

Harboring or Protecting? Militarized Refugees, State Responsibility, and the Evolution of Self-Defense

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Abstract

The laws governing the use of force are some of the most important in the international system, but they are also some of the most contentious. Since September 11, 2001, there have been shifts in the law that have arguably increased state responsibility and broadened the parameters of self-defense. These changes are particularly important for states hosting refugees, as they may find that they are under threat of reprisal from refugee-sending states for cross-border attacks carried out by militarized refugees. This article tracks possible shifts in the law regarding the use of force and self-defense, from before September 11 to its aftermath in Afghanistan and Iraq. It then applies these changes to the international refugee regime, assessing how refugee asylum might be affected. The author argues that host states should analyze refugee flows for potential security threats on a case-by-case basis, rather than automatically applying a security-first framework.

Introduction

“We make no distinction between terrorists and those who knowingly harbor or provide aid to them.”

—The National Security Strategy of the United States, September 2002¹

Refugees are a special category of people under international law, and they are entitled to specific measures of protection. Unlike regular migrants, refugees are inextricably linked to flight from persecution. They are defined by the 1951 Refugee Convention and 1967 Protocol as people who have crossed an international border due to a “well-founded fear of being persecuted for reasons of race, religion, nationality, [or] membership of a particular social group or political opinion.”² In non-legal terms, “refugees are people displaced by persecution, war, or conflict, who have fled across an international border and are in need of international humanitarian assistance.”³ They

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have lost the protection of a state and, according to international law, are entitled to have that protection restored.

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This image of refugees as persons in need of protection is not wrong, but it is incomplete—refugee situations are not just about passive suffering and humanitarian aid. Anthropologist Cindy Horst notes that refugees are generally portrayed as either vulnerable victims or crafty crooks.⁴ It is less common to view refugees through the lens of an armed group, wherein they not only suffer from violence, but are an organized and intentional source of violence. Refugees are often involved in attacks across the border of the state from which they fled. Examples of this trend include: Cambodian refugees in Thailand during the 1970s; Nicaraguan refugees in Costa Rica and Honduras; Afghan refugees in Pakistan during the 1980s; Rwandan refugees in Zaire during the

1990s; and Palestinian refugees, particularly in Jordan and Lebanon, throughout.⁵ In such cases, host states, having fulfilled their duties under international refugee law, may find themselves in violation of laws governing the use of force, and may even be subject to measures of armed self-defense from other states.

From the precedent set by the U.S. invasion of Afghanistan, states may be held strictly liable for attacks launched from their territory by non-state armed groups. While much has been written about the state of the law regarding the use of force in self-defense against non-state actors, there has been minimal focus on how it relates to situations of violence instigated by refugees. States hosting militarized refugees have always held some degree of responsibility for those refugees' activities, but this shift in the legal regime may cause states to reconsider extending protection to a refugee population for fear that it might become violent. Countries of first asylum, often neighbors to states in the midst of conflict, have little incentive to take on such heavy responsibility and risk being drawn into a regional war. This assumes, of course, that host states do not have interest in becoming involved in hostilities. In many cases, receiving states may use refugee populations as a proxy to strengthen one side in internal or international conflicts, much like Pakistan used Afghan refugees to fight the USSR in Afghanistan. In such cases, there is very little debate about whether a host state may become the target of armed attack by the sending state; by participating in the conflict, they assume such risk. This article, however, is concerned with states accepting refugees but wishing to avoid entanglements in conflict.

I will begin by examining the evolution of international law governing self-defense against non-state actors, beginning with the Mackenzie Rebellion in Canada and ending with Operation Enduring Freedom and the global war on terror. I will then apply this

legal framework to refugee host states. Due to the militarized nature of some refugee populations, the status of the law has important implications for countries of asylum. Next, I will look at options available to states under the international refugee legal regime that allow them to limit asylum for militants. A case study of Somali refugees in Kenya will show that, although the Kenyan government has always regarded Somalis as a security threat, it has only been in the post-9/11 context that they have resorted to *refoulement* by sealing their border. Finally, using Sarah Kenyon Lischer's research, I will argue that there are indications that some refugee populations may be more prone to organized violence than others. By paying close attention to early indicators, states can better prepare themselves to reduce organized violence from their territory while still abiding by their most basic duty of *nonrefoulement*.⁶

Changes in the Law?

Like so many issues in public international law, the law governing the use of force in self-defense against non-state actors and the states harboring them is far from clear. While it was murky to begin with, the events following the September 11, 2001 terrorist attacks on New York City have made the status of the law even more mercurial. When the U.S. invaded Afghanistan in October 2001 it was on the basis of self-defense against an armed attack, which is unremarkable. What is remarkable is that they held a state responsible for the actions of a non-state actor. This landmark event arguably transformed international law. So it is fitting that the principles widely considered representative of customary international law governing the use of force in self-defense—necessity, proportionality, and immediacy⁷—also evolved as a result.

The State of the Law Before 9/11

In 1837, during an armed insurrection in Canada against the British, a group of Canadian insurgents based inside the territory of the U.S. used a ferry named *The Caroline* to cross the Niagara River. During the night of December 29, a group of British soldiers from Canada entered the U.S. and boarded the ferry, which was occupied by thirty-three American citizens who were assisting the insurgents. At least one American was killed and several were wounded in the clash. The attacking party removed the men on board, and then lit the boat on fire and sent it over the Niagara Falls.⁸ In an exchange of letters between U.S. Secretary of State Daniel Webster and British Minister Lord Ashburton, the two men decided on the prerequisite conditions for using armed force in self-defense, confining it to situations where the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”⁹ Importantly, they did not rule out the possibility that self-defense could be used against non-state actors residing in another state's territory, as long as the situation met the established requirements.

The notion of a state bearing responsibility for the actions of non-state actors originating from within their territory was better defined in the *Trail Smelter* case (U.S. v. Canada (1941)), where the principle can be derived by extension.¹⁰ In that case,

an arbitration panel ruled that, “under the principles of international law, as well as the law of the U.S., no State has the right to use or permit the use of its territory in such a manner as to cause injury...to the territory of another.”¹¹ Eight years later, in the *Corfu Channel* case, the International Court of Justice (ICJ) ruled that every state was under an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹² As a further indication of custom, the United Nations General Assembly passed a resolution in 1949 on the *Rights and Duties of States* declaring that every state had a duty to refrain from intervention in other states, and “to prevent the organization within its territory of activities calculated to foment such civil strife.”¹³ The UN General Assembly passed the *Declaration on Friendly Relations* in 1970, which reiterated the points from the *Rights and Duties of States*, adding that a state should refrain from “acquiescing in organized activities within its territory directed towards the commission of [organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State], when the acts referred to in the present paragraph involve a threat or use of force.”¹⁴ While the General Assembly cannot legislate, its resolutions help establish custom. This principle of prohibiting non-state actors from using one state’s territory to attack another has since been confirmed as customary international law by the ICJ in its rulings in the *Nicaragua* case and the *Armed Activities on the Territory of Congo* case.¹⁵

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If a state bears such responsibility for actions emanating from its territory, then it must be prepared to suffer the consequences of such actions. However, whether an attacked state may claim self-defense and respond by using force across the border is a complicated and contentious matter. Self-defense is governed by Article 51 of the UN Charter, under which member nations have an “inherent right of individual or collective self-defense if an armed attack occurs.”¹⁶ The question of what constitutes an armed attack has become central in deciding when a state can legally rely on a claim of self-defense against a non-state actor.¹⁷

Any attack on an armed group is necessarily an attack on the state harboring them,¹⁸ so the question must be explored carefully.

Writing in 1963, Ian Brownlie clarified that the use of force across an international boundary by armed bands could only constitute an interstate armed attack if the armed band were controlled by the state.¹⁹ If they were not controlled by an aggressor state, then “defensive measures should be confined to the territory of the defending state,” fighting up to—but not across—the border.²⁰ Acting U.S. Secretary of State Kenneth Rush stated in 1974 that the policy of the United States was effectively the same, and that armed reprisals were not permitted against a state that “cannot or will not fulfill its international legal obligations to prevent the use of its territory for the unlawful

exercise of force.”²¹ This conservative interpretation of self-defense was widely accepted as law, affirming state’s responsibilities under General Assembly Resolution 2625, but acknowledging the primacy of Article 51. In their ruling on the *Nicaragua* case in 1986, the ICJ confirmed this principle as customary international law.²² Citing the 1974 General Assembly *Resolution on the Definition of Aggression*,²³ the ICJ clearly stated that armed bands using force could qualify as an armed attack, which would warrant self-defense by the attacked state, but that effective control of the armed band would have to be proven.²⁴

In summary, states are responsible for actions affecting other states that originate from their territory, including incursions by non-state actors. However, they may not be subject to the attacked state’s use of force in self-defense, unless the incursion by the non-state actors amounted to an armed attack. An armed attack, answerable with force as self-defense under Article 51, only occurs when there is effective control of the non-state actor by the state. In this interpretive framework, if a state becomes the unwitting, passive, or non-controlling haven of an aggressive armed group that proceeds to carry out extra-territorial attacks on another state, the harboring state bears responsibility, but punitive actions against them cannot amount to forcible measures.

The State of the Law After 9/11

Under such a legal regime, states granting asylum to refugees had little to fear if some of the refugees turned out to have violent intentions towards their country of origin. Legally, the host state could not be subject to armed reprisal. Christine Gray examined the international response to three states—Israel, South Africa, and Portugal—who most frequently invoked self-defense in contradiction to the legal norm, and found that they were routinely condemned for using force.²⁵ I do not, of course, suggest that law always controls action; some states have responded to force from non-state actors with force against the harboring-state’s territory irrespective of the act’s legality. However, before 9/11, while the law was controversial, most states apparently held that such use of force was illegal.²⁶ Since 9/11, interpretation of the law has varied widely, with some states asserting that there is no difference between an armed group—now often categorized under the broad heading of terrorists—and the state that harbors them.²⁷ While the ICJ seemingly upholds the earlier framework, it has refrained from giving a clear ruling.²⁸

On 9/11, a non-state actor—al-Qaeda—launched an attack on the U.S. that had been conceived and planned within the territory of Afghanistan; raising the very same legal questions we are dealing with here. On September 12, 2001, the UN Security Council passed a resolution implying for the first time that a state could use self-defense in response to terrorism.²⁹ With almost unanimous support from the UN Security Council and General Assembly—only Iraq directly challenged the legal authority to use force—the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS) invoked collective defense as laid out in their treaty agreements with the U.S.³⁰ Both the U.S. and the United Kingdom (UK) wrote to the Security Council, in

conformity with the guidelines under Article 51, notifying it of their intention to use force in self-defense.³¹ Without showing that the Taliban exercised effective control over al-Qaeda, something that was an established requirement under international law, Operation Enduring Freedom began an invasion of Afghanistan and forced a regime change. Was their action legal?

The current state of the law is unclear. Both the U.S. and the UK have declared that they will not distinguish between “terrorists and those who harbor them.”³² Yoram Dinstein has written that states are entitled to exercise self-defense against armed bands operating from another state’s territory, and may dispatch military units into that state’s territory to eliminate the threat.³³ Dinstein calls this “extra-territorial law enforcement,” and says that it would be unreasonable for a state to endure attacks from an armed group simply because they are not controlled by another state.³⁴ Michael J. Glennon goes further and says that acts of omission bleed into acts of commission, and that governments unable to effectively govern their own territory may be legitimately deposed if groups on their territory pose a threat.³⁵ The ICJ disagrees with this interpretation, however, upholding the requirement of effective control by a state in the ruling on *The Wall* and the *Armed Activities on the Territory of the Congo* cases.³⁶ But in the *Armed Activities* case, two dissenting judges, Judge Simma and Judge Kooijmans, maintained that states had a right to self-defense against an armed attack by non-state actors, claiming that 9/11 had changed the law, and using Dinstein’s idiom “extra-territorial law enforcement.”³⁷ There is no consensus, but in a world where terrorism and armed groups are considered a central threat,³⁸ the legality of self-defense against non-state actors may be expanding.³⁹

The Refugee Regime: Obligations and Options

Operation Enduring Freedom remains the only case to date wherein a state has successfully claimed its right to self-defense under Article 51 in response to terrorism. The implications for a shift in the law toward allowing states to exercise force against states that cannot control their territories are huge, not least for states granting asylum to refugees. Refugees, particularly those fleeing civil wars, have been blamed for spreading conflict to the countries that take them in, often by continuing to fight their country of origin. How can states simultaneously fulfill their duty to grant asylum to refugees fleeing conflict or persecution and guarantee that their territory will not be used to cause injury? The responsibilities seem to conflict with one another, and may even prove to be mutually exclusive.

Sadako Ogata, former High Commissioner for Refugees, pointed out in 2000 that asylum was already under threat: “Many countries are blatantly closing their borders to refugees while others are more insidiously introducing laws and procedures which effectively deny refugees admission to their territory.”⁴⁰ Jeff Crisp has identified economic and political challenges that are making asylum more tenuous in developing countries, where the vast majority of refugees are living.⁴¹ If states are becoming strictly liable for what those refugees do while under their protection, they may be less

inclined to offer asylum. Under the accepted principles of state responsibility, states are already responsible for what happens within their borders,⁴² including the conduct of refugees.⁴³ But as Dinstein notes, they were previously only nominally liable for actions that they could not control, and could not themselves become the subject of forceful measures of self-defense.⁴⁴ States may now argue that refugees are not only an economic and political burden, but that they may imperil the very existence of the asylum-granting state. Few states would be willing to grant *prima facie* status to refugees fleeing armed conflict if they thought that doing so might make their country a legally valid target. For states that, for lack of capacity or resources, cannot legitimately guarantee that refugees will not organize attacks across the border against their country of origin, this poses a real problem.

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States have a general obligation, *erga omnes*, to allow refugees to enter their territory, and not to send refugees back to a situation where they would risk persecution.⁴⁵ This obligation of prohibiting *refoulement* is codified in the 1951 Refugee Convention,⁴⁶ but is widely considered to be customary international law, binding on all states. This seems to conflict with states' responsibility to ensure that their territory is not used to cause injury to another state's territory. But *nonrefoulement* is not absolute—combatants have never been considered eligible for refugee status.

The 1951 Refugee Convention and the 1967 Protocol make it clear that only those with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” qualify as refugees.⁴⁷ If there is a definition for inclusion, then there must be some who are excluded from protection. Article 1(F) says that the Convention does not apply to anyone who has committed a crime against the peace, a war crime, or a crime against humanity; a serious, non-political crime; or anything “contrary to the purposes and principles of the United Nations.”⁴⁸ The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa further distinguishes between refugees and those who flee their country “for the sole purpose of fomenting subversion from the outside.”⁴⁹ Article 2(2) says that “the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.”⁵⁰ This means that combatants, by their nature as parties to a conflict, cannot be granted refugee status.⁵¹ States do not have to give everyone protected status as a refugee, and are actually obliged to screen and exclude some of the asylum seekers.⁵²

The idea of screening is a good one in theory, but is largely unrealistic in practice. Recall that, as Crisp notes, the vast majority of refugees are in developing countries, and screening can be an expensive and cumbersome process.⁵³ Furthermore, many of those refugees crossed the border and live in remote areas of asylum countries, places like Kakuma in Kenya or the Federally Administered Tribal Areas in Pakistan. Screening is logistically and technically difficult in such places, if not altogether impossible. Refugees fleeing conflict may number in the thousands, sometimes in the millions, so conducting interviews with each individual would take an exorbitant amount of time. Instead, most refugees are granted *prima facie* status, which means that they are accepted as refugees as a group, based on their place of origin.⁵⁴ If refugees are accepted en masse, then militants may cross the border with them, placing not just the refugees in danger, but also the host state if they are subject to armed reprisals. Faced with a choice of individually screening refugees, accepting refugees on a *prima facie* basis and risking becoming a haven for cross-border military activity, or simply sealing the border to avoid all the legal complications and potential risks, it seems reasonable that states might gravitate toward the last option.

Indeed, there is room in the 1951 Convention for states to claim extraordinary security concerns as a reason not to grant refugee status. Article 32 effectively says that states may expel a refugee on “grounds of national security or public order.”⁵⁵ Article 33, right after declaring the principle of *nonrefoulement*, adds that refugees may not claim this right if the state has “reasonable grounds for regarding [them] as a danger to the security of the country.”⁵⁶ As both Jacobsen⁵⁷ and Crisp⁵⁸ note, security is increasingly an excuse for not granting asylum, although they are both referring primarily to internal security—as in when refugees clash with local populations. National security is perhaps an even more compelling reason to turn back refugees, and may be regarded as more legitimate in congruence with aggressive anti-terrorism policies.

Security First in an Age of Terror: Somali Refugees in Kenya

It may be helpful at this point to turn to a concrete example of the way security can factor into asylum policy for host governments. There are many examples to choose from, but the situation of Somali refugees in Kenya is particularly illustrative. What is striking about this case is not the security-first policy of the Kenyan government, but the fact that—regardless of all the concern—the Somali refugee population has not militarized. While Somali refugees have endured high levels of violence, and may be involved in criminal activities like small-arms smuggling, they have not organized into militarized units that could pose a threat to Somalia or Kenya. In spite of this, the Kenyan government has used every opportunity to restrict asylum for Somali refugees, culminating in an outright refusal of access during the Ethiopian campaign in Somalia in 2007. This refusal was based on claims that the refugees would pose a dire national security threat by forming militarized units to wage an insurgency against the Ethiopian occupiers. While it is difficult to attribute causality, the changes in the law

making host states more directly responsible for the actions of non-state actors on their territory certainly gave the Kenyan government's refusal a degree of legal legitimacy, even though it was in violation of its obligations under the Refugee Convention.⁵⁹

Ever since their initial arrival in 1991, the Kenyan government has viewed Somali refugees with suspicion, concerned that they could become a security threat.⁶⁰ The government was reluctant to allow refugees to enter the country at all, but international pressure convinced it to open its borders to those fleeing large-scale violence in Somalia.⁶¹ Under President Moi, refugees were subject to what Kagwanja and Juma refer to as "abdication and containment."⁶² While the government established a National Refugee Secretariat in 1992 to deal with the massive influx of refugees (from 16,000 in early 1991 to over 427,000 by the end of 1992), the system was weak and unable to deal with the large numbers.⁶³ It responded by containing the refugees in camps and abdicating responsibility to the UN High Commissioner for Refugees (UNHCR) and international community.⁶⁴ UNHCR ultimately had absolute responsibility over the administration of the camps, but did not have the authority or resources to ensure the security and protection of the refugees.⁶⁵ One Somali refugee in Kakuma summed up the problem when he said "it is of no advantage for us to get a full ration from UNHCR if our lives are always at risk from insecurity."⁶⁶

Refugees confined to camps were not given actual refugee status, and were unable to seek local integration. Conditions in the camps were poor. Indeed, the Kenyan government may have intentionally sought to confine the Somalis at the periphery of society so as to encourage them to return to Somalia voluntarily.⁶⁷ Somalis, particularly those in the three camps in Dadaab, were forced to live in conditions of abject poverty and faced high rates of crime and violence, all of which worsened as the refugee crisis became protracted.⁶⁸ Jeff Crisp noted in 2000 that refugees in Kenyan camps faced domestic and community violence, sexual abuse and violence, armed robbery, violence within national refugee groups, violence between national refugee groups, and violence between the refugees and the local population.⁶⁹ In other words, refugees in Kenya faced every kind of violence short of actual militarized violence. However, Somalis were not attacked by elements from the failed Somali state, and they did not organize themselves into armed groups—on a scale larger than gangs to commit armed robbery—to attack elements of either their sending or host state.

Kenya's Northeast is populated by ethnic Somalis, and the relationship between Somali Kenyans and the central government has been strained since the colonial period. The arrival of more Somalis to the region, therefore, was treated with hostility by the government.⁷⁰ Indeed, the government appears to view all Somalis as a security threat, regardless of their citizenship.⁷¹ Originally, Somalis were seen as undisciplined and characterized as *shifita*, meaning bandits. In 1998, this stereotype started to shift from *shifita* to terrorists after the U.S. Embassy in Nairobi was bombed resulting in the death of 300 people.⁷² Kenyan authorities then focused particularly on the Dadaab refugee camps as a potential hotbed of terrorist activity.⁷³ However, while there is strong evidence that the embassy attacks in 1998 and the hotel attacks in Mombasa in

2003 were connected to militants in Somalia, no connection to the refugee camps has been established beyond rumors and speculation.⁷⁴ Indeed, although an insurgency rages just across the border, the refugee camps in Dadaab do not seem to have become havens or base camps for armed groups.

Despite the government's restrictions on Somalis in Kenya, it continued to grant them limited asylum throughout the 1990s in the form of temporary refugee status. When the three camps comprising Dadaab are taken together, they make up the largest refugee camp in the world, and Somali refugee numbers in Kenya have steadily remained above one hundred thousand.⁷⁵ However, in the context of the "global war on terror," Kenya's asylum policy took a sharp turn.

In January 2007, the U.S. military conducted several bombing raids in Ras Kambonion, Southern Somalia, not far from the Kenyan border.⁷⁶ This corresponded to the Ethiopian military invasion of Somalia to depose the budding Islamic Courts Union regime, and the resulting displacement of thousands of Somalis from areas around the capital, Mogadishu. Would-be refugees tried to cross the Kenyan border to reach safety, but the Kenyan government sealed the border and refused to allow them entrance.⁷⁷ Citing concerns over the spread of terrorism and militancy, Kenya "echoed the U.S." when explaining its decision, and kept the border closed even as the fighting in Somalia intensified between Ethiopian troops and local militias.⁷⁸ Somalis fleeing the violence were forced to sneak across the border with Kenya at night, and an estimated eighty thousand made the illegal journey to escape the conflict.⁷⁹

Was the Kenyan government justified in its actions? According to its own asylum laws, it was not. Kenyan refugee law prohibits returning refugees to an area where they will face persecution or death, and Kenya is a signatory to the 1969 OAU Convention that forbids states from sending asylum seekers back to situations of generalized violence like the kind ongoing in Somalia.⁸⁰ Yet despite its derogation from a commonly accepted principle of international law, vocal criticism of Kenya was minimal. Again, causation is difficult to determine, and whether considerations of international law

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played a large role in Kenya's decision-making may be impossible to prove or disprove, but it does appear that, in this case, concepts of national and international security were placed ahead of human rights concerns. Kenya's reluctance to open its borders to a population it feared might become militarized was not new; what was new was its decision to act on those fears and seal the border, turning away thousands of Somalis in need of protection. Even if the new population of refugees had become militarized, it seems unlikely that their actions would have drawn self-defense reprisals from any Somali force. It is possible, however, that they might have drawn a response from the

Ethiopian armed forces, who assumed the responsibility of protecting Somalia's territory with their status as occupiers. Whatever the response might have been, it is clear that Kenya did not wish to be held responsible for any possible actions of this new wave of asylum seekers once they crossed the border.

Indications of Violence

While policies that view refugees primarily as a threat can obscure the legal protection to which refugees are entitled, the fact remains that refugee situations can become violent and states may have legitimate concerns about this possibility. Refugees are not homogenous, and should not be categorized only as victims or perpetrators.⁸¹ By identifying trends in—and possible causes of—refugee violence, states may better prepare for possible conflict.

In *Dangerous Sanctuaries*, Sarah Kenyon Lischer analyzes three refugee situations involving conflict and violence. She notes that common socioeconomic explanations of refugee violence do not satisfactorily explain the spread of conflict.⁸² In her view, political contexts provide a better framework, and she proposes three categories of refugees based on their cause of flight.⁸³ They are: situational refugees, who flee to avoid danger during large-scale violence and civil war, and are unlikely to organize for military purposes; persecuted refugees, who are the target of ethnic cleansing, genocide, or other oppressive policies, and who may organize to affect cross-border violence; and state-in-exile refugees, who are often highly organized, use refugee protection as a strategy to avoid defeat in a civil war, and are the most likely to engage in organized, military violence as an extension of pre-existing conflict.⁸⁴

Lischer also finds that host state policy is determinative of whether war will spread within refugee populations.⁸⁵ In her analysis, receiving states can be categorized according to two measurements: capability and will.⁸⁶ Capability refers to a state's ability to secure its borders and demilitarize refugees. Will describes a state's desire to prevent violence. When the two are correspondingly high, violence should be lower; when they are both low, conflict is most likely.⁸⁷ The scenario discussed in this article most closely aligns with a high will to prevent cross-border attacks, especially given the consequences, but a low or non-existent capacity. These states will likely take the easiest route to ensure that their territory is not used to launch cross-border attacks—refusing asylum to all in order to keep out militants.

The last factor Lischer examines is the role of third parties in refugee-related conflict.⁸⁸ She finds that donor states “might pressure the receiving state to allow refugee militarization,” or may not give needed support to the host government in terms of security resources.⁸⁹ NGOs and UN agencies also play a role, and a central point of Lischer's work is that aid may unintentionally fuel conflict, as it is used to replenish militant supplies or sold to buy weapons.⁹⁰

Clearly there are multiple factors at play when examining militarized refugee situations. It is interesting that two of the three indicators Lischer uses depend on

factors not related to the host state. The political situation from which refugees flee is outside of the receiving state's control. Similarly, host states are often unable to exert much influence over third party organizations that become involved in managing the new population. A tension develops between powerful donors who try to impose their will and humanitarian agencies whose primary duty is following an organizational mandate that may not support the interests of the host government. Yet, curiously, states of refuge bear the majority of the responsibility for the behavior of refugees. There is a disconnect between the relative degree of control that a state may have over a refugee population's militarization and the extent to which they are held responsible if it does occur. This may create some difficult problems, and may discourage states from taking on such high risk.

One potential response to a host state with low capability would be to force a regime change—as Glennon suggests—with the hope that the replacement would be more capable and maintain the same level of will. Another follows Dinstein's model, wherein affected states can engage in extra-territorial law enforcement to eliminate the threat of militants.⁹¹ Both of these options risk an escalation in conflict, even though they might currently be permissible under international law. A third option, one that I would argue is highly preferable, is to support low-capacity states so they can secure their borders and clamp down on militancy, while still providing protection to refugees. If host states genuinely lack the capacity to secure their borders, perform screening for militants among the refugee population, and prevent militarization among refugees using law enforcement, then other states might be able to provide resources to ensure host and sending-state security. UNHCR was able to negotiate with the Kenyan government to supply extra police, which effectively lowered the level of violence in and around Dadaab camp.⁹² Although militarization was not the primary challenge in that case, the same model could be used to prevent or mitigate militarization. While it would undoubtedly not be the right solution for every situation, Lischer even suggests that robust peace enforcement would be the most effective response to situations of potential insecurity.⁹³ UNHCR employed a version of peace enforcement in Guinea in 2003 when it reached an agreement with the Canadian government to send officers from the Royal Canadian Mounted Police to assist Guinean government forces.⁹⁴ Such direct engagement by donors remains exceptional, however, as Western governments are generally unwilling to send their troops to deal with refugee crises. Sending troops should not be the first response, but if host states are not supported with resources and capacity, then armed conflicts could spread from countries of origin to countries of asylum, turning civil wars into regional wars.

Conclusion

Much has been written about the evolution of international law in an age of counterterrorism, and much has been written about the growing challenges to refugee protection. This paper argued that one may effect the other, and that host states are increasingly at risk of becoming targets of violence on the basis of self-

defensive measures, whether they are actively involved in the conflict or not. By using Lischer's indicators to analyze refugee situations, states and the international community can better predict when cross-border conflict with the country of origin is most likely to occur, and take measures to mitigate such action. However, although states may legally exclude militants when they grant asylum to refugees, such action is not always practical, or even possible. The alternative may be *prima facie* exclusion, which further imperils an already fragile protection regime.

It seems unreasonable to place so much responsibility on a host state, especially in cases where a weak central government has little control over its borders. Instead of interpreting Article 2(2) of the OAU Convention to impugn absolute host state responsibility, the emphasis would be better placed on the second half of the clause: "The grant of asylum to refugees...shall not be *regarded* as an unfriendly act by any Member State [italics mine]."95 If states must worry about being regarded as a belligerent in a conflict by granting asylum, refugees who legitimately need the protection they are guaranteed under international law will likely be turned away along with militants who do not. For the sake of clarity and the future protection of states and refugees, it would be advantageous to return to a traditional standard controlling the use of force in self-defense—one arguably still held by the majority of the judges at the ICJ—that requires proof of effective control of non-state actors by an aggressive state.

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Endnotes

- 1 The New York Times, "Full Text: Bush's National Security Strategy," September 20, 2002. <http://www.nytimes.com/2002/09/20/politics/20STEXT_FULLL.html?pagewanted=1>
- 2 UN High Commissioner for Refugees, "Convention and Protocol Relating to the Status of Refugees," 1951, <<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>> (accessed January 2009), 1(A)[2].
- 3 Karen Jacobsen, *The Economic Life of Refugees* (Bloomfield, CT: Kumarian, 2005), 4.
- 4 Cindy Horst, *Transnational Nomads*, Studies in Forced Migration, Vol. 19 (New York, NY: Berghahn, 2006). For an in-depth discussion of these terms, see: Bram J. Jansen, "Between Vulnerability and Assertiveness: Negotiating Resettlement in Kakuma Refugee Camp, Kenya," *African Affairs* 107 (429) (October 2008): 567.
- 5 Sarah Kenyon Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid* (Ithaca, NY: Cornell University, 2005), 2-5.
- 6 My analysis is admittedly primarily theoretical, deducing potential cause and effect only. This research would best be followed up by an empirical study of asylum policy in situations of cross-border conflict, but that is beyond the scope of this article.

- 7 Christine Gray cites necessity and proportionality. See Christine Gray, *International Law and the Use of Force*, 3rd ed., Foundations of Public International Law (Oxford: Oxford, 2008), 105. Craig Allen adds immediacy, which is a better reflection of the Caroline standard. See Craig H. Allen, "Armed Groups and the Law," in *Armed Groups: Studies in National Security, Counterterrorism, and Counterinsurgency*, Jeffrey H. Norwitz, ed. (Newport, RI: Naval War College, 2008), 95.
- 8 Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law: Cases and Materials*, 4th ed. (St. Paul, MN: West Group, 2001), 922-923.
- 9 *Ibid.*, 923.
- 10 *Ibid.*, 1518. The case, decided by an arbitration panel, dealt with a smelter plant in Trail, British Columbia. Pollutant fumes from the plant caused damage in Washington State, and the panel held Canada responsible. Although this was a case concerning environmental damage, they based their ruling on an interpretation of state responsibility as defined by Professor Eagleton: "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction," quoted from Clyde Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928), 80.
- 11 *Ibid.*, 1518.
- 12 Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University, 2001), 214.
- 13 UN General Assembly Resolution 375, December 6, 1949, as quoted in: Gray, 67.
- 14 UN General Assembly Resolution 2625, October 24, 1970, as quoted in Gray, 68.
- 15 Gray, 68.
- 16 United Nations, "Charter of the United Nations," October 24, 1945, 1 UNTS XV, <<http://www.un.org/en/documents/charter>> (accessed May 3, 2009). The full text reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."
- 17 Dinstein, 167.
- 18 United Nations "Charter of the United Nations." See Article 2(4), which forbids attack on the territory of another state.
- 19 Damrosch, et al., 965. Quoting from Ian Brownlie, *International Law and the Use of Force* (Oxford, 1963), 372-373.
- 20 *Ibid.*
- 21 *Ibid.*, 965, quoting from 68 AJIL 736 (1974).
- 22 Gray, 68.
- 23 United Nations General Assembly, "G.A.Res. 3314 (XXIX) (1974) 'Definition of Aggression' Resolution," in *Basic Documents Supplement to International Law: Cases and Materials*, 4th ed., Lori F. Damrosch, Louis Henkin, Richard C. Pugh, Oscar Schachter, and Hans Smit, eds. (St. Paul, MN: West Group, 2001), 409-412. Article 3(g) lists, "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out

acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein,” as an act that would qualify as aggression.

- 24 Damrosch, et al., 956. The majority opinion reads, “In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to the General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.”
- 25 Gray, 139.
- 26 Ibid., 198.
- 27 *The New York Times*, “Full Text: Bush’s National Security Strategy,” September 20, 2002.
- 28 While both the ICJ rulings on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* and *Armed Activities on the Territory of the Congo* could have dealt with the issue, the majority opinions avoided giving a clear resolution to the question of self-defense against armed groups. See: Gray, 133-135, 202.
- 29 Ibid., 193. See UNSCR 1368 (2001).
- 30 Ibid.
- 31 Ibid., 194.
- 32 Ibid., 200. Also see note 26 above.
- 33 Dinstein, 216.
- 34 Ibid, 215, 217.
- 35 Michael J. Glennon, “The Fog of Law: Self-Defense, Inherence, and Incoherence in the United Nations Charter,” *Harvard Journal of Law and Public Policy* 25 (2) (Spring 2002), 550.
- 36 Gray, 79-80, 134, 202.
- 37 Ibid., 135.
- 38 Richard Shultz, Douglas Farah, and Itamara Lochard, *Armed Groups: A Tier-One Security Priority* (Colorado Springs, CO: INSS, USAF Academy, 2004).
- 39 Of course, legal scholars do not agree on just how much the legal regime has changed. For other opinions, see Allen, 95; and Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, ASIL Presidential Task Force on Terrorism (American Society of International Law, 2002), 7.
- 40 As quoted in: Jeff Crisp, *A new asylum paradigm? Globalization, migration and the uncertain future of the international refugee regime*, New Issues in Refugee Research, Working Paper 100, Evaluation and Policy Analysis Unit, UNHCR (Geneva: UNHCR, 2003), 4.
- 41 Ibid., 5-6.
- 42 Dinstein, 181.
- 43 Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge, 2002), 140.
- 44 Dinstein, 215.

- 45 Guy S. Goodwin-Gill, "The Language of Protection," *International Journal of Refugee Law* 1(1) (1989), 16.
- 46 UN High Commissioner for Refugees, Article 33(1).
- 47 *Ibid.*, Article 1(A)[2]. The Organization of African States included persons who were fleeing "external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality." See Organization of African Unity, "Convention Governing the Specific Aspects of Refugee Problems in Africa," *UNHCR The UN Refugee Agency*, 1969 <http://www.unhcr.org/basics/BASICS/45dc1a682.pdf> (accessed May 3, 2009)
- 48 UN High Commissioner for Refugees, Article 1(F). Consider that the purposes and principles of the United Nations, as defined in Article 1 of the UN Charter, are so broad, that this last ground for exclusion could cover almost anything.
- 49 Organization for African Unity, para 4.
- 50 *Ibid.*, Article 2(2).
- 51 Lawyers Committee for Human Rights, *Refugees, Rebels and the Quest for Justice* (New York, 2002), 91-92.
- 52 *Ibid.*, 9.
- 53 Crisp, *A new asylum paradigm?*, 5-6.
- 54 Jacobsen, 5.
- 55 UN High Commissioner for Refugees, Article 32(1).
- 56 *Ibid.*, Article 33(2).
- 57 Jacobsen, 15.
- 58 Crisp, *A new asylum paradigm?*, 5-6.
- 59 The argument could be made that Kenya was not technically committing *refoulement* because they were not returning refugees to "the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion." (UN High Commissioner for Refugees, Article 33) They were not returning the refugees because they did not allow them entrance in the first place. However, whether or not refusing entry is significantly different from returning is a contentious notion. For an excellent discussion of limiting *refoulement* based on the legal principle of *jus cogens*, see: Alice Farmer, "Non-refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection," *Georgetown Immigration Law Journal* 23 (1) (Fall 2008).
- 60 Gil Loescher and James Milner, *Protracted Refugee Situations: Domestic and international security implications*, Adelphi Paper 375, IISS (NY: Routledge, 2005), 40.
- 61 *Ibid.*
- 62 Peter Kagwanja and Monica Juma, "Somali refugees: Protracted exile and shifting security frontiers," in *Protracted Refugee Situations: Political, Human Rights and Security Implications* (New York, NY: United Nations University, 2008), 219-220.
- 63 *Ibid.*, 220.
- 64 *Ibid.*
- 65 *Ibid.*
- 66 Jeff Crisp, "A State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps," *African Affairs* 99 (2000), 602.

- 67 Kagwanja et al., 221.
- 68 Kagwanja et al., 221; Loescher et al., 40-41.
- 69 Crisp, “A State of Insecurity,” 603-611.
- 70 Ibid.
- 71 Loescher et al., 42.
- 72 Ibid., 222-223.
- 73 Kagwanja et al., 222-223; David H. Shinn, “Somalia’s New Government and the Challenge of Al-Shabaab,” *CTC Sentinel*, March 2009, 2.
- 74 Ibid. There have been persistent claims that al-Shabaab and al-Qaeda have used Somali refugee camps in Kenya to infiltrate the country and carry out terrorist attacks. These claims appear to be based on hearsay, and tend to present no evidence to back up their assertions. For some particularly blatant examples of this, see Danna Harman, “In a dire Kenyan camp, links to Al Qaeda,” *The Christian Science Monitor*, December 18, 2002; Danna Harman, “Why radicals find fertile ground in moderate Kenya,” *The Christian Science Monitor*, December 6, 2002; and Geoffrey York, “Somalia’s leading export: its civil war,” *The Globe and Mail*, September 19, 2009. These articles fail to produce any evidence that either al-Shabaab or al-Qaeda have any presence in the camps other than the fact that the refugees are Somali. The only article that I have come across that seems to include any actual research other than chatting with a few Somalis in coffee shops in Nairobi is a *New York Times* piece, where the author actually traveled to Dadaab to interview Somali refugees. See Jeffrey Gettleman, “Radical Islamists Slipping Easily Into Kenya,” *The New York Times*, July 22, 2009. This kind of journalism on the subject is rare, and other articles merely seek to fan the flames of intrigue, while they simultaneously increase suspicion of Somalis in Kenya.
- 75 Human Rights Watch, *From Horror to Hopelessness*, (New York: Human Rights Watch, 29 March 2009), 12.
- 76 Jonathan Stevenson, “Risks and Opportunities in Somalia,” *Survival* 49(2) (June 2007), 14; Peter J. Quaranto, *Building States while Fighting Terror: Contradictions in United States Strategy in Somalia from 2001 to 2007*, Monograph Series, Institute for Security Studies (Tshwane: Institute for Security Studies, 2008), 43.
- 77 David Okwembah, “How Kenyan police found vital information from terror suspect’s computer,” *Daily Nation*, August 3, 2008; Human Rights Watch, 12.
- 78 Human Rights Watch, 12.
- 79 Ibid., 14.
- 80 Ibid., 14-15.
- 81 David Turton, *Conceptualising Forced Migration*, RSC Working Paper No. 12, Refugee Studies Center (Oxford: University of Oxford, 2003), 7.
- 82 Sarah Kenyon Lischer, 9-10.
- 83 Ibid., 10.
- 84 Ibid.
- 85 Ibid., 11.
- 86 Ibid.
- 87 Ibid.
- 88 Ibid.

89 Ibid.

90 Ibid.

91 Dinstein, 217.

92 See: Crisp, "A State of Insecurity," 613. Under a "security package," UNHCR was able to raise funds to strengthen local police capacity, and they supplemented their salaries, training, and equipment.

93 Lischer, 6.

94 James Milner and Astrid Christoffersen-Deb, "The militarization and demilitarization of refugee camps and settlements in Guinea, 1999-2004," in *No Refuge: The Crisis of Refugee Militarization in Africa* (New York, NY: Zed Books, 2006), 66-67.

95 Organization for African Unity, 2(2).