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Refugees

A Massacre of Unspeakable Brutality

With Bangladesh and India to the west, and China, Laos, and Thailand to the east, Myanmar (formerly Burma) is the largest country in mainland Southeast Asia.[1] Myanmar's history since independence in 1948 has been dominated by military dictatorship, ethnic strife, and civil war.[2] During this time, Myanmar's military – known as the Tatmadaw – has steadily resisted democratic reform while supporting and participating in extreme sectarian violence against minority ethnic groups. The Tatmadaw's decades-long targeting of the predominately Muslim Rohingya people has been especially unyielding, amounting to what has been characterized by a UN fact-finding mission as "severe, systemic and institutionalized oppression from birth to death."[3] The Rohingya are barred from obtaining Myanmar citizenship, rendering them stateless.[4] Their travel within and outside Rakhine state, where most Rohingya live, is subject to strict and discriminatory limitation, as is their right to public assembly.[5] In June and October 2012, two waves of pogrom-like violence against the Rohingya erupted with the encouragement of a government-supported campaign of "hate and dehumanization," resulting in the internal displacement of more than 140,000 and further severe violations of the Rohingya's human rights.[6]

[1] See 'Myanmar', Wikipedia. Myanmar has a total area of 678,500 square kilometers, making it roughly the size of Afghanistan or Texas. Ibid.
[2] Yun Sun, 'The Civil War in Myanmar: No End in Sight', Brookings Institution, 13 February 2023, www.brookings.edu/articles/the-civil-war-in-myanmar-no-end-in-sight/ [hereinafter No End in Sight].
[3] UN Human Rights Council, 'Report of the independent international fact-finding mission on Myanmar', 12 September 2018, A/HRC/39/64, para. 20 [hereinafter UN 2018 Fact-finding Report].
[4] Ibid. para. 21.
[5] Ibid. para. 23.
[6] Ibid. paras. 24–30.

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On August 25, 2017, Rohingya militants attacked a number of security force outposts across northern Rakhine State, killing twelve security personnel. Within hours, Myanmar's military launched a response the UN described as "immediate, brutal and grossly disproportionate."[7] The Tatmadaw began what it called "clearance operations," resulting in 392 Rohingya villages – 40 percent of all settlements in northern Rakhine – being partially or totally burned to the ground.[8] Mass killings were common, while "[l]arge-scale gang-rape was perpetrated by Tatmadaw soldiers in at least ten village tracts of northern Rakhine State."[9] One of the sites of this terror was the village of Tula Toli.

On August 30, 2017, Myanmar military forces and local villagers armed with machetes descended on Tula Toli.[10] Advancing soldiers trapped several hundred unarmed Rohingya villagers on the sandy bank of a turbulent river that surrounds the village on three sides. What unfolded over the next several hours, Human Rights Watch lamented, was "a massacre of unspeakable brutality."[11] Hassina Begum, a twenty-year-old Rohingya woman, was one of few survivors. She and other survivors described how soldiers separated women and children from men, and then systematically murdered the men over several hours, dumping their bodies into pits and setting them on fire. Soldiers then took the women and children away in small groups, killing some children on the beach, and tossing others into the rushing river to drown.[12]

Human Rights Watch summarized the horror inflicted on Ms. Begum and her family:

> Hassina tried hiding her 1-year-old daughter Sohaifa under her shawl. A soldier noticed and tore the infant from her, throwing the girl alive on a fire. Five soldiers took Hassina, her mother-in-law, Fatima, 35, and her sister-in-law, Asma, 18, together with Fatima's three young sons, ages 7, 10, and 14, from the water to a nearby bamboo house in the village. Hassina says that on arrival a group of ethnic Rakhine men at the house beat the three boys to death. The soldiers proceeded to sexually assault Hassina and the women inside the house. When Fatima resisted, the

[7] Ibid. para. 32.
[8] Ibid. para. 42.
[9] Ibid. para. 38.
[10] 'Massacre by the River: Burmese Army Crimes against Humanity in Tula Toli', Human Rights Watch, December 2017, www.hrw.org/sites/default/files/report_pdf/burma1217_web.pdf.
[11] Ibid. p. 1.
[12] Ibid.

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> soldiers stabbed her to death before beating the others unconscious, and knifing Hassina.
>
> As they left, the soldiers locked the unconscious and dead women inside the house and set it on fire. Hassina and Asma regained consciousness when their clothes caught on fire, and fought their way out through the burning bamboo walls. They were the sole survivors from that house. When interviewed by Human Rights Watch, the two women showed their wounds, which included burns and machete cuts.
>
> What happened to Hassina and her relatives that day was repeated many times in Tula Toli.[13]

The UN mission later confirmed that Tula Toli was not an isolated case, but one of many villages razed to the ground amidst organized mass killing and "large-scale gang rape."[14] The UN considered the estimate of 10,000 deaths by *Médecins Sans Frontières* to be "conservative," and characterized the government's "clearance operations" as "a human rights catastrophe."[15] Ultimately, the mission concluded that there was ample evidence of genocidal actions and intent to warrant investigation and prosecution of senior Tatmadaw officials for genocide.[16]

More than 742,000 Rohingya – half of them children – fled the terror to neighboring Bangladesh.[17] Many had fled violence years before, and today almost a million Rohingya (of a total estimated population of 1.4 million) live in crowded refugee camps in Bangladesh.[18] At the time of this writing, liberal reformers and various ethnic groups were locked in civil war against the Tatmadaw, with "no end in sight."[19] There is no reasonable prospect of the Rohingya returning *en masse* to Myanmar soon, if ever. Many will need to find a permanent home elsewhere.

This chapter considers how the burden of taking in and caring for almost a million Rohingya refugees is to be distributed and shared across the international community. More specifically, we consider the manner and extent to which norms of mandatory cooperation establish a framework for "burden-sharing" – by distributing the

[13] Ibid. pp. 1–2.
[14] UN 2018 Fact-finding Report, paras. 36–38.
[15] Ibid. para. 36.
[16] Ibid. paras. 84–87.
[17] 'Rohingya Refugee Crisis Explained', UNHCR, 23 August 2023, www.unrefugees.org/news/rohingya-refugee-crisis-explained/#Rohingya.
[18] '2023 Joint Response Plan Rohingya Humanitarian Crisis January—December 2023', Inter Sector Coordination Group, p. 14 (noting that as of September 30, 2022, approximately 945,953 Rohingya refugees/forcibly displaced Myanmar nationals were registered as residing in one of thirty-three "extremely congested camps").
[19] No End in Sight, *above* note 2.

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burden of taking in the Rohingya and others who are forced to flee their country of origin. We first set out briefly the core features of the legal regime created by the UN Convention Relating to the Status of Refugees (Refugee Convention)[20] and the subsequent UN Protocol Relating to the Status of Refugees (Protocol).[21] We argue that ensuring protection for refugees is a "common concern of humanity" under the international community's collective stewardship, not merely a burden that falls on states of first refuge, such as Bangladesh for Rohingya refugees.

In a nutshell, we suggest that international refugee law carves out an exception to state authority to exclude outsiders, and that this exception is an especially poignant example of equitable norms proscribing the abuse of sovereign rights (in this case, the right to exclude). Consistent with equitable principles, states may exercise their sovereign right to exclude only in a manner that reflects due regard for the interests of other states and foreign nationals. We argue that this equitable framework not only grounds the international prohibition against returning refugees to territories where they would face persecution[22] but also supports a requirement of equitable burden-sharing. According due regard to the equitable interests of other states and foreign nationals means, in part, that states must do their fair share to make good on international refugee law's promise, which is that people fleeing persecution will have access to a decent safe harbor. Thus, refugee burden-sharing is a strong candidate for mandatory cooperation under international law.

The argument for recognizing a legal obligation for states to participate in refugee burden-sharing is largely aspirational, but enjoys some support in state practice. We argue that the 2016 New York Declaration for Refugees and Migrants (New York Declaration),[23] the 2018 Global Compact for Safe, Orderly and Regular Migration (Global Compact for

[20] UN Convention Relating to the Status of Refugees, 189 UNTS 150, 19 UST 6259 (28 July 1951).

[21] UN Protocol Relating to the Status of Refugees, 31 January 1967, 19 UST 6223, TIAS No. 6577 (1968). The Refugee Convention and Protocol enjoy widespread acceptance, with 149 states having signed one or both of these agreements. UN High Commissioner for Refugees, 'The 1951 Refugee Convention and Key International Conventions', UN High Commissioner for Refugees, 25 November 2023, www.unhcr.org/il/en/1951-refugee-convention-and-international-conventions.

[22] Refugee Convention, art. 33(1).

[23] New York Declaration for Refugees and Migrants, New York, 13 September 2016, A/RES/71/L/1.

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Migration),[24] and the 2018 Global Compact on Refugees[25] represent substantial efforts to bring a measure of mandatory cooperation to burden-sharing. Indeed, by establishing burden-sharing frameworks based on nationally defined contributions, these instruments arguably reflect states' recognition that they bear joint stewardship obligations to ensure that all refugees have access to a decent safe harbor. In the final part, we assess some of the ways this approach to burden-sharing in the case of the Rohingya satisfies the demands of mandatory cooperation.

International Refugee Law

The cornerstone of international refugee law is the Refugee Convention's duty of *non-refoulement*, which obligates states-parties to refrain from returning refugees to places where their life or freedom would be threatened.[26] This duty is widely recognized as a customary norm because states generally do not forcibly repatriate refugees, and they do not do so, in part, because they believe themselves under a legal obligation not to do so.[27] There is also a growing consensus that the duty has a peremptory or *jus cogens* character, as affirmed in various Conclusions of the Executive Committee of the UNHCR,[28] the Cartagena Declaration,[29] and scholarship.[30] It follows from the duty's customary

[24] Global Compact on Safe, Orderly, and Regular Migration (GCM), New York, 19 December 2018, A/RES/73/195.

[25] Global Compact on Refugees, New York, 2 August 2018, A/73/12 (Part II).

[26] Refugee Convention, art. 33(1).

[27] See Jean Allain, 'The Jus Cogens Nature of Non-refoulement' (2001) 13 *Int'l J. Refugee L.* 533, 538, citing Guy S. Goodwin-Gil, *The Refugee in International Law*, 2nd ed. (Oxford: Oxford University Press, 1996), pp. 166–167; Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in Erika Feller et al. (eds.), *Refugee Protection in International Law: UNHCR Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2009), pp. 87, 158.

[28] See, e.g., Executive Committee on the High Commissioner's Programme, 'General Conclusion on International Protection No. 79 (XLVII)', 11 October 1996, www.refworld.org/docid/3ae68c430.html ("[T]he principle of *non-refoulement* is not subject to derogation.").

[29] See Cartagena Declaration on Refugees, 22 November 1984, para. 5, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, pp. 190–193 (1984–1985) ("This principle [of non-*refoulement*] . . . should be acknowledged and observed as a rule of jus cogens.").

[30] See, e.g., Arthur Helton and Eliana Jacobs, 'What Is Forced Migration' (1999) 13 *Geo. Immigr. L.J.* 526; Alice Farmer, 'Non-refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection' (2008) 32 *Geo. Immigr. L.J.* 1; Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes*

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status that it binds states that have not ratified the Refugee Convention and Protocol, as well as those that have done so. Moreover, if the duty is peremptory, then it applies to all states without the possibility of limitation or derogation. Reflecting the nascent rise of international human rights law at the time of its drafting, the Refugee Convention enshrines principles of nondiscrimination and nonpenalization. Under Article 3, states must apply the Convention "without discrimination as to race, religion, or country of origin."[31] And Article 31 bars states from penalizing asylum-seekers who have entered the state without authorization, so long as those persons "present themselves without delay to the authorities and show good cause for their illegal entry or presence."[32]

Importantly, however, the Refugee Convention's protection is limited in a variety of other ways. It does not expressly provide a permanent or even temporary right of asylum, nor rights to permanent resident status or citizenship.[33] Moreover, the weaker duty of *non-refoulement* provided under Article 33(1) does not apply to every person threatened with serious harm abroad. An individual counts as a "refugee" protected under the Refugee Convention only if they are outside their country of nationality or habitual residence and "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion ... [are] unable or unwilling to avail [themselves] of the protection of that country."[34] Thus, people who face risks arising from climate change or natural disasters are excluded. Other historically marginalized persons, such as women and sexual minorities, have to show that their persecution stems from their "membership of a particular social group."[35] Furthermore, the prohibition of *refoulement* does not apply to any person of "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[36] Other possible claimants to refugee status are barred by

Authority (New York: Oxford University Press, 2016), pp. 269–271 [hereinafter *Fiduciaries of Humanity*].

[31] Refugee Convention, art. 3.

[32] Ibid. art. 31.

[33] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007), p. 370 (affirming that a general and universal right to asylum was too controversial for states to reach agreement on it).

[34] Refugee Convention, art. 1(A)(2).

[35] Ibid.

[36] Ibid. art. 32(2).

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the Refugee Convention's Article 1(F) "exclusion clauses," which exclude persons from claiming refugee status if they have engaged in crimes against peace, war crimes, crimes against humanity, serious nonpolitical crimes, or acts "contrary to the purposes and principles of the United Nations."[37]

Wider protection is available under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)[38] in cases where "there are substantial grounds for believing that [the individual would be in danger of being subjected to torture."[39] The inquiry mandated by the CAT does not concern itself with the grounds of persecution; the test is simply whether there are "substantial grounds for believing" that an individual may be tortured if deported.[40] For cases falling outside the CAT, however, the restrictive definition from the Refugee Convention is the default standard of international refugee law.

Significantly for present purposes, there is no bar in the Refugee Convention on a receiving state closing its borders to claimants arriving from a safe third country. Nor does the Refugee Convention expressly prohibit states from interdicting possible claimants on the high seas or in foreign jurisdictions so as to prevent them from reaching the host state, or from using carrier sanctions and visa requirements for the same purpose.[41] The lack of an express right to asylum in the receiving country, the absence of a bar on returning a claimant to a safe third country, and the positive law's silence regarding non-entrée policies combine to supply the receiving state with a strong textual argument in favor of its alleged entitlement to determine whether an asylum-seeker is eligible to make an asylum claim in the receiving state or must instead make the claim somewhere else. In other words, the Refugee Convention does not expressly grant asylum-seekers the right to choose where they will seek asylum, resulting in some policymakers

[37] Ibid. art. 1(F).
[38] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.
[39] Ibid. art. 3(1).
[40] Ibid.
[41] But see Hirsi Jamaa v. Italy, 55 Eur. Ct. Hum. Rts. 627 (2012) (concluding that returning refugees interdicted on the high seas may violate the European Convention on Human Rights); Center for Human Rights v. United States, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/VII.95, doc. 7, rev. p. 550 (1997) (same); 'UNHCR Note on the Principle of Non-Refoulement', UN High Commission for Refugees, November 1997, www.refworld.org/docid/438c6d972.html (concluding that interdiction on the high seas may constitute *refoulement* under the Refugee Convention).

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filling the void with absolutist state authority to create burden-sharing arrangements that determine the country in which refugees can seek asylum.[42] Proponents of maritime interdiction and non-entrée policies argue, therefore, that burden-sharing lies within the state's prerogative, so long as the state does not violate the duty of *non-refoulement*.[43]

Cooperation for Burden-Sharing

Burden-sharing is sometimes considered problematic because its enforcement may involve states forcibly deporting refugees to countries where they lack meaningful ties and face "warehousing" in primitive camps that resemble prisons.[44] Cooperation agreements billed as "burden-sharing" may erect roadblocks that prevent asylum-seekers from accessing refuge from persecution. States have conspired with one another to disrupt global migration routes, preventing asylum-seekers from reaching countries in the Global North where they could access asylum and establish a minimally decent life.[45] Cooperation in this context reveals its potential to erode refugee

[42] E.g., Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership to Strengthen Shared International Commitments on the Protection of Refugees and Migrants art. 2(3)(a), https://assets.publishing.service.gov.uk/media/656f51d30f12ef07a53e0295/UK-Rwanda_MEDP_-_English_-_Formatted__5_Dec_23__-_UK_VERSION.pdf ("creating a mechanism for the relocation to Rwanda of asylum seekers whose claims are not being considered by the United Kingdom, and by providing a mechanism for an asylum seeker's claim for protection to be determined in Rwanda").

[43] See, e.g., James C. Hathaway and R. Alexander Neve, 'Making IRL Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harv. Hum. Rts. J.* 115, 117; Peter H. Shuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 YJIL 243. For an opposing view defending a defeasible right to remain in the receiving state, a right based on the moral cost of forcible deportation, as well as the ordinary Northern practice of permanent settlement, see our *Fiduciaries of Humanity*, *above*, pp. 263–264.

[44] See, e.g., Gregor Noll, 'Why Refugees Still Matter: A Response to James Hathaway' (2007) 8 *Melb. J. Int'l L.* 536, 538.

[45] See Maggy Lee, 'The Externalization of Border Control in the Global South: The Cases of Malaysia and Indonesia' (2022) 26 *Theoretical Criminology* 537; Monique Failla, 'Outsourcing Obligations to Developing Nations: Australia's Refugee Resettlement Agreement with Cambodia' (2016) 42 *Monash U. L. Rev.* 638; Jason Zubata, 'Is There a Safe Haven for Asylees Elsewhere? Assessing the International Legal Implications of Trump-Era Removal Practices' (2022) 25 *Harv. Latin Am. L. Rev.* 81; Margherita Matera et al., 'Is Australia a Model for the UK? A Critical Assessment of Parallels of Cruelty in Refugee Externalization Policies' (2022) 36 *J. Refugee Stud.* 271.

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protection in violation of international human rights law and international refugee law.[46]

In principle, however, international cooperation need not render refugees less safe or less free. Burden-sharing can take a variety of forms. It includes measures that promote refugee welfare, such as direct humanitarian assistance to refugee populations, indirect assistance through international organizations like the Office of the UN High Commissioner for Refugees (UNHCR), and resettlement programs that allow refugees to voluntarily relocate to safe third-countries. Burden-sharing also includes states establishing legal pathways whereby refugees at their borders may obtain asylum and a path to citizenship. Such measures honor the spirit of the Refugee Convention and Protocol by ensuring that refugees have access to a decent safe harbor.

Conventional wisdom suggests that states have broad discretion to choose whether or to what extent they will embrace these mechanisms for refugee burden-sharing. International lawyers tend to assume that states are free to decide for themselves whether they will provide humanitarian assistance to distant refugees, give asylum to refugees at their borders, and offer resettlement to refugees interned abroad. Aside from the peremptory duty to refrain from *refoulement*, states are not thought to bear legal obligations to cooperate in refugee burden-sharing.

However, there are good reasons to question this conventional wisdom. To the extent that forced migration jeopardizes refugees' human rights, international cooperation is often necessary to fulfill states' joint stewardship obligation under the UN Charter and international human rights treaties to ensure "universal respect for, and observance of, human rights and fundamental freedoms for all."[47] At a minimum, states must "take steps, individually and through international assistance and cooperation," to ensure that vulnerable refugees have access to adequate food, clothing, housing, primary and secondary education, and medical care.[48] States that refuse to contribute resources to assist needy refugees, such as the Rohingya in Bangladesh, violate this requirement under international human rights law. Likewise, to the extent that refugee warehousing, maritime interdiction, and non-entrée policies threaten

[46] David Cantor et al., 'Externalisation, Access to Territorial Asylum, and International Law' (2022) 34 *Int'l J. Refugee L.* 120.

[47] UN Charter arts. 55–56. For more on the joint stewardship obligation to respect, protect, and fulfill human rights, see Chapter 9.

[48] International Covenant on Economic, Social and Cultural Rights arts. 2(1), 11–13, 16 December 1966, 993 UNTS 3.

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refugees' human rights, mandatory cooperation arguably requires states to cooperate in other ways, including by admitting and offering asylum to vulnerable refugees. In this sense, international human rights law both constrains how states may conduct burden-sharing and imposes affirmative requirements to cooperate in protecting and fulfilling refugees' human rights.

In the next section, we sketch a joint stewardship theory of international refugee law that lends further support for mandatory cooperation.[49] We argue that this joint stewardship theory and norms of mandatory cooperation mutually support one another, providing a framework for limited and principled burden-sharing. Roughly, joint stewardship provides the legal basis and structure for burden-sharing, while mandatory cooperation supplies the means and methods. Both are premised on an equitable and constitutional conception of sovereign equality, and both conceptualize international law as tracing its ultimate justification back to the individuals it serves.

Refugee Protection as a Joint Stewardship

Our theory of international refugee law is premised on the state's occupation of dual but complementary stewardship (or fiduciary) positions.[50] One is local, the other global. The local position is the state's role as a public steward entrusted and authorized by international law with sovereignty over a given territory and the people amenable to its jurisdiction, including foreign nationals who arrive at the state's border. The second position occupied by the receiving state – the global position – is that of joint stewardship of the earth's surface held with all other states on behalf of humanity.[51] Eyal Benvenisti calls the state in this position "a trustee of humanity"[52] and concludes that the state is under an "obligation not to deny entry to migrants and refugees without taking

[49] We develop this joint stewardship theory in greater detail in *Fiduciaries of Humanity*, pp. 265–281; and Evan J. Criddle and Evan Fox-Decent, 'The Authority of International Refugee Law' (2021) 62 *Wm. & Mary L. Rev.* 1067.

[50] *Fiduciaries of Humanity*, pp. 265–281.

[51] See Evan Fox-Decent, 'From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment Through a Fiduciary Prism', in Ken Coghill, Charles Sampford, and Tim Smith (eds.), *Fiduciary Duty and the Atmospheric Trust* (London: Routledge Press, 2012), p. 253 (arguing that states are joint trustees of the atmosphere on behalf of humanity).

[52] Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295.

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into account the asylum seekers' individual concerns and at least providing justification for their exclusion."[53]

The argument for joint stewardship proceeds from the normative consequences of a particular kind of spillover effect produced by state possession of sovereign power. In our view, states are not entitled to set policies unilaterally that have spillover effects prejudicial to the rights or justice claims of foreign nationals. Policies related to greenhouse gas emissions are a prominent example of measures that have these kinds of spillover effects, as discussed in Chapter 7.[54]

This spillover principle applies to borders and a state's sovereign right to exclude. Mattias Kumm observes that borders present a "structural" justice-sensitive externality, one that arises as a consequence of international law's organization of the world into multiple territorially sovereign states.[55] The global territorial regime under which every state has the right to exclude outsiders raises the specter of a refugee with no place to exist lawfully. At the limit, if the refugee were forcibly driven from her home state and denied a right of asylum by all others, the territorial jurisdiction exercised over the earth's surface by sovereign states would convert her very physical existence into an illegality. Her body occupies space and must exist somewhere, but she herself (on the present assumption) has no right to be anywhere. And so her mere and unavoidable presence somewhere would constitute a permanent trespass.[56] She would do wrong by merely existing.

The possibility of doing wrong by merely existing is a structural spillover effect arising from international law's distribution of territorial sovereignty to states. Under the joint stewardship model, that distribution can be legitimate only if it can be understood to be made on behalf of every person subject to it, which is to say, on behalf of humanity. For this to be possible, international law must guarantee that every individual has a reasonable opportunity to pursue a decent life *somewhere*. Ordinarily, this opportunity is provided in the first instance through an individual's

[53] Ibid. p. 311.

[54] See Matthias Kumm, 'Constitutionalism and the Cosmopolitan State', NYU Public Law Research Paper, 10 October 2013, p. 18 [hereinafter Kumm, Constitutionalism]; Matthias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 *Ind. J. Glob. Legal Stud.* 605.

[55] Kumm, Constitutionalism, pp. 15–17.

[56] See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), pp. 279–280 (arguing that if all land were privately held and the landless were denied permission to be anywhere, "they would do wrong simply by being wherever they happened to be").

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home state. But if a person is forced to flee or is stripped of citizenship, international law must step in to provide the refugee somewhere safe to live. Without the availability of surrogate protection, international law would not guarantee to every individual a reasonable opportunity to live a life of dignity somewhere. International law would lose its claim to universal legitimacy because it could not be said to authorize territorial sovereignty on behalf of every person subject to it; refugees and the stateless would be excluded.

A plausible way to avoid this result is to conceive of states, at the global level, as joint stewards of the earth's surface on behalf of humanity. Under this conception, international law grants states a general right to exclude as part of their territorial sovereignty, but requires as a condition of the grant that states participate in a collective regime of surrogate protection in the service of exiled outsiders. International refugee law supplies the legal framework for a regime of surrogate protection by carving out an exception to exclusive territorial sovereignty in favor of refugees. While states retain a *general* claim to exclusive territorial jurisdiction, the claim is not *absolute*. States are barred by equitable principles from exercising their right to territorial sovereignty in a way that would refuse entry to refugees. Any such use of state power would amount to an abuse of right, and, from the perspective of mandatory cooperation, would infringe the duty of all states to have due regard for the interests of vulnerable foreign nationals. The joint stewardship model explains the refugee's standing to make a claim on international refugee law's equitable limitation on states' exercise of territorial sovereignty by positing states as joint stewards of the earth's surface on behalf of humanity, and in particular on behalf of asylum-seekers entitled to resort to surrogate protection. Properly understood, the stewardship theory does not place limits on otherwise unbridled sovereign power, since under this approach there is no de jure sovereign power to exclude asylum-seekers unilaterally. Rather, the stewardship model reconceives territorial sovereignty in a manner that makes it consistent with equitable principles that affirm the universal entitlement of every member of humanity to have their bare physical existence never treated as a wrong.

The New York Declaration and the Global Compacts

Within the past several years, states have affirmed their joint stewardship responsibility for refugees, endorsing the principle that they should share the burdens of refugee protection equitably. In response to the mass

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movement of asylum-seekers and the high loss of life in the Mediterranean Sea in 2015, the United Nations convened a Global Summit on Refugees and Migrants in September 2016. The Summit resulted in the unanimous adoption by all 193 UN member states of the New York Declaration for Refugees and Migrants, a statement of principle committing the international community to address jointly global migration issues.[57] The parties to the New York Declaration recognized "a shared responsibility to manage large movement of refugees and migrants in a humane, sensitive, compassionate and people-centred manner."[58] The parties likewise underlined "the centrality of international cooperation to the refugee protection regime."[59] They pledged to work together to "ensure . . . protection for all who need it,"[60] including asylum-seekers still in transit.[61] They noted the disproportionate burden of refugee hosting undertaken by developing countries, and committed to "a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees."[62] Committing to "actively promote durable solutions" compatible with equitable burden-sharing, the parties declared their intent "to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries," with the goal to "provide resettlement places and other legal pathways for admission on a scale that would enable the annual resettlement needs identified by [UNHCR] to be met."[63]

Two years after the summit in New York, states adopted two global compacts: the Global Compact for Migration, and the Global Compact on Refugees.[64] Like the New York Declaration, the global compacts are non-binding political agreements that seek to "foster[] international cooperation among all the relevant actors on migration, acknowledging

[57] New York Declaration for Refugees and Migrants, New York, 13 September 2016, A/RES/71/L/1.
[58] Ibid. para. 11.
[59] Ibid. para. 68.
[60] Ibid. para. 66.
[61] Ibid. para. 28 (committing to "intensifying international cooperation on the strengthening of search and rescue mechanisms" for asylum seekers at sea); ibid. para. 29 (agreeing to "take steps to address the particular vulnerabilities of women and children" in transit, such as "their potential exposure to discrimination and exploitation, as well as to sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery").
[62] Ibid.
[63] Ibid. paras. 77–78.
[64] Ibid. Appendix I, para. 19 (Global Compact on Refugees); Appendix II (Global Compact for Migration).

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that no State can address migration alone."[65] The global compacts also track the New York Declaration in expressing states' collective commitment and shared responsibility for safeguarding refugees' human rights and fundamental freedoms.[66]

The Global Compact for Migration lays out twenty-three multilateral policy objectives aimed at promoting safe, orderly, and regular migration. The objectives include commitments to "[e]nhance availability and flexibility of pathways for regular migration," "[a]ddress and reduce vulnerabilities in migration," and, most generally, "[s]trengthen international cooperation and global partnerships for safe, orderly and regular migration."[67] A further objective, significant for our purposes, requires states to "[m]inimize the adverse drivers and structural factors that compel people to leave their country of origin."[68]

The parties' commitments to achieve this last objective include investing in programs geared toward "climate change mitigation and adaptation."[69] States undertake to "[s]trengthen joint analysis and sharing of information to better map, understand, predict and address migration movements, such as those that may result from sudden-onset and slow-onset natural disasters, the adverse effects of climate change [and] environmental degradation."[70] With an explicit nod toward low-lying countries and other regions on the frontlines of climate change, the parties commit to "[d]evelop adaptation and resilience strategies to sudden-onset and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise."[71] These provisions are significant because people forced to migrate as a result of climate change do not ordinarily qualify for protection under the Refugee Convention and the Global Compact on Refugees. Implementation of these provisions is overseen by the International Migration Review Forum, an international conference convened by the United Nations every four years.[72]

[65] Global Compact for Migration, para. 7.
[66] Ibid. paras. 8, 11–12.
[67] Ibid. para. 16.
[68] Ibid.
[69] Ibid. para. 18(b).
[70] Ibid. para. 18(h).
[71] Ibid. para. 18(i).
[72] Format and Organizational Aspects of the International Migration Review Forums, 19 July 2019, A/RES/73/326.

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Thus far, the Global Compact on Migration's cooperative framework for addressing climate change-related migration has yielded disappointing results. The most significant international cooperation in this domain has arisen from the UN Framework Convention on Climate Change (UNFCCC), and more specifically from the Paris Agreement and the annual Conference of Parties meetings (COPs). As discussed in Chapter 7, the UNFCCC seeks to prevent global warming by encouraging states to set targets so as to reduce global carbon emissions overall. The international community has made less progress in addressing the effects of global warming on forced migration. Regrettably, the Forum concluded at its first meeting in 2022 that "efforts to mitigate and adapt to the adverse effects of climate change have been insufficient, including in climate finance."[73] Perhaps the most that can be reasonably expected from the Global Compact on Migration in this domain is that its Forum might offer periodic assessments of mitigation and adaptation efforts that relate to climate-induced migration.

The Global Compact on Refugees begins by announcing that "[t]he predicament of refugees is a common concern of humankind."[74] The central policy challenge facing the international community is the development and implementation of a framework to facilitate "more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States."[75] The overarching methodology proposed for the development of this policy is international cooperation, which is characterized as "a core purpose of the United Nations, as set out in its Charter, and is in line with the principle of sovereign equality of States."[76] However, the mission of the Global Compact on Refugees extends far beyond states, identifying a wide range of "relevant stakeholders" envisioned to play a role in equitable burden-sharing, including "international organizations within and outside the United Nations system . . . ; other humanitarian and development actors; international and regional financial institutions; regional organizations; local authorities; civil society, including faith-based organizations; academics and other experts; the private sector; media;

[73] Progress Declaration of the International Migration Review Forum, 7 June 2022. A/RES/76/266, para. 27.
[74] Global Compact on Refugees, para. 1.
[75] Ibid.
[76] Ibid. para. 2.

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host community members and refugees themselves."[77] This multisectoral strategy is sometimes referred to as a "whole-of-society approach," since it enlists civil society actors and organizations to contribute to the stewardship of migration, along with member states and the UN Migration Network.[78]

Like the Global Compact for Migration, the Global Compact on Refugees is "soft law," in that it is not legally binding. Instead, the Global Compact on Refugees purports to represent "the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries."[79] The "interlinked and interdependent" objectives of the Global Compact on Refugees are to "(i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third-country solutions; and (iv) support conditions in countries of origin for return in safety and dignity."[80] To achieve these objectives, this Global Compact adopts a *modus operandi* similar to the Paris Agreement. Whereas under the Paris Agreement states are called on to specify and realize "nationally determined contributions (NDCs)," under the Global Compact on Refugees, states and relevant stakeholders are asked to make voluntary contributions or pledges that they themselves determine, "taking into account their national realities, capacities and levels of development, and respecting national policies and priorities."[81]

Much like the way NDCs are monitored at the yearly COP under the UNFCCC framework, voluntary pledges are monitored at the Global Refugee Forum that convenes every four years to oversee implementation of the Global Compact on Refugees.[82] The first Global Refugee Forum met in 2019. The second met in December 2023. More than 4,200 participants from 168 countries attended the 2023 Refugee Forum.[83] Over 1,600 pledges were undertaken to support refugees and host countries, including 43 multi-partner commitments led by governments. An estimated USD 2.2 billion in new financial commitments were

[77] Ibid. para. 3.
[78] J. Kevin Appleby, 'Implementation of the Global Compact on Safe, Orderly, and Regular Migration: A Whole-of-Society Approach' (2020) 8 *J. Migration & Hum. Sec.* 214 (discussing the Global Compact on Migration with emphasis on irregular migration).
[79] Ibid. para. 4.
[80] Ibid. para. 7.
[81] Ibid. para. 4.
[82] Ibid. para. 17.
[83] 'About the Global Refugee Forum', UNHCR, www.unhcr.org/global-refugee-forum-2023.

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made by states and other stakeholders, including some 250 million pledged by the private sector.[84]

In his closing remarks at the December 2023 Refugee Forum, UN High Commissioner for Refugees Filippo Grandi lamented that since October 2023 alone, 700,000 people had been displaced by conflict in Myanmar, bringing the total of internally displaced persons within Myanmar to more than 2.5 million.[85] At the same time, he applauded the "multistakeholder whole-of-society pledging approach" taken by stakeholders.[86] The case of the nearly one million Rohingya exiled in camps in Bangladesh is instructive.

Under the Global Compact on Refugees framework, forty-nine states and civil society organizations have pledged to support the Rohingya and Bangladesh, including thirty-five new pledges in 2023.[87] The pledges address a wide range of socioeconomic needs arising from protracted confinement in refugee camps. They support diverse programs in the camps that aim to provide or improve the delivery of crucial public goods, including elementary education and literacy, occupational and agricultural skills training, healthcare, mental health and psychosocial support, hygiene, nutritional and food-security services, assistance for survivors of gender-based violence, child welfare and safety initiatives, climate adaptation agricultural and economic programs, disaster-response services, community strengthening and resilience measures (e.g., enhancing digital communication capacity), and disability support programs.[88] Some of the pledges address resettlement, such as the pledge from Amnesty International Australia "to mobilize our movement to advocate to the Australian government to increase Australia's annual humanitarian program to 40,000."[89]

Within Bangladesh, the UN Strategic Executive Group (SEG) provides overall guidance to the international community's Rohingya response. Consisting of UNHCR, the International Organization for Migration (IOM), and the UN Resident Coordinator, the SEG in 2023 pledged "to continue bolstering and mobilizing solidarity with the

[84] Ibid.
[85] UNHCR, 'Global Refugee Forum 2023 Closing Statement by UN High Commissioner for Refugees Filippo Grandi', UNHCR, 15 December 2023, www.unhcr.org/news/speeches-and-statements/global-refugee-forum-2023-closing-statement-un-high-commissioner.
[86] Ibid.
[87] 'Pledges & Contributions', UNHCR, https://globalcompactrefugees.org/pledges-contributions (Search pledges: "Rohingya").
[88] Ibid.
[89] Ibid.

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Government of Bangladesh – as the largest host of Rohingya refugees globally – to sustain support to the Rohingya humanitarian response."[90] The SEG also pledged concrete assistance to refugee resilience and empowerment programs, but plainly understands its mission to include international advocacy to support Bangladesh as host. In other words, the SEG understands its mandate to include attracting economic and political support for equitable burden-sharing, whether that happens through resettlement in other host countries, support for camps in Bangladesh, or eventual return to Myanmar. This multisectoral, whole-of-society effort is grounded within the overarching institutional structure created by the Global Compact on Refugees and its periodic Refugee Forum.

From Soft Law to Mandatory Cooperation

The Global Compact on Refugees, like the New York Declaration that generated it, is an expressly nonbinding agreement. In the lexicon of international lawyers, it is "soft law" inasmuch as it is not a formally binding treaty. Pledges made within its framework are often characterized as humanitarian in nature, which can convey the idea that they are praiseworthy but not obligatory. Nonetheless, there are good reasons to think that the Global Compact on Refugees is legally significant from the standpoint of mandatory cooperation. As with various international declarations addressing transboundary pollution,[91] the Global Compact on Refugees evinces a serious effort on the part of the international community to coordinate publicly joint action around urgent matters, and these efforts can bolster sometimes-flagging political will. State commitments to the Global Compact on Refugees are normatively significant under international law – even if in practice they are nonjusticiable or otherwise unenforceable – insofar as they reflect a good faith effort by the participating states to satisfy their obligations to cooperate for the benefit of refugees and other forced migrants.

When the Global Compact on Refugees was presented for the approval of the UN General Assembly, it was approved overwhelmingly by a vote of 181 in favor to 2 against (United States and Hungary), with three

[90] Ibid.

[91] We explain why soft law declarations are legally relevant to mandatory cooperation at the end of Chapter 6.

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abstentions (Eritrea, Liberia, Libya).[92] However, even states that opposed the Global Compact on Refugees arguably have an obligation to support its successful implementation based on their role as joint stewards of the earth's territory. Recall that under the joint stewardship theory of international refugee law, states' duty of *non-refoulement* is justified as an equitable implication of states' exclusive jurisdiction over the earth's habitable territories: persons to whom all states closed their doors would trespass and do wrong just by existing, because their presence anywhere would be illegal. For the international legal order to be legitimate, we claimed, asylum-seekers must be able to find decent safe harbor somewhere. Decent safe harbor, however, is not costless. It is an international public good. For the cost of that good to be distributed in a manner that is more equitable than letting first receiving states such as Bangladesh shoulder the burden alone, an international institution is required in which states-parties can hold each other to account publicly as they negotiate fair contributions. For now, that institution is the regime of pledging and monitoring created by the Global Compact on Refugees. Becoming a member in good standing within that institution is an obligation that falls on every state because every state claims exclusive territorial jurisdiction, and therefore every state is subject to the equitable restriction on exclusive territorial jurisdiction that asylum-seekers can rightfully claim. It follows that every state has an obligation to participate in good faith as an equal in an international policy-setting institution that aims to distribute equitably the cost of providing decent safe harbor to refugees. A recalcitrant state that refuses to cooperate with others on equal terms subverts its claim to exclusive jurisdiction over its territory, since the claim to exclusive jurisdiction relies on making good on the promise of an equitable limit on territorial sovereignty in favor of asylum-seekers.

This theory is supported by states' broad participation in the Global Refugee Forum's framework of national pledges and contributions.[93]

[92] Nayla Rush, 'Global Compact for Refugees Adopted Today: Even Without U.S. Assent, It Will Likely Shape Global Regulation', Ctr. Immigr. Studs., 17 December 2018.

[93] Global Refugee Forum 2023, UNHCR, www.unhcr.org/events/global-refugee-forum-2023 (observing that 168 countries participated in the latest forum meeting). For example, after initially opposing the Global Compact on Refugees, the United States subsequently has participated in the Global Refugee Forum, making pledges that include robust commitments to increase Rohingya resettlement to the United States and to encourage Rohingya resettlement in third countries. United States Announces New Pledges at 2023 Global Refugee Forum, US Dep't of State, 15 December 2023. The United States will likely suspend its participation, however, for the duration of the Trump administration.

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A possible explanation for this emerging practice is that states recognize a general obligation to burden-share, but, as was the case with the Paris Agreement and NDCs, they wish to retain ultimate legislative control over the specific content of that obligation through a system of pledges. The fact that neither the general obligation to burden-share nor specific pledges under the Global Compact on Refugees are presently enforceable as a matter of international law does not necessarily mean they lack legal significance. For example, should states-parties generally continue to pledge and deliver on their pledges in a manner akin to the way they perform NDC-type treaty obligations under the Paris Agreement, a future court could find that pledges on which other stakeholders or refugees detrimentally rely are in some cases enforceable as a matter of customary law, or possibly under a doctrine of promissory estoppel.[94] Over time, soft law can harden, which itself suggests that soft law is an inchoate or embryonic form of law.

Some might reject the analysis above on realist grounds, suggesting perhaps that cooperation under the Global Compact on Refugees is driven by states' self-interested motive to advance their reputations rather than any sense of legal obligation or constraint. The frequent characterization of pledges as humanitarian supports this understanding, since humanitarianism responds to an imperfect duty of beneficence or charity under which the humanitarian agent does good whether they give a little or a lot. However, the mere existence of the Global Compact on Refugees can be read to suggest that states acknowledge a collective obligation to provide decent safe harbor for refugees. The difficulty arises at the moment of interpreting and applying the general injunction to provide decent safe harbor to the specific circumstances of each state. And since each state can determine its own pledges, this too seems to reinforce a realist reading under which states make humanitarian gestures to improve their reputations. A legalist account of burden-sharing is nonetheless available.

The key to understanding the legal quality of good faith deliberations and negotiation over burden-sharing is appreciating the distinction between legislation and interpretation. By coming together to establish the Global Compact on Refugees, the injunction to provide decent safe harbor to which states have jointly subscribed is legislative in nature: it directs states, collectively, to provide decent safe harbor. The all-purpose means for them to do so is international cooperation, but the specific

[94] Nuclear Tests, Austr. v. Fr., 1974 ICJ Rep. 253 (20 December).

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contributions of each state are subject to each state's interpretation of its own fair share, taking into account the burden-sharing capacity and willingness of other states. At the stage of interpretation and application of the general injunction to provide decent safe harbor, every state in effect adopts the judicial role of interpreter.

Using the analogy of children arguing over the interpretation of a rule in a winner-take-all game that is played without a referee, David Dyzenhaus claims that states in international law, even without the benefit of separate dispute-resolution institutions, will sometimes occupy a judicial interpretive role with respect to the rules of international law.[95] The judicial role brings with it a variety of implicit commitments, such that children and states alike who adopt that role necessarily undertake to abide by the following principles: "to offer reasonable interpretations of what a rule requires . . . ; to take into account for the sake of fairness the way in which the rule has been previously interpreted in analogous situations; to treat each participant as an equal when it comes to interpretation."[96] States and game-playing children alike who occupy the judicial role have "accepted the onus of showing precisely why the different interpretations were not reducible to a player's [or state's] interests."[97] They occupy this role jointly with other states, and on equal terms, such that none is entitled to dictate unilaterally the interpretation of a rule that will bind the group. In short, the various norms internal to and constitutive of the joint judicial role show why interpretations offered by good faith states (or game-playing children) cannot be reduced to their interests, and count as legal interpretations, properly so-called.

This is so whether the ultimate legislative genesis of such interpretations is a formal treaty, such as the Paris Agreement, or a nonbinding agreement, such as the Global Compact on Refugees. The substantively legal quality of good faith deliberations is similar in both cases because the basic norms governing the judicial role of states and legal interpretation are similar in both. This too helps explain how the soft law from the Global Compact on Refugees could harden over time as customary law. States operating in good faith within the regime set by the Global Compact on Refugees will understand and abide by the norms governing their judicial role when they interpret the burden-sharing rule and apply

[95] See David Dyzenhaus, 'Hobbes and the International Rule of Law' (2014) 23 *Ethics & Int'l Affs*. 53–64.
[96] Ibid. p. 60.
[97] Ibid.

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it to themselves in accordance with equitable principles. Because the reasons for their interpretation of the rule commanding decent safe harbor are conditioned by legality and therefore distinct from whatever interest they have in defending a favored interpretation, that interpretation cannot be reduced to their self-interest. A state's reasonable, good faith interpretation of its burden-sharing contribution is most easily explicable by attributing to the state a commitment to the form of legality intrinsic to the judicial role. And this conclusion paves the way for the eventual recognition of the norms of cooperation under the Global Compact on Refugees – norms governing multilateral pledging and the performance of pledges – as binding international customary law. Although duties of mandatory cooperation have yet to fully crystallize at this stage of international refugee law's development, the Rohingya people and Bangladesh may one day be able to demand that the international community contribute its fair share to the Rohingya refugee crisis as a matter of right.

Conclusion

The plight of the Rohingya people is terrible and ongoing. In the Global Compact on Refugees the international community acknowledges that the "predicament of refugees" like the Rohingya "is a common concern of humankind."[98] Through its multisectoral whole-of-society approach, the Global Compact on Refugees supplies a framework through which a significant number of states-parties, international organizations, and civil society organizations have joined forces to support the nearly one million Rohingya exiled in Bangladesh. While Bangladesh is still shouldering a massively disproportionate amount of the burden of hosting and caring for the Rohingya, there is at least now an international regime in place to facilitate burden-sharing through consultation, negotiation, and collective implementation. Formally, this regime is nonbinding soft law. Nonetheless, we have suggested that it has a legal character that may in time give rise to obligations under customary international law.

In the last section of this chapter, we discussed briefly the possible implications of states adopting a judicial role as joint interpreters of the rules of international law. Of course, international law now has arbitral and judicial institutions of its own. In Chapter 12 we suggest

[98] Global Compact on Refugees, para. 1.

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that, contrary to conventional wisdom, states have an obligation to resort to such institutions if a dispute turns intractable. Before taking up that argument, however, in the next chapter we explain how mandatory cooperation applies to settings where multiple states have regulatory jurisdiction over the same people, property, or activities, posing a risk of international regulatory conflicts.

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