafuli and the two leaders announced their intentions to repatriate the Burundian refugees. Tanzania ended the *prima facie* policy: all newly arriving Burundians would have to apply for individual refugee status determination (Nkundikje 2017; Okiror 2017; UNHCR 2018). In the two years following the end of PFRSD, Tanzania recognized a sum total of zero Burundian's individual RSD applications, as compared to the estimated 216,000-246,000 refugees recognized through PFRSD between 2015 and 2017 (UNHCR 2020; UNHCR 2018).[31] As mentioned above, Tanzania had prior experience kicking out Burundian refugees in 2009 and 2010, when they similarly stopped *prima facie* recognition and began closing down refugee camps. In that case, the government forced all remaining refugees to re-apply through

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[27] See Reuters 2015; Office of the President of the United States 2015; Associated Foreign Press (AFP) 2015.

[28] On Burundi's international reputation after the civil war see (Curtis 2013)

[29] Author field observations. For examples of descriptions of these conditions in the international press see Essa 2015; Oxfam International 2016.

[30] Author field observations and interviews. At the time, Burundians were at increased risk of detention and arrest by Tanzanian authorities.

[31] There is a discrepancy between the data in the UNHCR populations database and the UNHCR Burundi operations portal. This may reflect the difference between the total number of Burundians in country at the time, and the total number of new arrivals to Burundi after 2015.

individual RSD if they wished to remain (Human Rights Watch 2009). Given this history, rumors swirled among camp denizens that Burundians who arrived after 2015 may soon have to justify their individual asylum cases or Tanzania would kick them out, just like before.

In 2019, Burundi and Tanzania signed a bilateral agreement to coordinate their efforts to return the refugees. Leaked diplomatic documents suggest that Burundian and Tanzanian officials agreed to forcibly return refugees if necessary (Human Rights Watch 2019; Amnesty International 2019). UNHCR rebuked the agreement, issuing a statement that all returns must be voluntary, stating the agency would only assist in spontaneous voluntary repatriation rather than organizing efforts to repatriate refugees (UNHCR 2019a). UNHCR's refusal to help coordinate a return campaign was indicative of their assessment that the political situation in Burundi had not improved enough to qualify for cessation of status due to improved conditions. Still, UNHCR had little power besides issuing public statements, and continued to engage in tripartite discussions for organizing voluntary return (UNHCR 2019b). While UNHCR would not contribute to planning a broad return campaign, they still facilitated the return of those Burundians who chose 'on their own' to voluntarily return.

One reason UNHCR was hesitant to take stronger action against Tanzania's clear efforts to coerce return, was because the agency was in the process of working with the Tanzanian government to naturalize approximately 200,000 Burundian refugees who had been in Tanzania since 1972. However, the 1972 cohort in Tanzania was exceptional, receiving favored treatment as the result of domestic political dynamics that those arriving from Burundi at other points in time did not enjoy.[32] In interviews, NGO staff and UNHCR officials directly referenced Tanzania's gracious naturalization of the 1972-cohort as a reason why they could not press the government on its treatment of the 2015-cohort.

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[32] Author field observations. See also (Milner 2014; Kuch 2016).

The Tanzanian government's efforts to coerce 'voluntary' return proceeded with public information campaigns informing Burundians they would soon be kicked out and pressuring them to leave on their own. In addition, the Tanzanian government began creating adverse living conditions for the 2015-era Burundian refugees living in camps.[33] Tactics included a phased shut down of the camps housing this cohort of refugees, starting with shuttering the camp markets. For the next two years Tanzanian officials repeatedly threatened the Burundians living in these camps, telling them they must go home now or face a future enforced return.

Central to Tanzania and Burundi's efforts to repatriate refugees was a public campaign to reframe Burundians living in Tanzania as economic migrants fleeing poverty, who therefore did not qualify for refugee status to stay in Tanzania. As one regional official explained to me, the Burundians were only leaving because they were hungry. Tanzania also denigrated the Burundian refugees in public and private statements, taking advantage of the fact that Burundians in Tanzania often face xenophobia from the host population. The government played on stereotypes of Burundians as criminals and bandits, bringing the instability and violence from their country-of-origin with them to Tanzania.[34] All of these actions — restriction of movement, maintenance of unlivable conditions, ending *prima facie* RSD, and reframing refugees as economic migrants — align with Tanzania's ruling Chama Cha Mapinduzi (CCM) party's stated goals since 2005 of creating a refugee free Tanzania (Milner 2014).

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[33] As noted above, Tanzania had different policies for the 1972 era Burundian refugees. The 1972 era refugees either lived in cities and towns throughout the country, or in a different set of camps known as the "Old Settlements."

[34] See for example (Mtanzania Digital 2019), in which President Magufuli is quoted saying " "President Dr. John Magufuli has called on refugees from Burundi who have been engaged in criminal acts in the country to stop at once for they have been eroding the country's peace and making Tanzanians live in fear." "You cannot be welcomed then some of you are participating in targeting good citizens and sometimes passing arms through Lake Tanganyika I urge them [Burundian refugees] to stop and from such behavior that is not pleasing to us we have seen to best to assess/investigate the issue of giving citizenship to their children because they can bring [non-related criminal] people saying they are their children, but who are really criminals because they have a tendency to welcome their peers who this week are in Tanzania, the next they are in Burundi and so forth." (translated from the Swahili).

In Burundi, President Nkurunziza was on a mission to prove his continued rule was legitimate and extend his term in office. Since the onset of the crisis both the United Nations and the International Criminal Court had opened investigations into human rights violations committed in Burundi, including alleged crimes against humanity. In response Burundi engaged in a two-fold strategy to mitigate the damage to their international reputation. First, the government sought to hide its repressive campaign, shifting from assassinations in broad daylight and summary executions in the street, to what many refugees referred to as a 'silent war' of torture and forced disappearances.[35]

Second, Nkurunziza and other Burundian government officials repeatedly claimed that refugee return was evidence of peace and stability in the country, and that those claiming Burundi was not peaceful were lying for their own agenda.[36] For example, in 2016 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."[37] In his 2017 meeting with Tanzanian President Magufuli, Nkurunziza called on refugees to return, insisting that conditions in Burundi were peaceful, and returnees would therefore be safe (Okiror 2017; Nkundikje 2017).

The Burundian government also had incentives to surveille and control the refugee population, as many of those Burundians who remained in exile were assumed to be opposition-party supporters, and Burundi was gearing up for two electoral campaigns (a 2018 constitutional referendum, and 2020 multi-level election). By encouraging refugee return, but then covertly

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[35] Author interviews.
[36] For example see (Al Jazeera 2019), in which a Burundian minister is quoted saying "Burundi is currently at peace, adding that he had "information whereby people, international organizations, are deceiving people, telling them there is no peace in Burundi".
[37] See tweets: https://twitter.com/willynyamitwe/status/779855005058752512?s=20
 https://twitter.com/willynyamitwe/status/888006603236151298?s=20

surveilling, detaining, torturing, or killing returning refugees, the Burundian government could simultaneously signal to the international community that their human rights record was improving because refugees were 'choosing to return', while maintaining strict control over perceived opponents.

The Burundian government's behavior in the lead up to a 2018 constitutional referendum and the 2020 national elections demonstrate how they acted on these incentives. President Nkurunziza and his ruling party continued their violent oppression against anyone perceived to be in the opposition, while simultaneously flouting international interference (Human Rights Watch 2018; 2020). The government placed restrictions on international NGOs, refused to allow the UN Commission of Inquiry investigators in the country, suspended its cooperation with the UN Office on Human Rights, and forced the organization to shutter their local office in Burundi (UN Human Rights Office (OHCHR) 2019). In shutting down the office, the government representatives claimed that the issue of refugees in the region has been "exploited" for political purposes.[38] At the same time there was mounting evidence that the government targeted returned refugees as potential threats to the regime.[39]

Newly installed Burundian President Evariste Ndayishimiye has continued to hold the line against international interference in Burundi, insisting the country is peaceful and referencing refugee return as evidence of this peace. Upon confirmation of his election and subsequent swearing in, Ndayishimiye urged all refuges living abroad to return, saying "Burundi is our mother country. They have to come back to build it" (Manishatse 2020). Then in September 2020 at his first attendance of the UN General Assembly, Ndayishimiye rebuked the international community for intervening in the country's affairs in the name of human rights. He went on to cite the peaceful return of more than

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[38] See for example Burundian Ambassador Rénovat Tabu 2019 press release in response to the 41st session of the UN Human Rights Council that "the issue of Burundian refugees continues to be exploited for political ends by malicious gossip that claiming that the situation in Burundi is going from bad to worse as evidenced by the growing number of refugees" [author's translation]: https://twitter.com/ImvahoBdi/status/1146099772987793408/photo/3
[39] See for example (Maclean 2019; Freedom House 2021).

92,000 refugees, claiming that "this massive voluntary return movement is an obvious manifestation of the return of peace, tranquility, trust and stability in the country" (United Nations Affairs 2020; Ndayishimiye 2020).

The visibility of refugee return makes this strategy particularly effective. 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. In describing 'the recent repatriation of Burundi refugees from neighboring countries as a positive development,' the Security Council's representative from the Russian Federation said, 'the situation in that country no longer poses a threat to international peace and security and therefore the Council should decide to remove that country from its agenda' (United Nations Security Council 2020).

5. Conclusion

Current understandings of the failings of the global asylum and refugee protection regime are largely based on state behavior and infrastructure in the Global North. In general, these tactics are designed to allow governments to avoid conferring refugee status on those seeking asylum, rather than to return refugees who have already attained status. The consensus has been that these tactics exacerbate existing disparities in refugee hosting between the Global North and Global South, as states in the Global South are unable to similarly skirt their refugee hosting obligations.

By examining the governance of refugee return in the Global South, however, this article elucidates a complimentary strategy that states use to avoid hosting refugees while arguably upholding the core norm of the global asylum regime. I call this strategy return without *refoulement*. Instead of

preventing the initial designation of refugee status, return without *refoulement* aims to expel recognized refugees already on a country's territory. This strategy is made possible in large part because of the widespread use of *prima facie* or related group protections, which makes it easier for states to treat refugees' presence as temporary and argue refugees are no longer in need of international protection due to improved conditions in the country of origin. Tactics within this strategy fall into two related categories: (1) turning refugees into asylum seekers by ending PFRSD and/or ceasing *prima facie* refugee status; and (2) inducing 'voluntary' return through repressive coercion and/or positive incentivization. Notably, these are not simply bad faith actions in which states declare their opposition to international asylum norms. Instead states design return without *refoulement* tactics to simultaneously signal adherence to *non-refoulement* in principle, while simultaneously pressuring refugees to leave. While countries worldwide can and have used return without *refoulement* tactics, *non-entrée* far out paces return without *refoulement* as the strategy of choice in the Global North, while return without *refoulement* is more common than *non-entrée* in the Global South.

In highlighting the role of *prima facie* status determination in state responses to asylum-seeking, this article also complicates how we think about the relative liberality of state asylum policy in the Global South. For example, national legislation allowing the executive office to declare the use of *prima facie* RSD, as is on the books in Tanzania, is a *de jure* liberal policy. However, in implementing this policy, Tanzania may cease refugee status prematurely and coerce refugees to return without changing the *de jure* legislation. This is true in many other countries that grant the executive decision-making power to *prima facie* recognize refugees. This manipulation of liberal policy towards illiberal ends is precisely the goal of strategies like return without r*efoulement, non-entrée* and bureaucratic delay/exclusion: keep refugees out, while (arguably) doing so within the bounds of compliance with *non-refoulement*. Only in considering the broader administrative context in which states can apply *and*

cease *prima facie* status does it become clear how countries may be operating under the guise of *de jure* liberality to enact restrictive policies.

Illustrating the return without *refoulement* strategy also demonstrates the need for more research on norm strength and how the privileging *non-refoulement* over all other rights in the Refugee Convention may be causing perverse outcomes for refugee protection. This article has shown how ending PFRSD opens the door for host states to campaign for voluntary repatriation based on alleged improved conditions in refugees' countries of origin. Host states can also induce refugees to 'choose' to return by creating hostile conditions, often in violation of standards of refugee treatment outlined in the Refugee Convention, such as access to shelter, employment, education. Combined, these tactics allow states to claim they are acting in accordance with the refugee protection regime, not in conflict with it, while effectively refouling refugees.

Identifying return without *refoulement* as a complimentary strategy to *non-entrée* and bureaucratic manipulation therefore provides a more complete picture of the pathologies of the global asylum and refugee protection regime: the issue is not only the hyper-territorialization of refugee law, but also the de-prioritization of standards of treatment in-country. The implementation of *non-entrée* and return without *refoulement* strategies simultaneously strengthens states normative commitment to *non-refoulement* and while undermining the actual provision of refugee protection.

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