

ESSAY

CUSTOMARY INTERNATIONAL LAW AND THE SHIFTING PATTERNS OF REFUGEE MIGRATION

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I. INTRODUCTION

Over the last decade, refugees have fled to more, different states than ever before. For example, the recent Syrian conflict has quickly transformed a state which once hosted more than fifteen percent of asylum-seekers globally into one of the largest source countries for refugees fleeing danger. This Essay assesses whether this and other changes in refugee protection and migration patterns have also changed customary international refugee law. States such as Turkey and Lebanon, once minor refugee hosts, have also quickly begun to care for millions. The developing conflict in Ukraine may also create new refugee movements and new states hosting more displaced people. These changes mean that more of the world's asylum-seekers are protected by different legal regimes than ten years ago. In addition, customary international law has received renewed attention, and its methodology continues to be adjusted and refined, including issues such as the

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role of international organizations and specially interested states. This Essay will apply recent scholarship on customary international law to consider if this shift in asylum-seeker migration patterns and the resulting change in specially interested states forces us to change our approach to customary international law on refugee status.

To make the claim that changing migration patterns may impact customary international law, this Essay will focus on the doctrine of “specially interested” states and their role in establishing customary international law. Under the traditional notion of specially interested states, the practice and *opinio juris* of certain states is more important than others in establishing customary international law. That said, the traditional understanding of international doctrine does not clearly distinguish between proving the existence of customary international law and prescribing customary international law.¹ Actors like the International Law Commission, however, are increasingly attempting to articulate the method for identifying customary international law,² including the role of specially interested states.³

This Essay will first discuss the doctrine of specially interested states. It will then identify which states were specially interested in refugee migration ten years ago and which states are specially interested now. After chronicling the change in specially interested states, this Essay will speculate on some possible changes in customary international law on refuge, focusing on the example of the refugee definition as supplemented by other regional instruments.

1. See, e.g., William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 *GEORGETOWN J. INT'L L.* 445 (2014) [hereinafter Worster, *Inductive and Deductive Methods*].

2. See, e.g., Int'l L. Comm'n, Rep. on the Work of the Seventieth Session, U.N. Doc. A/73/10, at 119 (2018) [hereinafter ILC, *Draft Conclusions on Customary International Law*].

3. See, e.g., William Thomas Worster, *The Transformation of Quantity to Quality: Critical Mass in the Formation of Customary International Law*, 31(1) *B. U. INT'L L.J.* 1 (2013) [hereinafter Worster, *Transformation of Quantity to Quality*].

II. IDENTIFYING CUSTOMARY INTERNATIONAL LAW

When determining the existence of a norm under customary international law, one must consult evidence of state practice and *opinio juris*. Both the Statute of the International Court of Justice and the Statute of the Permanent Court of International Justice include the same statement on customary international law as a source of law.⁴ These instruments require two elements for proving customary international law: state practice and *opinio juris sive necessitatis*.⁵ State practice is the objective widespread and consistent practice of states,⁶ and *opinio juris* is the subjective belief of those states that they are acting out of a sense of obligation.⁷

We do not, however, need to assess all states to establish whether a norm of customary international law is widespread.⁸ Quite simply, states do not have equal influence on the formation of customary international law. Doctrine has long recognized the notion of the "specially interested" state.⁹ This idea is that states

4. See Statute of the Permanent Court of Justice art. 38, Dec. 16, 1920, 6 L.N.T.S. 380; Statute of the International Court of Justice art. 38, June 16, 1945, 33 U.N.T.S. 993.

5. See, e.g., S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7); Asylum Case (Colom./Peru), 1950 I.C.J. 266, 276-77 (Nov. 20); North Sea Continental Shelf (Den./Ger.), 1969 I.C.J. 3, 44 (Feb. 20).

6. See *Asylum Case*, 1950 I.C.J. at 276-77; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-11 (5th ed. 1998).

7. See S.S. "Lotus", 1927 P.C.I.J. at 27-28; *Asylum Case*, 1950 I.C.J. at 277; *Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 42-43 (Apr. 12); *North Sea Continental Shelf*, 1969 I.C.J. at 43; *Military & Paramilitary Acts in & Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 108-09 (June 27).

8. See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) ("[I]t is generally accepted that . . . [a] comprehensive survey of all legal systems of the world [is not required] as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute.").

9. See *Aaland Island Question*, Advisory Opinion, 1920 League of Nations Official J. Spec. Supp. No. 3 (1920); S.S. "Wimbledon" (Fr., It., Japan & U.K. v. Ger.) 1923 P.C.I.J. (ser. A) No. 1, at 7 (Jan. 16); *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 138 (Dec. 18); *Right of Passage over Indian Territory*, 1960 I.C.J. at 23; *North Sea Continental Shelf*, 1969 I.C.J. at 43; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. RED. CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xlv (2005) [hereinafter ICRC, CUSTOMARY IHL].

that are more significantly impacted or participate more actively in certain practices have a larger contribution to developing customary international law doctrine that is proportionate to their enhanced role.¹⁰ At first, this method might appear to contradict the accepted rule of sovereign equality; however, it is merely a means for identifying rules of custom reliably and efficiently. This is not to say that “uninterested” states are not invested in the existence of a customary international law rule.¹¹ It means instead that, in sampling state practice, one must include those states that not only engage in the practice, but that engage in the most representative practice of the international community.¹² Two prominent examples of specially interested states having significant impact on customary international law are roles that coastal states had in forming the law of the sea, and states active in space exploration had in forming the law of outer space.¹³ While both the sea and space are open to all states and can even constitute a global common heritage, we need not examine state practice of every state in the world to identify customary international law governing them. This Essay does not address whether specially interested states have an outsized role in constituting customary international law; this Essay only makes the more modest claim that specially interested state practice proves the existence of customary international law. Therefore, identifying customary international law requires considering which states are more significantly engaged than others in certain issues.

One important critique of this doctrine, however, is that Western and/or Global North states may be disproportionately considered specially interested.¹⁴ This concern might lead to abuse

10. See Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 36 (Anne Peters ed., 2006).

11. See ICRC, *CUSTOMARY IHL*, *supra* note 9, at xliv-xlv.

12. See, e.g., *id.* at xlix-l.

13. See, e.g., *North Sea Continental Shelf*, 1969 I.C.J. at 176 (Tanaka, J., dissenting); *id.* at 227 (Lachs, J., dissenting).

14. See MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 51-2 (1979); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 354-55 (1989); GENNADY DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 96 (1993); Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT'L L. 191, 192 (2018).

of the doctrine by those states to sway the law in their interest.¹⁵ Increasingly more states are publishing digests of what they view their state practice to be and the UN General Assembly, European Union and Council of Europe have encouraged the use of standardized approaches for doing so.¹⁶ That said, simply increasing the rate of self-reporting may not be sufficient.¹⁷ More importantly, focusing on practice by Global North states is unlikely to be truly representative. As a counterbalance to excessive influence by a particular region or group of states, some authorities have recognized that the specially interested states analysis must also consider regional distribution.¹⁸ For example, the International Committee of the Red Cross (“ICRC”) study on customary international humanitarian law consulted a variety of states, not only states with recent experience of armed conflict, ensuring that it examined states from all regions of the world, acknowledging that all states had some interest in the rules on the use of force and protection of humanity.¹⁹ For these reasons, this Essay will apply a region-by-region approach to the specially interested states analysis.

This Essay will not generally address whether non-state actors can contribute to customary international law,²⁰ other than

15. See DANILENKO, *supra* note 14, at 96.

16. See G.A. Res. 2099 (XX), at 89-90 (Dec. 20, 1965); Eur. Council, Council Conclusions Inviting the Introduction of the European Case Law Identifier (ECLI) and a Minimum Set of Uniform Metadata for Case Law, 2011 O.J. (C 127) 1, 2; Council of Eur. Comm. Mins., Res. (68)17, Model Plan for the Classification of Documents Concerning States Practice in the Field of Public International Law (June 28, 1968), as amended by Recomm. 97(11) (June 12, 1997).

17. See Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 99 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

18. See North Sea Continental Shelf, 1969 I.C.J. at 227 (Lachs, J., dissenting); ICRC, CUSTOMARY IHL, *supra* note 9, at xlv-xlv, li.

19. See ICRC, CUSTOMARY IHL, *supra* note 9, at xxx-xlv.

20. See Int’l L. Ass’n, *Statement of Principles Applicable to the Formation of General Customary International Law, Final Report of the Committee*, Princs. 10, 11 cmt. (a), (b) (2000). Also see Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 25 (May 28) (in identifying the existence of customary international law, the Court examined the depositary practice of the U.N. Secretary-General, a rare example of an international organization appearing to

to observe that the European Union is widely understood to be an important exception. The International Law Commission (“ILC”) Special Rapporteur observed that the European Union may contribute to customary international law when it acts as a state in the scope of its competences.²¹ The European Union has also submitted the same view,²² and several EU Member States have agreed.²³ Following the same reasoning, the United Nations High Commissioner for Refugees (“UNHCR”) could also contribute to customary international law when it operates within a state and determines refugee status for that state.²⁴ It is true that other non-state actors are understood to contribute to customary international law, for example, developing the law on non-international armed conflict. But this conclusion is largely based on the application of the law in such conflicts by and to such actors. The only non-state actors involved in promulgating and applying refugee law, respectively, are the European Union and UNHCR. Therefore, only states would apply any customary international refugee law, so the larger issues of non-state actors will be omitted from this study, except for the European Union and UNHCR. Thus, this analysis will include the practice of these two organizations.

contribute to customary international law); William Thomas Worster, *The Contribution to Customary International Law of Territories under International Administration*, in *INTERNATIONAL ORGANISATIONS, NON-STATE ACTORS AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW* 343 (Sufyan Droubi & Jean d’Aspremont, eds., 2021).

21. See ILC, *Draft Conclusions on Customary International Law*, *supra* note 2, at conclusion 4(2), cmt. (6); Int’l L. Comm’n, Sir Michael Wood, Spec. Rapp., Third Report on Identification of Customary International Law, UN Doc. A/CN.4/682 para. 45 (Mar. 27, 2015) [hereinafter ILC, Wood, *Third Report*].

22. See ILC, Wood, *Third Report*, at 53 n.184; Int’l L. Comm’n, Sir Michael Wood, Spec. Rapp., Second Report on Identification of Customary International Law, UN Doc. A/CN.4/672 n.135 (May 22, 2014). See also General Assembly, Summary record of the 20th meeting: 6th Committee, UN Doc. A/C.6/71/SR.20 para. 45 (Oct. 24, 2016).

23. See, e.g., U.N. GAOR 68th Sess., 6th Comm. 21st mtg, para. 63, UN Doc. A/C.6/71/SR.21 (“Romania”) (Nov. 16, 2016); U.N. GAOR 69th Sess., 6th Comm. 25th mtg, para. 130, UN Doc. A/C.6/69/SR.25 (Nov. 29, 2014) (delegate of Norway speaking on behalf of Nordic countries, including EU).

24. See William Thomas Worster, *The Evolving Definition of the Refugee in Customary International Law*, 30(1) *BERKELEY J. INT’L L.* 94 (2012) [hereinafter Worster, *Evolving Definition of the Refugee*].

III. CONTEMPORARY INTERNATIONAL LAW ON REFUGEES AND ASYLUM-SEEKERS

Contemporary international refugee law is primarily founded on the Refugee Convention of 1951 and its 1967 Protocol,²⁵ though there are supplementary sources, including customary international law.²⁶ The Refugee Convention provides a definition and terms on treatment of refugees. Beyond the adoption of the 1967 Protocol, the Refugee Convention has not been amended. That said, a variety of regional instruments supplement the Refugee Convention and expand its application to a wider pool of potential refugees, such as the Organization of African Unity Convention²⁷ and European Union Qualification Directive.²⁸ The UNHCR has specifically argued that EU law is relevant to the formation of customary international law on refugee status.²⁹

25. See Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (collectively, Refugee Convention).

26. UN High Comm'r for Refugees, *The Refugee Concept Under International Law: Global Compact for Safe, Orderly and Regular Migration* (Mar. 8 2018), <https://www.unhcr.org/events/conferences/5aa290937/refugee-concept-under-international-law.html> [<https://perma.cc/67RF-8YF7>] [hereinafter UNHCR, *Refugee Concept*] ("International refugee law derives from a range of treaties (universal and regional), rules of customary international law, general principles of law, and national laws and standards."). See generally, Worster, *Evolving Definition of the Refugee*, *supra* note 24.

27. See Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 UNTS 45 [hereinafter OAU Refugee Convention] (expanded the definition of refugee in the Refugee Convention to include those fleeing "external aggression, occupation, foreign domination or events seriously disturbing public order.").

28. See E.U. Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (Apr. 29, 2004), Council Directive, 2004/83/EC, 2004 O.J. (L 304/12) (EC) [hereinafter EU Qualification Directive] (also expanding the scope of protection beyond those qualifying under the Refugee Convention).

29. See UNHCR, *Refugee Concept*, *supra* note 26 (internal citations omitted):

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol laid the foundation upon which subsequent regional instruments have built, including the 1969 OAU Convention, the 1984 Cartagena Declaration, the EU Qualification Directive and other relevant instruments of the EU asylum *acquis communautaire*, and the 1966 Bangkok Principles. Collectively, this body of law, complemented by international human rights

Added to these instruments, the international community has also adopted various other non-binding instruments. Examples include the Bangkok Principles,³⁰ Cartagena Declaration,³¹ Brasilia Declaration,³² and the Mercosur Rio de Janeiro Declaration.³³ While these declarations do not themselves create binding obligations, states adopted them in the context of international organizations, and they inform us of states' views on the expected protections. In some cases, states have adopted these non-binding obligations within their domestic law.

The Refugee Convention and the regional instruments and declarations differ slightly on the degree and scope of their coverage and protection. This Essay primarily focuses on the definition of individuals fleeing danger that states and organizations designate as refugees, but other differences are worthy of academic attention. While the Refugee Convention only covers situations of persecution,³⁴ the OAU Convention covers individuals fleeing "external aggression, occupation, foreign

law, makes up the international refugee protection regime under which UNHCR exercises its mandate responsibilities.

30. See Asian-Afr. Legal Consult. Org., [*Bangkok*] *Principles Concerning Treatment of Refugees*, 8th Sess., at 38-45 (Aug. 17, 1966), <https://www.aalco.int/report8thAS> [<https://perma.cc/94Z3-2BTC>] [hereinafter *Bangkok Principles*] (expanding the definition of refugee to include "every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.").

31. See *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, in Cartagena, Colombia, 19-22 Nov. 1984, <http://www.unhcr.org/refworld/docid/3ae6b36ec.html> [<https://perma.cc/AS3V-55G9>] [hereinafter *Cartagena Declaration*] (expanding the definition along the lines of the OAU Convention).

32. See *Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas*, UNHCR, Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, Brasilia, (Nov. 11, 2010), <http://www.unhcr.org/4cdd3fac6.html> [<https://perma.cc/TH4W-54MD>].

33. See MERCOSUR, *Rio de Janeiro Declaration on the Institution of Refuge*, Nov. 10, 2000, <http://www.unhcr.org/refworld/docid/3de4f8982.html> [<https://perma.cc/YEP7-83AX>] [hereinafter *Rio de Janeiro Declaration*] (expanding the definition of refugee to cover "individuals persecuted for reasons of race, nationality, religion, membership of a particular social group, political opinion or victims of serious and generalized violation of human rights").

34. See Refugee Convention, *supra* note 25.

domination or events seriously disturbing public order”³⁵ and the EU Qualification Directive provides for “subsidiary protection” for individuals not qualifying as refugees but are otherwise at risk for suffering serious harm.³⁶ The non-binding declarations partly repeat binding obligations of the OAU Convention or EU Qualification Directive. For example, the Bangkok Principles and Cartagena Declaration define protected persons similarly to the OAU Convention.³⁷ The Mercosur Rio de Janeiro Declaration adopts a definition closer to the Refugee Convention, though it builds on and refines some categories of persecuted persons.³⁸

Of course, none of these regional instruments or declarations have universal adherence, so we can also consider whether any of their terms contribute to customary international law. Although some scholars have been dubious of enough consistency to establish customary international law governing refugee status for differing groups of asylum-seekers,³⁹ others argue that there is enough widespread and consistent practice to identify some rules.⁴⁰ If we view the binding regional instruments collectively and identify underlying state practice and *opinio juris*, we can find some similarities in discrete elements within the refugee definition. In addition, implementation of these binding and non-binding obligations aligns in important ways in a widespread and consistent manner. To this state practice and *opinio juris* we can add that of the European Union and UNHCR to solidify those obligations under customary international law. On this basis, an expanded core refugee definition already exists under international custom that includes, *inter alia*, persons fleeing armed conflict.

This practice and *opinio juris*, however, relies heavily on certain specially interested states,⁴¹ whose identities may be

35. See OAU Refugee Convention, *supra* note 27, at 2.

36. See EU Qualification Directive, *supra* note 28.

37. See Bangkok Principles, *supra* note 30; Cartagena Declaration, *supra* note 31.

38. See Rio de Janeiro Declaration, *supra* note 33.

39. See GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 171 (1996); RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 393 (rev. 2d ed. 1988).

40. See Worster, *Evolving Definition of the Refugee* *supra* note 24, at 116.

41. See *id.*

changing. When it comes to the law applying to asylum seekers, we could consider which states are specially interested. Though all states are interested in refugee migration in principle, refugees do not disperse evenly around the world, and some states have a significantly disproportionate burden in hosting individuals claiming refugee status. The practice of states hosting significant numbers of asylum-seekers gives those states an equally disproportionate role in contributing to customary international law, because their practice toward refugees impacts the greatest number of persons seeking refuge. The total number of refugees hosted in various states, and the number as a percentage of the world population of asylum-seekers, as relevant to determine which states were more or less specially interested, has already been identified elsewhere.⁴² That practice and *opinio juris* was then more influential in defining the scope and contours of the refugee definition under customary international law.

We can determine which states are more or less specially interested by assessing the number of persons protected in their territory. The UNHCR database provides statistics on refugees and individuals seeking asylum.⁴³ This Essay includes both groups because the latter might still qualify as refugees under the law, though their status has not yet been recognized. Stateless persons and internally displaced people are, however, excluded, so this study focuses only on refugees. Of course, the numbers of persons contain some degree of inherent ambiguity due to challenges of identification and classification, as well as reliability issues. The objective of this analysis is not to identify with a high degree of precision the exact amounts of refugees and asylum-seekers within in each state, but to generate a general overview of trends in this forced migration. For this reason, readers may disagree whether a state hosts 0.5 percent or 0.6 percent of the world total,

42. See generally William Thomas Worster, *The Contemporary International Law Status of the Right to Receive Asylum*, 26 INT'L J. REFUGEE L. 477 (2014); Worster, *Evolving Definition of the Refugee*, *supra* note 24, at 117.

43. See U.N. High Comm'r for Refugees, *Refugee Population Statistics Database*, <https://www.unhcr.org/refugee-statistics/> [<https://perma.cc/3LJ8-PD86>] (last updated June 18, 2021) [hereinafter UNHCR, *Refugee Population Statistics Database*]. See also, U.N. High Comm'r for Refugees, *Global Trends: Forced Displacement 2020* (2021), <https://www.unhcr.org/flagship-reports/globaltrends/> [<https://perma.cc/EY8T-HLVF>].

but can generally agree on which states, relatively speaking, are experiencing increased migration.

IV. CHANGING PATTERNS OF ASYLUM-SEEKING MIGRATION⁴⁴

Primarily due to armed conflict, the states that host larger populations of persons seeking refuge are changing, with the potential for a change in customary international law designating persons fleeing armed conflict as refugees. Looking back ten years, the following states used to host the largest number of asylum-seekers. Syria has historically hosted the largest number of refugees at 1.5 million, representing 15.5 percent of the world total. Following Syria, Iran and Pakistan hosted almost one million each, amounting to approximately ten percent of the world total each. Germany, Jordan, and Tanzania each hosted approximately half a million, or five percent of the world total. Following those states at approximately three percent of the world total each were China, the United Kingdom, Chad, the United States, and Kenya. Just slightly lower were Saudi Arabia, Uganda, Sudan, Democratic Republic of the Congo, and Canada. At less than two percent of the world total each were India, France, Nepal, Thailand, Yemen, and Zambia. And at one percent of the world total each were Serbia, Egypt, Algeria, the Netherlands, and Ethiopia. Sweden, Cameroon, Rwanda, and Lebanon followed up closely behind. Perhaps it is also interesting to note that, if the European Union were a state, it would rank at number two on this list with more than 1.2 million asylum-seekers. Of course, the United Kingdom was a member state of the European Union at the time.

According to the approach previously stated, these statistics lead to some conclusions about which states were more influential in the past. The Bangkok Principles have historically been a strong statement of *opinio juris* because some of the states with the largest hosted populations—including Syria and Pakistan—authored the declaration and other states with large populations of protected

44. The outlined in analysis in Part IV is based on the manipulation of publicly available data from UNHCR's Refugee Population Statistics Database. For further details on this database and methods of analysis see UNHCR, *Refugee Population Statistics Database*, *supra* note 43 and accompanying text.

person, such as Iran, have subsequently participated by joining the Asian-African Legal Consultative Organization. The Bangkok Principles, however, are clearly non-binding, and not all states have revised domestic state practice by, for example, adopting the expanded refugee definition into domestic law. On the other hand, the EU regulations that provide an expanded refugee definition are binding, directly applicable, and strongly influence customary international law. They do not, of course, constitute customary international law alone, but do contribute to the global consensus on customary international law. This influence is partly due to the European Union's role as a public law actor, and partly due to the fact that it applies to the major hosting states of Germany, United Kingdom, France, and Netherlands, among others. In addition, the OAU Convention, which is similarly binding, is a strong expression of practice and *opinio juris*, including the very important hosting states of Tanzania, Chad, Kenya, Uganda, Sudan, Democratic Republic of the Congo, Zambia, Egypt, Algeria, Ethiopia, Cameroon, and Rwanda. In sum, ten years ago, there was a very strong practice of expanding the refugee definition in the Refugee Convention to include people fleeing armed conflicts.

This list of recipients of asylum-seekers, however, is changing in light of the recent massive refugee crisis, especially due to the armed conflict in Syria (previously the largest host of refugees), Afghanistan, Myanmar, and other places. The state now hosting the largest number of refugees is Turkey, which protects almost four million refugees/asylum-seekers, sixteen percent of the world total. Germany, Pakistan, Uganda, and the United States place far behind Turkey at only 1.5 million each, or six percent of the world total each. The next tier is Sudan, Lebanon, Bangladesh, Ethiopia, Iran, and Jordan, with populations at just under one million each. France, Peru, Kenya, Democratic Republic of the Congo, Chad, and Cameroon all had approximately 0.5 million, or two percent of the world total each. Egypt and South Sudan have 1.5 percent each, and China, Iraq, Sweden, Tanzania, Brazil, South Africa, Niger, the United Kingdom, Spain, India, Canada, Italy, Malaysia, and Yemen all host approximately one percent each. States with approximately 0.5 percent of the world total each include Greece, Austria, Rwanda, Australia, Ecuador, Mexico, Switzerland, Armenia, Algeria, Costa Rica, Thailand, Mauritania, Belgium, the Netherlands, and Burundi. If the European Union counted as a *de*

facto unified regime, it would still be the second-most important actor contributing to customary international law. It currently hosts 3.6 million asylum seekers, amounting to fourteen percent of the world total, and almost as many as Turkey alone. Following Brexit, the United Kingdom's numbers are naturally removed from the European Union; however, the Union would still host 3.4 million asylum-seekers, thus remaining at the same ranking on this list.

These changes mean that several states now qualify as specially interested, and thus more influential in shaping customary international law. Turkey has clearly jumped to the top of the list, experiencing a 57,038 percent increase in asylum seekers, and is now the top destination for asylum-seekers worldwide. Not but ten years ago, Turkey's influence on customary international law in this area was considerably less influential. Peru is also becoming far more important. A 54,360 percent increase in refugees has pushed the state to into the top fifteen. South Sudan has seen a significant increase as well. The precise numbers for South Sudan from ten years ago were not reported with a high degree of confidence, so it is more difficult to evaluate their growth. But having jumped from a small, albeit uncertain, number of asylum-seekers to a top twenty host state, it certainly has experienced a significant change in its role. Bangladesh is another arrival on the most influential list. It has experienced a 3,042 percent increase in refugees, largely due to the Rohingya crisis in Myanmar. Now Bangladesh is comfortably within the top ten hosts of refugees in the world. Lebanon and Ethiopia are growing, experiencing a 1,652 percent and 841 percent increase in asylum-seekers respectively. Brazil, Niger, Spain, Greece, and Ecuador are also increasingly important. For example, although Brazil is only in the top twenty-six states in the overall number of forced migrants under its care, it has seen an increase in asylum-seekers of 6,831 percent over the past ten years.

Some states are quite resilient in maintaining a consistently high degree of significance. The European Union, Pakistan, Germany, Iran, and Jordan continue to be about as highly relevant as before. As noted above, the European Union continues, over the past ten years, at the second highest number of asylum-seekers.

Although it has experienced an almost two hundred percent increase in people seeking asylum, that growth generally keeps pace with the global increase. Notably, within the European Union, a significant amount of this growth has been shouldered by Germany, which increased its refugee population by 274 percent and is now the third most important host state worldwide. The second tier of states that maintain a stable impact on customary international law includes Chad, the United States, Kenya, Uganda, Sudan, Democratic Republic of the Congo, and France.

Other states are losing influence. Nepal, Thailand, Zambia, Serbia, and Congo no longer significantly contribute to customary international law. Saudi Arabia also eliminated its reception of asylum-seekers by ninety-nine percent and fell in significance. The greatest drop, however, is Syria, for obvious reasons. Once the most critical host state, protecting more than fifteen percent of all the refugees worldwide, it has lost more than ninety-eight percent of its refugees and now hosts only a negligible global percentage. In fact, Syria has shifted from being a host state to being a major producer of refugee flight.

The armed conflicts and changes in refugee migration suggest changes in influence. Currently, no customary international law study of refugee law, status, or treatment can be complete without consulting the practice and *opinio juris* of Turkey, Pakistan, Uganda, the United States, Sudan, Lebanon, Bangladesh, Ethiopia, Iran, and Jordan. Germany and France are important states as well, as their practices, along with that of the European Union, significantly influence the content of customary international law. Peru, Kenya, Democratic Republic of the Congo, Chad, Cameroon, and Egypt are also important. To ensure geographical representation and counterbalance the risk of disproportionate regional role in forming customary international law, China, Brazil, India, Canada, Malaysia, Australia, and Armenia should also have a seat at the table.

V. *POSSIBLE CONSEQUENCES OF CHANGING SPECIALLY INTERESTED STATES*

This Part addresses specific state policies and their changing influence. This is not an exhaustive analysis of all customary international norms of refugee law. Instead, this Part will focus only on the expanded refugee definition.

Syria was, in some ways, a good influence on the refugee definition prior to the armed conflict. It permitted the UNHCR to operate in country and had begun to reform its asylum procedures.⁴⁵ While it was not a party to the Refugee Convention, it exercised a strong and relatively generous protection policy by hosting very large amounts of persons fleeing the armed conflict in Iraq.⁴⁶ Also, participating in the Bangkok Principles affirmed that not only people fleeing armed conflict were properly classified as refugees, but also individuals fleeing “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.”⁴⁷

Turkey, on the other hand, implements a more restrictive definition. Most importantly, it maintains strict limitations on its accession to the Refugee Convention by not recognizing non-Europeans as refugees.⁴⁸ That being said, Turkey did advocate for expanding the refugee definition to include persons fleeing international or internal armed conflict. Still, it did not advocate for the more extensive definition in the declaration covering aggression, occupation, and public disturbance, as mentioned above. In addition, the Law on Foreigners and International Protection does not contemplate permanent settlement for

45. See U.N. High Comm’r for Refugees, *Syria*, <https://www.unhcr.org/sy/refugees> [<https://perma.cc/J9BT-W6HE>] (“Syria has been tolerant in hosting refugees and has continued to cooperate with UNHCR in extending protection and assistance to refugees and asylum seekers on its territory”); United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 – Syria*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2b3a.html> [<https://perma.cc/P8CG-SND3>] [hereinafter USCRI, *World Refugee Survey 2009 – Syria*] (“In October 2006, the [Syrian] Government formed the National Asylum Law Committee to draft an asylum law, and Committee members have traveled to UNHCR headquarters to discuss this process. During 2008, the Swiss government offered to work with UNHCR and Syria to craft a refugee policy.”).

46. See USCRI, *World Refugee Survey 2009 – Syria*, *supra* note 45.

47. See Bangkok Principles, *supra* note 30, art. I(2)–(3).

48. Refugee Convention, *supra* note 25. See also U.N. HIGH COMM’R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (Apr. 2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/GD9N-RVVM>] [hereinafter STATES PARTIES TO THE REFUGEE CONVENTION].

refugees.⁴⁹ While the Turkish authorities have adopted a more flexible approach for the case of Syrian refugees and does permit UNHCR to operate in-country,⁵⁰ they are excluded from recognition as *de jure* refugees.⁵¹ The outsize role of Turkey in hosting asylum-seekers makes this practice increasingly significant in assessing customary international law.

In addition, other major host states have mixed practices, with perhaps a slightly more restrictive approach than in the past. Pakistan, Lebanon, Bangladesh, Jordan, India, and Malaysia are not parties to the Refugee Convention⁵² or any binding instrument. Pakistan, Jordan, and India do participate in the Bangkok Principles.⁵³ Pakistan and Jordan did not oppose a more expensive definition, though India did.⁵⁴ Iran and China are indeed party to both the 1951 Refugee Convention and 1967 Protocol,⁵⁵ and they

49. See generally *Yabancılar ve Uluslararası Koruma Kanunu* [Law on Foreigners and International Protection], Apr. 4, 2013, Resmi Gazete [Official Gazette], No. 28615 (Apr. 11, 2013), https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/04/LoFIP_ENG_DGMM_revised-2017.pdf [<https://perma.cc/XEM6-Y3Q5>]; Law on Foreigners and International Protection (LFIP), Law No. 6458, art. 1(1), (Apr. 4, 2013), https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/02/law_on_foreigners_and_international_protection.pdf [<https://perma.cc/6E7W-HQNS>].

50. See U.N. High Comm'r for Refugees, *UN High Commissioner for Refugees Praises the Republic of Turkey for its Continued Commitment to Provide Protection to All Those in Need* (Sept. 10, 2021), <https://www.unhcr.org/tr/en/30521-un-high-commissioner-for-refugees-praises-the-republic-of-turkey-for-its-continued-commitment-to-provide-protection-to-all-those-in-need.html> [<https://perma.cc/8P53-M6RA>].

51. See Oktay Durukan et al., Asylum Information Database, *Country Report: Turkey* 11–15 (May 18, 2015), https://asylumineurope.org/wp-content/uploads/2015/08/report-download_aida_turkey_final.pdf [<https://perma.cc/8G2U-62WR>] (“Turkey maintains a geographical limitation to the 1951 Refugee Convention, restricting its application to refugees originating from European countries”); Thomas Huddleston et al., *Migration Integration Policy Index 2015* 208–11 (2015), <https://www.mipex.eu/sites/default/files/downloads/files/mipex-2015-book-a5.pdf> [<https://perma.cc/LX7V-MQTF>]; *Turkey Ranks Bottom in Migrant Integration Report with Flow of Refugees*, HÜRRIYET DAILY NEWS (June 23, 2015), <http://www.hurriyetdailynews.com/turkey-ranks-bottom-in-migrant-integration-report-with-flow-of-refugees.aspx?pageID=238&nID=84424&NewsCatID=339> [<https://perma.cc/YX9V-YSMK>].

52. Refugee Convention, *supra* note 25; STATES PARTIES TO THE REFUGEE CONVENTION, *supra* note 48.

53. See Bangkok Principles, *supra* note 30.

54. See *id.*

55. Refugee Convention, *supra* note 25; STATES PARTIES TO THE REFUGEE CONVENTION, *supra* note 48.

also participate in the Bangkok Principles as a supplementary instrument and are supportive of the expansive definition.⁵⁶ China permits the UNHCR to operate but prohibits it from working near the North Korean border.⁵⁷ Similarly, Peru and Brazil are parties to the Refugee Convention, but not to the non-binding Cartagena Declaration.⁵⁸ That said, Brazil has adopted terms of the Cartagena Declaration into its domestic law.⁵⁹

However, there are some more potentially positive influences on customary international law. The European Union is generally a good influence on refugee practice because EU law is rather liberal and the EU Member States are parties to the Refugee Convention,⁶⁰ and implement their obligations therein. EU refugee regulations are also directly applicable in the Member States.⁶¹ Germany and France, as such major states of protection, have particularly strong influence. The EU definition in the Qualification Directive, however, differs from the OAU Refugee Convention or Bangkok Principles. It merely repeats the refugee definition from the Refugee Convention and adds a “subsidiary protection” option for individuals who do not qualify as refugees but are at risk of serious harm.⁶² As of the time of this writing, four million individuals have fled from the conflict in Ukraine to the European Union and are being admitted under the EU Temporary Protection Directive which does not purport to apply any definition of

56. See Bangkok Principles, *supra* note 30.

57. See United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 – China*, (June 17, 2009), <http://www.unhcr.org/refworld/docid/4a40d2a3c.html> [<https://perma.cc/D8LR-LKTE>].

58. See Cartagena Declaration, *supra* note 31, at concl. III, 5.

59. See U.N. High Comm’r for Refugees, *ACNUR parabeniza Brasil por reconhecer condição de refugiado de venezuelanos com base na Declaração de Cartagena* (July 29, 2019), <https://www.acnur.org/portugues/2019/07/29/acnur-parabeniza-brasil-por-reconhecer-condicao-de-refugiado-de-venezuelanos-com-base-na-declaracao-de-cartagena/> [<https://perma.cc/J6JB-49UX>].

60. Refugee Convention, *supra* note 25; STATES PARTIES TO THE REFUGEE CONVENTION, *supra* note 48.

61. See EU Qualification Directive, *supra* note 28.

62. See *id.* art. 2(f).

refugee.⁶³ It merely manages mass influx. In time, these individuals admitted to the EU may apply for more robust protection under the Qualification Directive. At that point, they will test how expansive the Qualification Directive is. If these millions of individuals are confirmed for subsidiary protection rather than refugee status, then this act will constitute strong evidence that fleeing armed conflict is not part of a customary refugee definition.

That said, other specially interested states may also exert influence favoring an expansive definition. Canada, Australia, and Armenia are party to the Refugee Convention, though the United States is not.⁶⁴ Instead, it is party to the 1967 Protocol.⁶⁵ Uganda, Sudan, Kenya, Cameroon, and Egypt also positively influence a much more expansive refugee definition. They are parties to the Refugee Convention and Protocol,⁶⁶ OAU Convention,⁶⁷ and Bangkok Principles,⁶⁸ and permit UNHCR to operate in country and apply its policies. For example, Kenya hosts huge refugee camps, which shows a willingness to apply a liberal definition of qualifying persons in line with those instruments. Ethiopia, Democratic Republic of the Congo, and Chad are parties to both the Refugee Convention⁶⁹ and the OAU Convention.⁷⁰ The OAU Convention adopts, in binding law, the expanded refugee definition covering external aggression, occupation, foreign domination, or public order disturbances mentioned in the Bangkok Principles.

In reaching general observations, we may be seeing the beginning of a shift to a more restrictive approach in customary international law. Turkey's influence is critical in this shift, but Pakistan, Lebanon, Bangladesh, and Jordan are also important. Increasingly, states that are not party to the Refugee Convention and not supportive of expanded definitions are hosting asylum-seekers. The European Union (especially Germany), Uganda,

63. See Council Directive 2001/55/EC, 2001 O.J. (L 212/12) (EC) [hereinafter EU Temporary Protection Directive].

64. See Refugee Convention, *supra* note 25; STATES PARTIES TO THE REFUGEE CONVENTION, *supra* note 48, at 1.

65. See 1967 Refugee Protocol, *supra* note 25.

66. See Refugee Convention, *supra* note 25; STATES PARTIES TO THE REFUGEE CONVENTION, *supra* note 48, at 2-4.

67. See OAU Refugee Convention, *supra* note 27, at 14.

68. See Bangkok Principles, *supra* note 30.

69. See Refugee Convention, *supra* note 25; STATES PARTIES TO THE REFUGEE CONVENTION, *supra* note 48, at 2.

70. See OAU Refugee Convention, *supra* note 27, at 14.

Sudan, and Ethiopia counterbalance some of this restrictive approach for the time being. This shift could suggest, for example, a slight diminishment of state practice that supports the expanded definition of refugees as including persons fleeing war.

VI. CONCLUSION

This Essay suggests a general methodology for assessing customary international law and identifies some preliminary indications of where customary international law on a refugee definition may be heading. Customary international law is formed by state practice and *opinio juris*, so state actions can directly impact international law. Certain states, so-called “specially interested” states, are critical in this analysis, but the states that are specially interested in refugee protection are changing.

Some of these changes enhance the role of states with positive protection regimes, but applying this methodology may suggest the diminishment of influence of states with expansive refugee protection policies. A broad survey of practice shows that the definition of refugee as including persons fleeing armed conflict, not only persons fleeing persecution or torture, may be weakening. A rule that evolves to become more conservative will protect fewer people from armed conflict.

Of course, states with generous refugee regimes, who interpret their international obligations liberally could positively impact customary international law by increasing admissions of persons fleeing armed conflict to have more parity with states in the current main refugee regions to enhance their status as specially interested states. In the Ukraine conflict, initial reports indicate that the European Union may take this approach, though the individuals fleeing at this early point are only covered by a Temporary Protection regime, and their refugee status is not yet determined.⁷¹ Such enhanced influence in forming customary international law would result in a stronger, more liberal refugee protection regime worldwide. If states in the region were obligated to provide stronger protection, then ultimately, more people

71. See EU Temporary Protection Directive, *supra* note 63.

would be protected in the region. Paradoxically, increasing admissions of asylum-seekers might make it easier for destination states to argue against further asylum-seeker admissions.