

NON-REFOULEMENT RUN AFOUL: THE QUESTIONABLE LEGALITY OF EXTRATERRITORIAL REPATRIATION PROGRAMS

The last decade saw a veritable explosion in the number of people fleeing their homes in search of asylum in foreign countries.¹ In 1991 there were nearly 17 million asylum-seekers worldwide.² Numerous problems have caused this massive increase in the number of asylum-seekers, including political persecution, civil unrest, natural disasters and economic despair.³ The world's response to the massive influx of potential asylum-seekers has varied, has often been contrary to the letter and spirit of international obligations,⁴ and in many cases has been inhumane.

The single most important foundation of refugee law is the principle of *non-refoulement*.⁵ This principle generally prohibits nations from re-

1. The number of refugees world-wide grew from 7.8 million in 1983 to nearly 17 million in 1991. U.S. COMMITTEE FOR REFUGEES, 1983 WORLD REFUGEE SURVEY 61 (Rosemary E. Tripp ed., 1983) (7.8 million refugees); *Report of the United Nations High Commissioner for Refugees*, U.N. GAOR, 47th Sess., Supp. No. 12, at 1, U.N. Doc. A/47/12 (1992) [hereinafter "1992 Report of the UNHCR"] (17 million refugees); see also U.S. COMMITTEE FOR REFUGEES, 1992 WORLD REFUGEE SURVEY 61 (Virginia Hamilton ed., 1992) [hereinafter "1992 World Refugee Survey"] (listing a total of 16.6 million in 1991).

2. 1992 Report of the UNHCR, *supra* note 1, at 1.

3. The U.N. High Commissioner for Refugees sees several sources of population movements in Africa which could aptly refer to such flows worldwide.

[S]ome of the problems which triggered movements arose from the legacies of colonialism. The majority, however, were a result of internal conflict, ethnic strife, abuse of human rights, lack of political accountability and democracy, extreme poverty, structural adjustment, heavy debt-servicing, the existence of weak systems and institutions for managing the economy and policies, environmental degradation, drought and famine. . . .

1992 Report of the UNHCR, *supra* note 1, at 19.

4. International obligations in this field arise largely from treaty obligations, and, as will be discussed later, to some extent customary international law. The main expression of international obligations comes from the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter "U.N. Convention"], and the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter "U.N. Protocol"]. Many regional agreements spell out obligations of contracting states, notably the Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter "O.A.U. Convention"], and the *Recommendation on The Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognized as Refugees*, Council of Eur. Comm. of Ministers, Doc. No. R(84)1, (1984). Finally, most bilateral extradition treaties address this issue as well, providing exceptions to extradition obligations in the case of individuals accused of political crimes. See, e.g., Convention for the Reciprocal Extradition of Criminals, May 7, 1888, U.S. — Colombia, art. V, 26 Stat. 1534.

5. "The most fundamental of protection principles and the first of refugee rights is that of non-refoulement. . . ." 1988 Report of the United Nations High Commissioner for Refugees, U.N. GAOR, 43rd Sess., Supp. No. 12, at 6, U.N. Doc. A/43/12 (1988) [hereinafter "1988 Report of the

turning an individual to any country in which that person would be subjected to persecution.⁶ The precise limits of this protection afforded to asylum-seekers are unclear.⁷ Perhaps, the most controversial *non-refoulement* issue is whether an individual fits within the definition of a refugee, and thus, is deserving of protection. Much of the *non-refoulement* debate focuses on the so-called "screening" obligations—that is, when a state must expend the resources to determine whether or not an asylum-seeker is entitled to refugee protections, including the right of *non-refoulement*.⁸ No clear standard has emerged to determine when the obligation arises to screen asylum-seekers.

The principle of *non-refoulement* first gained international recognition in the period immediately following World War II, and it has grown in acceptance ever since. The United Nations Convention Relating to the Status of Refugees (U.N. Convention)⁹ is the primary expression of international refugee law drafted in the post-war period.¹⁰ The U. N. Con-

UNHCR"]; "[T]he principle of non-refoulement [is] the foundation stone of international protection. . . ." GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 18 (1983); "This principle . . . can be regarded as the cornerstone of refugee law." Paul Weis, *The Development of Refugee Law*, in *TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES* 3, 31 (Michigan Yearbook of International Legal Studies ed., 1982).

6. U.N. Convention, *supra* note 4, art. 33(1) at 176. See also GOODWIN-GILL, *supra* note 5, at 69. Goodwin-Gill defines the obligation as follows:

No person in distress shall be returned to any country or rejected at any frontier if the effect of such measure would be to expose him or her to a threat to life or liberty for reasons of race, religion, national or ethnic origin, social group or political opinion, or would be otherwise inhumane.

Guy S. Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 917 (1986).

7. Nations disagree whether they must extend this protection to all asylum-seekers, or only to a subset consisting of those fleeing *bona fide* political persecution. The vast majority of states extend refugee protections only to those asylum-seekers meeting certain political criteria. There is a considerable debate whether the *non-refoulement* obligation extends, or should extend, to so-called "humanitarian refugees"—that is, individuals fleeing lack of economic opportunity rather than political persecution. This issue is beyond the scope of this Note. For an excellent discussion of this issue, see Kay Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857 (1986).

8. See 1992 Report of the UNHCR, *supra* note 1, ¶ 11, at 4. Though there is considerable debate over who precisely should be entitled to the benefits of classification as a refugee, see *supra* note 7, there is general agreement that those not fitting the definition are not entitled to the right against *refoulement*. See 1992 Report of the UNHCR, *supra* note 1, at 5.

9. U.N. Convention, *supra* note 4. The U.N. Convention has been amended by the U.N. Protocol, *supra* note 4. The two must be read together to understand fully the scope of international obligations toward asylum-seekers.

10. The U.N. Convention and the U.N. Protocol are the "principal international instruments benefiting refugees. . . ." GOODWIN-GILL, *supra* note 5, at 13.

vention delineates the responsibilities of signatory states toward individuals seeking asylum.

Article 33 of the U.N. Convention prohibits a signatory state from returning an alien who qualifies as a refugee¹¹ to a place where that person has a well-founded fear of persecution. At the time the U.N. Convention was drafted, the principle of *non-refoulement* was quite new in itself, and there was uncertainty about the precise territorial reach of the obligation. The drafters left the language of the Convention vague on this point, perhaps deliberately, in order to reach some agreement on the treatment of refugees. In the years since the drafting of the Convention, *non-refoulement* has gained limited acceptance as part of customary international law, and applies to states whether or not signatory to the Convention.¹²

Nations have avoided a precise definition of the *non-refoulement* obligation to circumvent the strict protective requirements of Article 33.¹³ Some states insist that legal presence within their own territory triggers the obligation of *non-refoulement*.¹⁴ Other states require a refugee to be

11. The word "refugee" is a term of art in the immigration field. Unfortunately, it is also a word on which it is difficult to pin a precise meaning because the definition has changed over time and because different documents define "refugee" in different ways. The Statute of the United Nations High Commissioner for Refugees defines a refugee as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country." *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428, Annex, U.N. GAOR, 5th Sess., 325th Plen. Meeting, Supp. No. 20, at 46, U.N. Doc. A/1775 (1950). The U.N. Convention adds to the list of reasons for the well-founded fear of being persecuted "membership of a particular social group." U.N. Convention, *supra* note 4, art. 1(A)(2), at 152. The O.A.U. Convention goes one step further, adding to those who fit the U.N. Convention definition of "refugee" "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of [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." O.A.U. Convention, *supra* note 4, art. 1(2), at 47. This Note uses the terms "refugee" and "asylum-seeker" interchangeably, unless otherwise indicated by the context.

12. See *infra* text accompanying notes 65-70.

13. Recently, many asylum-seekers have been returned to the hands of their persecutors. While some nations have attempted to minimize their non-refoulement obligations, others have broadened theirs. African countries have held themselves to a higher standard, not allowing repatriation in situations involving civil strife or natural disaster. See *supra* note 11 and *infra* notes 57-61 and accompanying text. European countries have also held themselves to a higher standard, not allowing return of so-called de facto refugees or "B-status" refugees who do not quite fit the definition of "refugee" under the U.N. Convention, but who still are granted limited asylum. See *infra* notes 62-64 and accompanying text.

14. See *infra* part II.A.

physically present in the state in order for the principle to apply.¹⁵ The remaining states insist that the principle applies to refugees once they have left their homeland, regardless of whether they have entered a new territory.¹⁶

Part I of this Note examines the legal development of the *non-refoulement* concept. Part II explores various international interpretations of the concept of *non-refoulement* in practice. Part III examines the recent judicial interpretations of state obligations by courts in the United States. Part IV then proposes a universal definition of the territorial reach of the *non-refoulement* obligation to provide protection against *refoulement* to asylum-seekers regardless of where they are found.¹⁷

I. LEGAL DEVELOPMENT OF THE *NON-REFOULEMENT* CONCEPT

The *non-refoulement* obligation has evolved considerably in the near half century following World War II. Early uses of the concept focused only on the obligation not to return refugees to the hands of persecutors. Scant attention was paid to the issue of where the refugees were found.¹⁸ Codification of the *non-refoulement* principle in the 1951 U.N. Convention resulted in a debate about its applicability to refugees at the frontiers of contracting states. Though the language in the U.N. Convention is

15. See *infra* part II.B.

16. See *infra* part II.C.

17. This Note is not intended to be critical of the extraordinary efforts directed at making the life of a refugee more bearable. The international community has made considerable progress since the end of World War II. This Note focuses on what legal obligations exist today regarding the treatment of refugees, and the failure of many states to live up to those legal standards. Despite the failure of many states to live up to these obligations, the international community as a whole should be praised for its work on behalf of refugees.

[Refugees] receive help on a scale which often surprises those who have little contact with international institutions or with voluntary agencies that provide compassionate aid for the victims of actions perpetrated by governments, their servants and associated groups. The effort to assist refugees to stay alive through their initial peril, to return to their homes if circumstances permit, to resettle in new lands if only that way is open and to avoid a squandering of human energy while their fates are determined reflects large-scale organized, transnational activity. In the first instance, it owes its existence to the willingness of governments—not all, but a substantial, well-endowed number of them—to co-operate. This co-operation achieves organizational continuity through a corps of international civil servants as well as officials of the sprawling network of non-governmental agencies. The latter work with intergovernmental bodies and with national authorities that frequently serve as executive arms. A substantial foundation of international law and concomitant international practice reflects the successful efforts made in the past and offers a footing for the future.

LEON GORDENKER, REFUGEES IN INTERNATIONAL POLITICS 11-12 (1987).

18. See *infra* part I.A.

clear on its face,¹⁹ the negotiating history of the Convention raises some doubts as to the drafters' intentions. As a result of the work of the United Nations High Commissioner for Refugees, as well as numerous regional agreements, the obligation against *refoulement* has attained recognition as part of customary international law, quite apart from the U.N. Convention.²⁰ The *non-refoulement* principle is generally recognized as a universal obligation, but the territorial parameters of this obligation remain unclear.

A. Early Uses

Prior to the 1950s, *non-refoulement* was not a part of international practice. Nations were simply too concerned about surrendering any sovereign authority over admittance of aliens at their borders to accept such a potentially far-reaching obligation.²¹ The first multi-national reference to an obligation against *refoulement* appeared in the 1933 Convention Relating to the International Status of Refugees.²² Three years later, the obligation appeared again in an agreement concerning refugees coming from Germany.²³ Yet neither of these agreements was widely

19. See *infra* notes 33-42 and accompanying text.

20. See *infra* notes 65-70 and accompanying text.

21. In fact, this concern continues to be the single largest obstacle to expanding world refugee protection. "[S]tates, even in these days of Communities, Councils, and other alliances, both commercial and political, still jealously guard their sovereignty and do not welcome external interpretations of their domestic obligations." Roy McDowall, *Co-ordination of Refugee Policy in Europe*, in REFUGEES AND INTERNATIONAL RELATIONS 179, 181 (Gil Loescher and Laila Monahan eds., 1989). See also Hailbronner, *supra* note 7, at 866; GOODWIN-GILL, *supra* note 5, at 75. Members of the United Nations have consistently failed to draft a treaty creating a right to asylum, once again showing the reluctance of nation-states to give up this fundamental aspect of their sovereignty. GOODWIN-GILL, *supra* note 5, at 77. See also Ved P. Nanda, *Refugee Law and Policy*, in REFUGEE LAW AND POLICY 3, 9 (Ved P. Nanda ed., 1989).

22. Convention Relating to the International Status of Refugees, Oct. 28, 1933, art. 3, 159 L.N.T.S. 199, 205; See GOODWIN-GILL, *supra* note 5, at 70. Notably, the term *refoulement* was used in this treaty, apparently referring solely to the practice of non-admittance at the frontier. GOODWIN-GILL, *supra* note 5, at 70. Yet this convention went one step further, with each of the contracting states undertaking "not to refuse entry to refugees at the frontiers of their countries of origin." GOODWIN-GILL, *supra* note 5, at 70-71. Though the term *refoulement* was not used in reference to this practice, the principle behind the obligation was clearly present.

23. Provisional Arrangement Concerning the Status of Refugees Coming from Germany, July 4, 1936, art. 4, 171 L.N.T.S. 75, 79. The language of this treaty was quite clear in preventing what would later become known as *refoulement*. "Even in this last mentioned case the Governments undertake that refugees shall not be *sent back across the frontier of the Reich* unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object." *Id.*, art 4(3), at 79 (emphasis added).

received, being signed by only eight and seven states, respectively.²⁴

By the close of World War II, however, *non-refoulement* seemed to have gained significant acceptance. Following the war, a tremendous number of displaced persons were scattered across Western Europe.²⁵ The United Nations Relief and Rehabilitation Administration (UNRRA) played a major role in assisting these displaced persons, primarily in arranging for repatriation—return to their home country.²⁶ Yet the UNRRA avoided forced repatriation,²⁷ implementing the moral resolve of the victorious allies.²⁸ The first wide-scale practice of *non-refoulement* was directed at individuals without regard to where they were located.

B. The 1951 Convention

Article 33 of the U.N. Convention Relating to the Status of Refugees, signed in 1951,²⁹ is the first significant treaty obligation involving the principle of *non-refoulement*.³⁰ The language of the Convention suggests

24. Britain objected to the concept of non-return. GOODWIN-GILL, *supra* note 5, at 71. Compare the limited acceptance of these treaties with the nearly universal acceptance of the 1951 U.N. Convention, and the 1967 U.N. Protocol, which have been accepted by more than 110 countries.

25. In 1946, the United Nations assisted over 1.6 million refugees in Europe, while countless others had already been admitted to countries of refuge. GOODWIN-GILL, *supra* note 5, at 71-72. Ultimately the "[U.N. Relief and Rehabilitation Administration] helped some seven million people return to their homes." GORDENKER, *supra* note 17, at 23.

26. GORDENKER, *supra* note 17, at 22-24.

27. Forced repatriation was generally avoided, though there were some exceptions. "[M]ore than 2,000,000 war prisoners, refugees, forced laborers and turncoat soldiers were forced back to the Soviet Union. . . ." GORDENKER, *supra* note 17, at 46 n. 5 (citing NICHOLAS BETHELL, *THE LAST SECRET: FORCIBLE REPATRIATION TO RUSSIA 1944-47* (1974) and NIKOLAI TOLSTOI, *THE SILENT BETRAYAL* (1978)). See also GOODWIN-GILL, *supra* note 5, at 72 n. 15 (citing TOLSTOY, *VICTIMS OF YALTA* (1977, rev. ed. 1979)).

28. GORDENKER, *supra* note 17, at 24-25. Gordenker calls the refusal to "repatriate those who did not want to leave" an "American and Western European moral precept." *Id.* at 25.

29. U.N. Convention, *supra* note 4. The U.N. Convention did not actually come into force until April 22, 1954, ninety days after the requisite six nations acceded in accordance with article 43. U.N. Convention, *supra* note 4, at 150 n.1.

30. Earlier treaties making use of the *non-refoulement* concept had failed to achieve significant international support. See *supra* Part IA. The obligations arising out of the U.N. Convention were limited to a narrow set of circumstances. Notably, the definition of refugee applied only to persons displaced prior to 1951. U.N. Convention, *supra* note 4, art. 1(A)(2), at 152. "[T]he term 'refugee' shall apply to any person who . . . As a result of events occurring before 1 January 1951. . ." U.N. Convention, *supra* note 4, art. 1(A)(2), at 152. Furthermore, signatories were given the option of limiting their obligations to refugees fleeing events in Europe only. U.N. Convention, *supra* note 4, art. 1(B)(1), at 154. "For the purposes of this Convention, the words 'events occurring before 1 January 1951' in article 1, section A, shall be understood to mean either (a) 'events occurring in Europe before 1 January 1951'; or (b) 'events occurring in Europe or elsewhere before 1 January 1951'. . ." U.N. Convention, *supra* note 4, art. 1(B)(1), at 154. Many of the contracting states

that signatory states consented to an obligation not to return refugees once they had crossed any international border.³¹ However, the negotiating history indicates there may have been some disagreement over the universality of this obligation.³²

The language of the Convention appears to create an obligation that accrues once asylum-seekers cross the frontier of their home country. The plain language of Article 33 is clear—the text creates an obligation prohibiting expulsion or return of refugees to the frontiers of territories in which life or freedom would be threatened, with only two minor exceptions.³³ Article 33 focuses on the actions of contracting states regarding refugees as the term is defined in the Convention.³⁴ No limitation is placed on the location of the refugees, which are defined in Article 1 simply with reference to the fact that they are outside their country of nationality.³⁵ To be considered a refugee the border of one's country of origin must be crossed. Article 33 plainly and simply prohibits a contracting state from forcibly returning a refugee to the hands of his or her persecutors. The word "expel" unquestionably applies this prohibition to state action conducted on refugees within the contracting state's territory.³⁶

chose the limited definition. In fact, two of the original six ratifying states opted to apply the definition only to individuals fleeing persecution in Europe. U.N. Convention, *supra* note 4, 137, 200-202.

This result might at first appear to indicate a retreat on the part of nations from a broad principle of *non-refoulement* as expressed in the treatment of displaced persons immediately following World War II. Yet the Convention must be viewed as a response to a narrow crisis which was seen, at the time, to be temporary in nature. "The 1951 Refugee Convention was the outcome of extensive negotiations among the major Western states to respond to the large number of displaced people in post-war Europe and the continuous flow of refugees from Eastern Europe." Johan Cels, *European Responses to de facto Refugees*, in *REFUGEES AND INTERNATIONAL RELATIONS* 187, 188 (Gil Loesch and Laila Monahan eds., 1989).

31. See *infra* notes 33-42 and accompanying text.

32. See *infra* notes 43-46 and accompanying text.

33. The unequivocal prohibition is found in article 33(1) of the U.N. Convention. "No Contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." U.N. Convention, *supra* note 4, art. 33(1), at 176. The adopted text also includes two exceptions: one for national security concerns and one for dangerous criminals. U.N. Convention, *supra* note 4, art. 33(2), at 176.

34. The term "refugee" is defined in Article 1 of the U.N. Convention, *supra* note 4, at 152-56, and modified by Article 1 of the U.N. Protocol, *supra* note 4, at 268-70. See *supra* note 11.

35. U.N. Convention, *supra* note 4, art. 1, at 152.

36. The word "'expel' . . . is a term of art in this setting, referring to the formal process of removing an alien who was admitted to the country." Brief for Petitioner at n. 25, *Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993). See also Brief for Respondents at n. 22, *Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

The only word with the potential for ambiguity, and the source of any uncertainty regarding the *non-refoulement* obligation, is the word "return", which is followed in the English text by the French word "refouler" in brackets.³⁷ Words in treaties are generally given their ordinary meaning,³⁸ and in this case the ordinary meaning of "return," and for that matter "refouler," is simply to send back.³⁹ The preamble to the Convention also makes clear the humanitarian context in which the Convention was drafted, and the fundamental goal of providing protection for refugees.⁴⁰ Granting refugees protection from *refoulement* once they have left their country is more consistent with the plainly-stated goal of assuring refugees the "widest possible exercise" of their rights and freedoms.⁴¹

Finally, the Conference of Plenipotentiaries, responsible for drafting the U.N. Convention, also adopted a concurrent resolution which encouraged signatories to extend the principles embodied in the Convention more broadly than the text required.⁴² Thus, from the official text of the U.N. Convention, the right against *refoulement* appears to accrue to refugees once they leave their country of origin.

At the conference adopting the Convention, however, there was some

37. The French word "refouler" has been translated to mean "to push back." See Brief for Respondents at n.25, *Sale v. Haitian Centers, Council*, No. 92-344, 1993 WL 211610 (U.S. June 31, 1993). *But see also* Brief for Petitioners, at n.25, *Sale v. Haitian Centers, Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

38. See *Vienna Convention on the Law of Treaties*, U.N. GAOR Conference on the Law of Treaties, 24th Sess., U.N. Doc. A/Conf.39/27 (1969), reprinted in 8 I.L.M. 679 (1969) [hereinafter "Vienna Convention on the Law of Treaties"].

39. WEBSTER'S NEW COLLEGIATE DICTIONARY 990 (1973). Though this is actually the third listed definition of the transitive form of the word, it is the first one that captures the sense contextually. The others connote other meanings of the word "return" such as "to give (as an official account) to a superior" and "to bring, send, or put back to a former or proper place" (as a gun to its holster). *Id.*

The U.S. Supreme Court has noted that "refouler" means more to repulse, repel, or drive back than it means to send back. See *infra* note 140 and accompanying text. However, the practical difference in meanings is not clear. See *infra* notes 145-46 and accompanying text.

40. The U.N. Convention was drafted because the U.N. had "manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of [their] fundamental rights and freedoms." U.N. Convention, *supra* note 4, pmb. at 150.

41. U.N. Convention, *supra* note 4, pmb. at 150.

42. Resolution E stated:

The Conference Expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding the contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.

U.N. Convention, *supra* note 4, Resolution E at 148.

limited discussion regarding the extraterritorial applicability of the *non-refoulement* obligation, which calls into doubt the apparent clarity of the Convention's language. The main view expressed was that the obligation exists only when a refugee is within the territory of a contracting state.⁴³ The delegates from Switzerland and the Netherlands were adamant in their national interpretations that *non-refoulement* does not apply until a refugee is within the territory of a contracting state.⁴⁴ These delegates were concerned with the potential for a massive flow of refugees, and the inability of a contracting state to deal effectively with a large influx of people.⁴⁵ These states felt it was important that they not be obligated to refrain from rejecting refugees at the border. At that time, Switzerland and the Netherlands were joined in this interpretation by several other European nations, including Belgium, Germany, Italy, and Sweden.⁴⁶ Thus, uncertainty about the extraterritorial application of the *non-refoulement* obligation existed as early as the adoption of the U.N. Convention.

C. *Development of the Non-Refoulement Principle Following the Convention*

The Office of the U.N. High Commissioner for Refugees (UNHCR) views *non-refoulement* as an obligation of states once a refugee crosses an international boundary. In 1950, the United Nations established the UNHCR while negotiations regarding the Convention were still under-

43. The distinction between being physically present or legally present in the contracting state arose later as nations tried to further limit their obligations towards individuals who had arrived at their shores. For instance, in the United States, there is a completely different statutory scheme for lawfully admitted aliens who are seeking to remain (and avoid deportation), 8 U.S.C. § 1252(b) (1992), than for illegal aliens seeking to remain (and avoid exclusion), 8 U.S.C. § 1226 (1992).

44. "In the Swiss Government's view, the term 'expulsion' applied to a refugee who had already been admitted to the territory of a country. The term '*refoulement*,' on the other hand, had a vaguer meaning; it could not, however, be applied to a refugee who had not yet entered the territory of a country. The word 'return,' used in the English text, gave that idea exactly." CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS SUMMARY RECORD OF THE 16TH MEETING at 6, U.N. Doc. A/Conf. 2/SR.16 (July 11, 1951)(remarks of the Delegate from Switzerland). Two weeks later, at the final meeting of the conference, the Netherlands delegate reiterated the views of the Swiss delegate and asked that the conference adopt that view as the official interpretation. No objection was raised to that suggestion.

45. CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS SUMMARY RECORD OF THE 35TH MEETING at 21, U.N. Doc. A/Conf. 2/SR.35 (July 25, 1951) (remarks of the Delegate from the Netherlands).

46. *Id.* See also Brief for Appellees at 44, *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2nd Cir. 1992) (No. 92-6144), *rev'd sub nom.* *Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

way.⁴⁷ The statute establishing the UNHCR defined refugees in much the same way as the Convention.⁴⁸ The UNHCR views its primary function as safeguarding the rights of refugees who are without the protection of an independent sovereign government.⁴⁹ The UNHCR intervenes with the main objective of protecting the fundamental rights of the people concerned, including the right of *non-refoulement*.⁵⁰ Moreover, the UNHCR sees *non-refoulement* as a limitation on a state's ability to expel refugees or to reject them at the frontier.⁵¹ According to the UNHCR,

47. The purpose of this office was largely to offer protection to refugees. Perhaps the single defining characteristic of refugees is the lack of protection of fundamental rights from their state of origin. "[I]t is the lack of protection by their own government which distinguishes refugees from ordinary aliens." GOODWIN-GILL, *supra* note 5, at 6. Thus, the UNHCR was designed to be the source of protection for refugees. The first sentence of the statute gives the UNHCR "the function of providing international protection. . . to refugees. . . ." *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428, U.N. GAOR, 5th Sess., 325 Plen. meeting, Annex, Supp. No. 20, at 46, U.N. Doc. A/1775 (1950).

48. The only difference was that the statute did not include fear of persecution due to membership in a particular social group. *See supra* note 11. This difference in definitions has had no practical consequence. GOODWIN-GILL, *supra* note 5, at 12.

The statute only granted the UNHCR the power to assist those people meeting the definition of refugee. Yet the United Nations quickly expanded the role of the UNHCR by authorizing assistance to people not technically refugees under the statute or Convention. For instance, in 1957, the UNHCR helped Chinese asylum-seekers in Hong Kong, even though the asylum-seekers were not technically within the definition of refugee in the statute. GOODWIN-GILL, *supra* note 5, at 7.

Notably, the UNHCR has expanded its protection to nearly all circumstances involving massive flows of people across international frontiers. While political and social upheaval and domestic unrest following natural disasters were clearly not part of the original mandate of the UNHCR, such events have repeatedly led to massive international flows of people, and the UNHCR has often intervened on behalf of such people. The mandate of the UNHCR has expanded considerably over time as a result of the actual practice of the UNHCR. Guy S. Goodwin-Gill notes:

[T]he class of persons within the mandate of, or of concern to, UNHCR includes: (1) those who, having left their country, can, on a case by case basis, be determined to have a well-founded fear of persecution on certain specified grounds; and (2) those often large groups or categories or persons who, likewise having crossed an international frontier, can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their state of origin. This is the broad meaning of the term 'refugee' for the purposes of the United Nations. . . .

GOODWIN-GILL, *supra* note 5, at 11-12.

49. Refugees cannot rely for protection on their country of origin, which they have fled, and until they are granted asylum they can not rely on any other sovereign. *See supra* note 48. "Ensuring that international protection is extended to refugees and other persons of concern to UNHCR and facilitating durable solutions to their problems are the primary functions of the Office." 1992 Report of the UNHCR, *supra* note 1, ¶ 7, at 3.

50. 1992 Report of the UNHCR, *supra* note 1, ¶ 8, at 3. *See also* GOODWIN-GILL, *supra* note 5, at 10.

51. REPORT OF THE 28TH SESSION OF THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, at ¶ 53.4(c), U.N. Doc. A/AC.96/549 (1977); REPORT OF THE 30TH SESSION OF THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, at ¶ 72(2)(b),

Article 33 applies as soon as a refugee crosses an international boundary, regardless of whether such a person has entered the territory of a contracting state.⁵²

The adoption of the 1967 Protocol Relating to the Status of Refugees (Protocol) had no practical effect on the interpretation of the extraterritorial reach of the *non-refoulement* obligation. The Protocol expanded the definition of "refugee" found in the 1951 U.N. Convention both temporally and geographically. This change provided refugee protections, including *non-refoulement*, to a broader class of people.⁵³ However, neither the Protocol nor the drafting conference addressed the issue of the extraterritorial applicability of the *non-refoulement* principle.⁵⁴

Regional agreements and municipal laws have also extended the obligation against *refoulement* beyond the requirements of the U.N. Convention. Generally, however, little attention has been paid to the issue of where a refugee must be to warrant protection against *refoulement*. In particular, African⁵⁵ and European states⁵⁶ have held themselves to

U.N. Doc. A/AC.96/572 (1979); REPORT OF THE 32ND SESSION OF THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, at ¶ 57(2), U.N. Doc. A/AC.96/601 (1981).

52. The UNHCR has interpreted Article 33 to mean "that refugees must not be sent back to a place where their lives or freedom would be threatened regardless of whether the State first encounters the refugee inside or outside its own territory." Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents at n.7, *Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993) (Lexis, Briefs file) [hereinafter "UNHCR Brief"]. The main function of the UNHCR is to provide protection to refugees. See *supra* note 49 and accompanying text. Any interpretation of Article 33 assuring refugees a right to such protection only if they are fortuitous enough to reach the borders of another country would turn the role of the UNHCR into a moral absurdity. It is not where the refugees are, but rather where they are not that creates the need for protection.

53. Adoption of the Protocol extended refugee rights to people fleeing persecution after 1951, and removed the option of restricting the definition of refugee to those fleeing events within Europe. The Protocol was largely a recognition that refugee problems as a class were not limited in a temporal sense, and that the international community should recognize that as one crisis is "solved" another will inevitably arise. See Weis, *supra* note 5, at 31. Furthermore, the geographic limitation on the official definition allowed in the U.N. Convention was removed, extending refugee status and the protection of *non-refoulement* to displaced persons everywhere. U.N. Protocol, *supra* note 4.

54. The 1967 Protocol was drafted by the Colloquium on Legal Aspects of Refugee Problems, a group of legal experts outside of the United Nations, and thus there are no official records of the drafting meetings. See *Report of the United Nations High Commissioner for Refugees*, U.N. GAOR, 22nd Sess., Supp. No. 11, at 6, U.N. Doc. A/6711 (1967). Furthermore, the Protocol's language simply changes the definition of "refugee" and incorporates by reference the 1951 Convention. Thus, there was no discussion of Article 33 and the *non-refoulement* issue in drawing up the 1967 Protocol. See *id.*

55. See *infra* text accompanying notes 57-61.

56. See *infra* text accompanying notes 62-64.

higher standards than those set forth in the U.N. Convention.

African states have extended protection to a broader class of people than the U.N. Convention requires, and these states have clarified where a refugee must be to invoke the *non-refoulement* obligation. Members of the Organization for African Unity (O.A.U.)⁵⁷ adopted a Convention Governing the Specific Aspects of Refugee Problems in Africa (O.A.U. Convention)⁵⁸ in 1968. In the O.A.U. Convention, the African states expanded the definition of refugee to include massive refugee flows resulting from political, social, and natural disasters.⁵⁹ African states have thus extended fundamental refugee rights, including the right to avoid refoulement, to a considerably broader set of people than required by the U.N. Convention and Protocol.⁶⁰ The O.A.U. Convention is also more clear than the U.N. Convention regarding the extraterritorial applicability of the *non-refoulement* obligation when dealing with refugees who have not reached a state's territory.⁶¹

European states have effectively extended the *non-refoulement* principle as well. In order to deal effectively with massive flows of asylum-seekers, who generally did not qualify as refugees under the U.N. Convention, European states developed a new concept called "B-status" or *de facto* refugees. Asylum-seekers are granted this status when they fail to meet the Convention's refugee definition, but humanitarian concern makes their repatriation unpalatable.⁶² Most importantly, these refugees are protected against *refoulement*.⁶³ The development of this *de facto* refugee status has largely been on a municipal level in Europe. To date,

57. The O.A.U. is a multi-national political organization, with membership consisting of nations on the African continent. In 1967, the 40 members were: Algeria, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Dahomey, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, United Arab Republic, United Republic of Tanzania, Upper Volta, and Zambia.

58. O.A.U. Convention, *supra* note 4.

59. For the precise language of the O.A.U. definition of the term "refugee" see *supra* note 11.

60. Weis, *supra* note 5, at 33.

61. O.A.U. Convention, *supra* note 4, art. II(3), at 48 ("No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.").

62. Cels, *supra* note 30, at 140, 192-93.

63. "The level of protection given to *de facto* refugees varies, but in nearly all European countries they may be granted a humanitarian status which protects them against *refoulement*. . . ." Cels, *supra* note 30, at 188.

there has been no clearly delineated policy regarding any extraterritorial obligations.⁶⁴

Today the concept of *non-refoulement* is probably part of general customary international law, quite apart from conventional law. International law manifests itself in two basic forms: conventional law (i.e., treaty law) and customary law.⁶⁵ The principle of *non-refoulement* is indisputably a conventional obligation for the vast majority of states and is found in numerous treaties.⁶⁶ Whether *non-refoulement* has become customary law, however, is a more difficult question. Yet the UNHCR has observed that *non-refoulement* is a customary norm, and may have risen to the level of *jus cogens*.⁶⁷ Numerous commentators hold similar opinions.⁶⁸ Unfortunately, in the field of international law, there is extremely limited case law to peruse for judicial interpretation. State practice, which is one of the best indications of what has become customary law,⁶⁹ is inconsistent at best in this field.⁷⁰

64. See *infra* notes 83-87 and 94-98 and accompanying text regarding Italian practice.

65. The Statute of the International Court of Justice lists as sources of international law "a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law. . . ." Statute of the International Court of Justice, 59 Stat. 1055, art. 38, at 1060.

66. See *supra* notes 21-64 and accompanying text.

67. 1988 Report of the UNHCR, *supra* note 5, § 24, at 6. See also *Report of the United Nations High Commissioner for Refugees*, U.N. GAOR, 40th Sess., Supp. No. 12, § 22, at 6, U.N. Doc. E/1985/62 (1985).

A principle which has risen to the level of *jus cogens*, otherwise known as a peremptory norm of international law, is a legal principle so firmly rooted in the fabric of international law that it is virtually unchangeable. The Vienna Convention on the Law of Treaties describes such a principle as "a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Vienna Convention on the Law of Treaties*, *supra* note 38, at 8 I.L.M. 679, art. 53, 698-99.

68. "[T]oday the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent." GOODWIN-GILL, *supra* note 5, at 97; see also GOODWIN-GILL, *supra* note 5, at 97-100; "Due to its repeated reaffirmation at the universal, regional, and national levels, the principle of non-refoulement has now become characterized as a peremptory norm (*jus cogens*) for this hemisphere." Karen Parker, *The Rights of Refugees under International Humanitarian Law*, in REFUGEE LAW AND POLICY 33, at n.17 (Ved P. Nanda ed., 1989).

69. Customary law exists with the presence of "two distinct elements (1) 'general practice' and (2) its acceptance as law." LOUIS HENKIN, ET AL., *INTERNATIONAL LAW* 37 (1987). Without a consistent practice, it is difficult to claim that a principle is a customary law.

70. See *infra* part II.

II. INTERNATIONAL INTERPRETATIONS OF THE *NON-REFOULEMENT* OBLIGATION IN PRACTICE

States have varied significantly in how they have interpreted when their *non-refoulement* obligations arise. Though certainly the obligation only accrues to people who fit the definition of refugee, there is considerable disagreement over exactly who should fit the definition.⁷¹ Furthermore, political exigencies have given rise to varying levels of commitment to the *non-refoulement* obligation.⁷² In fact, some states have shifted their official interpretation to fit the political climate. Generally, there are three views of when the obligation to screen, and ultimately provide protection, arises. Some states have embraced a preference for limiting the obligation to refugees who are legally present within their state.⁷³ Other states require a refugee simply to be physically present within their territory.⁷⁴ The practice of yet another group of states extends the protection of *non-refoulement* to refugees regardless of where they may be located, as long as they have left the boundaries of their home country.⁷⁵

A. *Legally Present*

Several states have extended *non-refoulement* protection only to refugees who have arrived legally in their territory. The U.N. Convention is explicit in prohibiting discrimination against asylum-seekers based on the legality or illegality of their presence.⁷⁶ Nevertheless, when threatened with a massive influx of refugees, several nations have fallen back on this approach as a means of justifying what would otherwise be clear transgressions against international *non-refoulement* obligations. Generally, significant international protest follows these practices.⁷⁷

71. The debate over the breadth of the definition of the term "refugee" lurks just beneath the surface of the issue addressed by this Note. To some extent, without a precise definition of who is a refugee to whom the obligation of *non-refoulement* applies, any discussion of the obligation of *non-refoulement* is incomplete. The discussion in this Note adopts the definition of refugee from the U.N. Protocol because that is the most widely-used definition. For an excellent discussion of the problems surrounding a more general definition, see Hailbronner, *supra* note 7.

72. This has been true in several countries, including Thailand, *see infra* notes 78-82 and accompanying text, and Italy, *see infra* notes 83-87 and 94-98.

73. *See infra* part II.A.

74. *See infra* part II.B.

75. *See infra* part II.C.

76. U.N. Convention, *supra* note 4, art. 31, at 174. "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees. . . ." *Id.*

77. For example, significant international pressure was applied against Thailand, *see infra* notes 78-82 and accompanying text, and Italy, *see infra* notes 94-98.

Thailand's practice of turning back Vietnamese boats from harbor and sending them back to sea provides one of the most dramatic examples of this approach.⁷⁸ In the late 1970s, Thailand pursued a policy of rejection at the border and *refoulement* without determining refugee status, and subjected thousands of boat people to peril at sea or jeopardy at home. Though this policy was ended in 1980 as a result of a United Nations brokered resettlement plan, a resurgence of Vietnamese refugees in 1988 once again led to "push-backs."⁷⁹ The Vietnamese turned away were clearly within the territorial limits of Thailand,⁸⁰ but they were not afforded a screening opportunity.⁸¹ Thailand thus embraced a policy of

78. News accounts of this practice are disturbing:

The exodus of the "boat people" from Vietnam reached its peak in 1979, when as many as 50,000 people were fleeing by sea each month. Thailand, by virtue of its geography, was the hardest-hit country of first asylum. At the same time that Vietnamese boats were piling up on Thai beaches, tens of thousands of Cambodians were fleeing over Thailand's eastern border, and like numbers of Laotians were fleeing across its northern border. Faced with feeding and housing this increasing accumulation of unwanted humanity, with little meaningful help from the outside world, Thailand took drastic measures. Thai naval vessels began towing Vietnamese back out to sea in their leaky boats, condemning many of them to certain death. In June, 1979, the Thais rounded up 40,000 Cambodian refugees and forced them at gunpoint to re-enter their own country down a steep escarpment into a heavily mined field. Ten thousand people died in the exercise, either from exploding mines or from Thai gunfire when they tried to turn back.

William Mullen, *No Place Called Home*, CHI. TRIB., Oct. 9, 1988, Sunday Magazine, at 12, 18. In 1980, the United Nations brokered a plan of action for the refugees, creating resettlement options in the West in exchange for an end to the "push-backs". *Id.*

79. The policy reversal in 1980 has generally held, although there have been some resurgences. In the mid-1980s, the number of Vietnamese fleeing their homeland decreased, while the numbers resettled from first asylum countries in South-East Asia to countries in the West increased. In fact, some thought "the problem of refugee buildup in Asia would go away." Nick B. Williams Jr. and Mark Fineman, *Refugees Now Being Urged to Go Back to Vietnam; Positions Harden in Crisis Over "Boat People"*, L.A. TIMES, Dec. 20, 1988, at 13-14. Then in 1988, in Thailand, the numbers of incoming refugees exploded. Particularly in the "Trat province, on the eastern shore along the Cambodian border. [In] December [of 1987] and January [of 1988], boat people began arriving at the rate of 2,000 a month." *Id.* This led to a resurgence of push-backs. *Id.*

80. The territorial limit extends out to sea twelve nautical miles. In fact, a nation maintains some policing authority up to twenty-four miles out to sea. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 511 (1986) (statement of general international law).

81. Thailand is not a party to the 1951 Convention or the 1967 Protocol. However, as noted above, the principle of *non-refoulement* is often considered part of customary international law, deriving its force not from treaty obligations but rather from the general practice of nations. *See supra* notes 65-70 and accompanying text. Notably, Thailand has absorbed a considerable number of refugees over the past decade. In most situations, Thailand pursues a screening procedure to determine refugee status, and provides asylum or resettlement assistance to those considered refugees. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 65. *See also* U.S. COMMITTEE FOR REFUGEES, 1991 WORLD REFUGEE SURVEY 66 (Virginia Hamilton ed., 1991).

non-refoulement only for those legally present.⁸²

In early 1991, thousands of Albanians arrived at the shores of Italy seeking asylum.⁸³ Italy initially provided a screening opportunity for all arriving Albanians.⁸⁴ In August of that year, after Italy believed that the tide of refugees had subsided,⁸⁵ thousands of Albanians arrived again.⁸⁶ Italy refused to screen the asylum-seekers to identify bona-fide refugees and returned all of the Albanians to Albania.⁸⁷ Italy, too, interpreted its *non-refoulement* obligation as extending only to those legally present.

The situation of the Iraqi Kurds presents a third example of the legally present approach. In 1991, on the heels of the allied victory in the Gulf War, Iraqi Kurds revolted in northern Iraq.⁸⁸ The revolt was quashed by the Iraqi army,⁸⁹ and thousands of Iraqi Kurds fled to Turkey.⁹⁰ Turkey, however, closed its borders to these Kurds and refused entry.⁹¹ No screening procedures were instituted; rather, entrance was summarily denied to all Kurds. Those Kurds who managed to cross the border were

82. Due to considerable international pressure, Thailand has retreated from its "push-back" policy and instituted screening procedures for those arriving in Thai ports. Thailand now appears to follow a policy of *non-refoulement* for those physically present. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 65.

83. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 75-77.

84. See *infra* notes 94-98 and accompanying text.

85. In a letter dated August 1, 1991, the Italian Embassy stated "[I]t appears that the arrival of Albanians via the seaboard has ended, and thus the question of sending them back is irrelevant. . . . [A] month or so ago the last ones who attempted to reach Italy in this manner were intercepted at sea and accompanied back to Albania. From that moment the phenomenon has stopped." Letter from Italian Embassy in the United States to the United States Committee for Refugees (August 1, 1991) (quoted in 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 76). On August 18, a second wave of Albanians arrived at Italian ports. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 76.

86. It is reported that 17,000 Albanians arrived at Bari harbor, 14,000 on one ship arriving on August 8. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 76.

87. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 76.

88. Ann Devroy and John E. Yang, *Bush Orders Airlift of Aid to Refugees*, WASH. POST, Apr. 6, 1991, at A1.

89. *Id.*

90. Four hundred fifty-two thousand asylum-seekers were reported by the United States Committee for Refugees, over four thousand of which are still inside Turkey. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 81.

91. Turkey found itself faced with a problem it thought it had seen before. At the outset of the 1991 crisis, in April, the Turkish government decided not to repeat what it viewed as its earlier mistake. In 1988 Turkey received much criticism from Western countries for its treatment of the Kurdish refugees, but very little support. In announcing the decision not to admit the Kurds, but instead to provide "humanitarian aid" at the border, Turkish Minister of State Kamran Inan said, "The world did nothing then [i.e., after 1988] to help us house and feed the refugees." 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 82.

returned to Iraq.⁹² Turkey thus adopted a policy extending its obligation against *refoulement* only to those refugees legally in Turkish territory.⁹³

B. *Physically Present*

In contrast to requiring legal presence of refugees before any *non-refoulement* obligation arises, many states simply require physical presence as a prerequisite. For example, when Albanians first began fleeing en masse to Italy in 1991, Italy extended protection against *refoulement* to all Albanians physically present in Italy, and the Italian authorities conducted proper screening.⁹⁴ The initial arrivals, in March of that year, were treated fairly under a new Italian immigration law.⁹⁵ Italy instituted screening procedures, permitted appeals, and ultimately allowed over five percent to remain.⁹⁶ At the same time, however, Italy instituted an interdiction program in the Adriatic. Italian vessels tracked ships headed for its shores and escorted them back to Albania.⁹⁷ Those who were fortunate enough to reach Italian shores were screened, and refugees were protected against *refoulement*. Those not reaching Italian shores fared worse, and were subjected to forced repatriation without screening. Thus, when first confronted with a massive refugee problem, Italy embraced a policy of *non-refoulement* only for those physically

92. "Any who ventured more than a hundred yards or so into Turkey were pushed back by Turkish soldiers, firing warning shots in the air." 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 82.

93. Turkey acceded to the U.N. Convention in 1962. Turkey has limited its definition of refugee to include only those fleeing persecution in Europe, pursuant to the terms of its original accession. 424 U.N.T.S. 349, 350 (Mar. 30, 1962). However, the obligation against *refoulement* extends beyond mere treaty obligations, as it is generally viewed as part of customary international law. See *supra* notes 65-70 and accompanying text. The United States built tent cities in Northern Iraq and a considerable number of refugees returned to Iraq voluntarily. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 82. Nevertheless, the Turkish policy of refusing entrance, particularly without screening, indicates a clear interpretation of the *non-refoulement* principle.

94. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 75.

95. Italy historically has had very liberal provisions regarding asylum-seekers. In anticipation of open borders in the European Community, Italy amended its laws in 1990, to conform to practices of the European community, creating more stringent requirements for asylum-seekers than had previously been in place. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 75. The Albanians arriving in March were screened under the new procedures, and refugee status was granted according to Italy's new commitments.

96. In 1990, prior to the massive influx of Albanians, the percentage of asylum-seekers granted asylum was approximately 59%. As a result of the mass arrivals in 1991, the ratio of those granted asylum to those seeking it dropped to 5.5%. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 75.

97. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 76.

present.⁹⁸

The United States has also apparently embraced a *non-refoulement* policy based on physical presence, though like Italy, the U.S. position has shifted over time.⁹⁹ The U.S. Supreme Court has recently held that the United States' obligation regarding *non-refoulement* only extends to refugees physically present within the United States.¹⁰⁰

Since 1981, the United States has pursued a policy of tracking Haitian nationals¹⁰¹ fleeing the oppressive military regime in power in Haiti, intercepting them in international waters, and returning them to Haiti.¹⁰² Originally, the U.S. Coast Guard conducted a screening process to determine if any Haitians warranted "refugee" status which might entitle them to protection from *refoulement*. The original U.S. policy thus accepted a *non-refoulement* obligation extending into international waters and not requiring any sort of presence in the United States.¹⁰³ However, the situation in Haiti deteriorated in late September 1991.¹⁰⁴ In May 1992 President Bush issued the Kennebunkport Order,¹⁰⁵ which shifted U.S. policy away from mandatory screenings.¹⁰⁶

This shift in policy indicated a new American interpretation requiring physical presence in the United States before the *non-refoulement* obliga-

98. Subsequently, Italy abandoned its policy of protection for those physically present due to a resurgence of asylum-seekers. See *supra* notes 83-87 and accompanying text.

99. See *infra* notes 103-06 and accompanying text.

100. See *infra* part III.

101. The term "national" is a term of art in the field of immigration law, and is defined as "[a] person owing permanent allegiance to a state." 8 U.S.C. § 1101(a)(21) (1992). It has a broader meaning than "citizen". BLACK'S LAW DICTIONARY 1024 (6th ed. 1990).

102. Executive Order 12,324, 46 Fed. Reg. 48,109 (1981).

103. See *infra* notes 119-123 and accompanying text.

104. On September 30, 1991, the democratically-elected President of Haiti, Jean-Bertrand Aristide, was overthrown in a military coup. Following the coup, a massive increase in the migration from Haiti transpired. The United States suspended its program of repatriation, and initiated a program of interdiction and temporary encampment at Guantanamo Bay, Cuba. Mike Clary, *U.S. Pushes for Haitian Resettlement Plan*, L.A. TIMES, Nov. 16, 1991, at A21. On November 18, 1991, the United States resumed its repatriation policy. See *U.S. Judge Halts Return of Haitians*, CHI. TRIB., Nov. 20, 1991, at 6. The increase in asylum-seekers from the coup ultimately led to the May 24, 1992 executive order that changed U.S. policy and denied screening to the Haitian asylum-seekers. *Id.*

105. Executive Order 12,807 1992, 57 Fed. Reg. 23,133 (1992).

106. "[T]he Attorney General, in his *unreviewable discretion*, may decide that a person who is a refugee will not be returned without his consent. . . Executive Order No. 12324 is hereby revoked and replaced by this order." Executive Order 12,807, *supra* note 105 (emphasis added). The language in the 1981 presidential order, deferring to the laws of the United States and international obligations, was also deleted. See *infra* note 122 and accompanying text.

tion arises. This new policy was challenged in the United States courts,¹⁰⁷ where the government argued that the obligation of *non-refoulement* does not arise until refugees are physically present in the United States.¹⁰⁸ The U.S. Supreme Court recently upheld this policy,¹⁰⁹ which has been continued by the new President.¹¹⁰ U.S. practice, at least currently, embraces a *non-refoulement* obligation only once a refugee reaches American soil.

C. *Anywhere Found*

While some states have taken a narrow view of their *non-refoulement* obligations, other states have granted protection to refugees regardless where found. African states have taken a particularly liberal view towards treatment of refugees and the concept of *non-refoulement*.¹¹¹ Regardless of where they are found, asylum-seekers in Africa are generally protected from *refoulement*. The United States has also indicated a pref-

107. *See infra* part III.

108. "Article 33 applies only to refugees who have entered the territory of a contracting state." Brief for Appellees at 37, *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2nd Cir. 1992)(No. 92-6144), *rev'd sub nom. Sale v. Haitian Centers Council*, 1993 WL 211610 (U.S. June 21, 1993). The government based its argument on four points: 1) Article 33 does not expressly state that it is to apply extraterritorially; 2) the negotiating history indicates a view against extraterritorial application; 3) U.S. obligations at the time of accession to the U.N. Protocol only extended to aliens within the United States; and 4) the State Department has always interpreted U.S. obligations under Article 33 to apply only to refugees within the United States. *Id.* at 37-50.

109. *Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

110. Timothy J. McNulty, *Clinton Reverses Course on Haitians*, CHI. TRIB., Jan. 15, 1993, at 5.

111. Prior to this century, Africa was heavily colonized, and the independent nations that ultimately emerged bore little relationship to the one-time dominant tribal system. The effects of this colonial domination on the African approaches to Western legalism are significant.

By the beginning of this century, seven European states had practically divided all of Africa among themselves, while the descendants of the eighth had dug their teeth deeply into South Africa. Only Ethiopia and Liberia remained free. This was the time when frontiers in Africa were drawn with straightedge rulers at conference tables in Europe, regardless of the peoples whose destinies were influenced by these decisions. Today's political map of Africa shows that these straight lines cut through tribes, clans, and families and split up ecological units, pasture grounds, and market areas.

Peter Nobel, *Refugees, Law, and Development in Africa*, in *TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES* 255, 256-57 (Michigan Yearbook of International Legal Studies ed., 1982).

Thus, in many ways the modern African nation-states are not nearly as concerned with traditional notions of sovereignty as their Western counterparts. *See id.* at 256-57 and 265-66. Most of the modern African states won their independence in the 1960s. By the end of that decade there was a mounting refugee crisis on the continent. The Organization for African Unity (O.A.U.) adopted the O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969. *See supra* notes 57-61 and accompanying text. Following adoption of the O.A.U. Convention, African states have generally followed a consistent approach to refugee *non-refoulement*. *See infra* notes 113-118 and accompanying text. *See also supra* note 61.

erence for this interpretation at times.¹¹²

Côte d'Ivoire absorbed nearly 240,000 refugees from Liberia in December 1989 and at the beginning of 1990.¹¹³ Despite the difficulties associated with this absorption, Côte d'Ivoire pursued an open policy during 1990 and much of 1991. By late 1991, however, Côte d'Ivoire began screening new arrivals to determine refugee status (granting this status to greater than 50%).¹¹⁴ Yet Côte d'Ivoire has not sent any Liberians back to Liberia, even those who have failed to attain refugee status.¹¹⁵ Côte d'Ivoire thus pursues a policy against *refoulement* in all situations.

Malawi has allowed nearly a million refugees from Mozambique to enter since 1976 due to a brutal civil war in Mozambique.¹¹⁶ Refugees now constitute more than ten percent of Malawi's total population.¹¹⁷ Despite the hardships this has caused and a decrease in U.N. funds, Malawi has remained committed to admitting refugees and avoiding *refoulement*.¹¹⁸

112. See *infra* notes 119-123 and accompanying text.

113. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 38.

114. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 39.

115. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 39.

116. The United States Committee for Refugees reported 982,000 refugees. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 46.

117. There are over 982,000 refugees in Malawi, while the total population is approximately 9.4 million. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 35 (Table 7).

118. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 46. Response to refugee flows in Africa has not been without some inconsistencies. Sandwiched between warring Ethiopia and Somalia, Djibouti has had to deal with refugees from the outset of its independence in 1978. 1992 World Refugee Survey, *supra* note 1, at 39. Almost a third of the population is comprised of refugees—120,000 refugees out of a total population of nearly 400,000. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 40. Though Djibouti has generally been accommodating to refugees, Djibouti has also forcibly repatriated some refugees. Events in Ethiopia in mid-1991 prompted a massive influx of some 49,000 Ethiopians. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 40; see also Michael A. Hiltzik, *Rebel Troops Attack Capital of Ethiopia*, L.A. TIMES, May 28, 1991, at A1, A16 ("The Eritrean rebels Saturday [May 25, 1991] also took Assab, the last major Red Sea port held by the government and a vital fuel supply source for Addis Ababa. That action provoked the outflow of about 30,000 refugees, including deserting soldiers and citizens of the city."). In order to encourage "voluntary" repatriation, Djibouti did not allow a full opportunity to apply for asylum. "Djibouti authorities, anxious that the Ethiopians—especially the soldiers—leave, reportedly did not fully provide the Ethiopians an opportunity to apply for asylum." 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 40.

Perhaps the most graphic example of a lessened standard regarding *refoulement* in Africa involved Kenya in May 1991. Like Djibouti, Kenya borders both Ethiopia and Somalia. Due to increasing tensions in 1991, a considerable number of refugees began fleeing to Kenya. In April and May of 1991, several ships carrying Somalis were turned back from Kenyan ports and sent back to sea. This unusual display of rejection at an African border, which ultimately led to some deaths,

United States policy regarding the extraterritorial applicability of the *non-refoulement* obligation has been inconsistent, though at times the United States has indicated its *non-refoulement* obligations arise once refugees leave their home country. When the United States began interdicting ships carrying asylum-seekers fleeing Haiti in 1981,¹¹⁹ all intercepted Haitians were screened to determine if any were bona fide refugees.¹²⁰ The Executive Order authorizing the interceptions clearly restricted the practice to international waters,¹²¹ and required observance of "international obligations."¹²² At a minimum, the language of this Executive Order implied that the U.S. believed it was under some international obligation regarding asylum-seekers in international waters. In any event, this policy provided screening to determine refugee status for asylum-seekers who had not yet arrived in the territory of the United States. The United States continued this policy for over ten years before abandoning it in 1992.¹²³

III. JUDICIAL INTERPRETATIONS

As is true with many questions of international law,¹²⁴ judicial inter-

came under considerable international protest. 1992 WORLD REFUGEE SURVEY, *supra* note 1, at 43.

Nevertheless, even these states generally accept a *non-refoulement* obligation regardless where refugees are found. *See supra* note 61.

119. *See supra* text accompanying notes 101-02.

120. Executive Order 12,324, 46 Fed. Reg. 48,109 (1981). The order instructed the Coast Guard to stop certain defined vessels on the high seas, to "make inquiries of those on board . . . as are necessary . . . to establish [their status]", and to "return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which [the United States has] an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent." *Id.*

121. *Id.* The order authorized interception and screening "only outside the territorial waters of the United States." *Id.*

122. *Id.* The order required "strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." *Id.*

123. *See supra* notes 99-110 and accompanying text.

124. Procedural and jurisdictional problems limit considerably the availability of domestic courts to resolve international law issues. International tribunals primarily exist to resolve disputes between states, rather than between a state and individuals.

Among the most serious deficiencies in international law is the frequent absence of an assured procedure for the identification of a violation. Theoretical inquiry can clarify the problem and provide some insight into the solution. The status of controverted behavior as legal or illegal is quite problematical, in the first instance, because no central institutions exist to make judgments that will be treated as authoritative by states. This is the familiar weakness of international law that results from reliance upon self-interpretation to discern the scope of permissible behavior.

pretations are scarce regarding the *non-refoulement* obligation. The U.S. Supreme Court only recently provided some guidance regarding when the *non-refoulement* and screening obligations arise. The several courts that addressed the issue prior to the Supreme Court's decision disagreed over the appropriate interpretation.¹²⁵ Three circuit courts¹²⁶ addressed this issue in the context of the Haitian situation. These courts focused their analysis primarily on obligations arising from § 243(h)(1) of the Immigration and Nationality Act¹²⁷ (INA), which is a domestic law based on Article 33 of the U.N. Convention.¹²⁸ Two circuits found United States obligations to exist only when an alien is physically present in the United States.¹²⁹ However, neither of these courts discussed the merits of the international law question at length. One circuit, however, carefully analyzed the *non-refoulement* issue, and decided that the United States obligations extend to wherever the alien may be found.¹³⁰ This circuit's decision was reversed by the Supreme Court, which found Arti-

Richard A. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 249 (1964).

125. Further complicating the analyses of these courts are a variety of procedural and domestic law issues which are beyond the scope of this Note.

126. The D.C. Circuit addressed this issue in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987) (requiring physical presence). The Eleventh Circuit addressed this issue in two cases by the same name: *Haitian Refugee Center v. Baker*, 949 F.2d 1109 (11th Cir. 1991) [hereinafter "HRC I"] and *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir. 1992) (requiring physical presence), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1245 (1992) [hereinafter "HRC II"]. The Second Circuit addressed this issue in *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992) (extending protection extraterritorially), *rev'd sub nom. Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

127. 8 U.S.C. § 1253(h)(1) (1992). "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*

128. The U.S. Supreme Court has made note of the basis for § 243(h)(1):

If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968. Indeed, the definition of "refugee" that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the Convention. . . .

INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987)(citations omitted); *see also INS v. Stevic*, 467 U.S. 407, 421 (1984).

129. *See supra* note 126.

130. The Second Circuit addressed this issue in *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom. Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

cle 33 to apply only once an individual was physically within the United States.

In *Sale v. Haitian Centers Council, Inc.*,¹³¹ the Supreme Court found that the United States was obligated to avoid the *refoulement* of only those aliens within the territorial boundaries of the United States.¹³² While focusing its analysis upon domestic law,¹³³ the Supreme Court explored the meaning of Article 33 because that article gave rise to the domestic law in this field. The Court gave three reasons why the obligations in Article 33 cannot apply extraterritorially: (1) the explicit reference in Article 33.2 to the country in which a refugee is found; (2) the parallel use of the terms "expel" and "return" in Article 33.1; and (3) the negotiating history of the Convention itself.¹³⁴

Article 33.2 exempts contracting states from the prohibition of *non-refoulement* when a refugee presents a danger to the security of the contracting state.¹³⁵ The exemption applies when a refugee is a security risk to the "country in which he is . . ."¹³⁶ The Supreme Court held that because Article 33.2 only applied to a refugee within the territory of a country, Article 33.1 must also apply only to refugees within the territory of a country. The Court found that to hold otherwise would be unreasonable because refugees posing a security risk who were found on the high seas would be protected against *refoulement* while those posing a security risk within a country would not.¹³⁷

The Court next found that the word "return" in Article 33 was intended to refer to the process that applies to aliens physically present though not legally present within the territory of that state. In the United States, aliens who have legally arrived are subject to deportation, while aliens who are illegally within the country are subject to exclu-

131. No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

132. *Id.*

133. Domestic law in the United States was enacted to comply with the U.N. Protocol. *See supra* notes 127-28.

134. *Haitian Centers Council*, 1993 WL 211610, at *10-*13.

135. Article 33(2) actually establishes two exceptions to the non-refoulement obligation:

The benefit of [Article 33(1)] may not, however, be claimed by a refugee 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.

U.N. Convention, *supra* note 4, art. 33(2), at 176.

136. *Id.*

137. *Haitian Centers Council*, 1993 WL 211610, at *10.

sion.¹³⁸ The Court found that the word "return" has the same meaning as "exclude."¹³⁹ The basis of the Court's decision is unclear. The Court appears to have relied upon the remarks of commentators near the time of the original drafting of the U.N. Convention, and on the belief that "return" and "refouler" do not mean the same thing.¹⁴⁰ Yet the Court failed to explain how it reached the legal conclusion that "return" has a special, limited meaning as it is used in the U.N. Convention.

Finally, the Court placed great emphasis upon the negotiating history of the U.N. Convention.¹⁴¹ The Court noted the interpretation of the words "expel" and "return" favored by several European countries at the drafting conference limited the word "expel" to apply to a refugee already admitted into a country and limited the word "return" to apply to a refugee already within the territory of a country but not yet residing there.¹⁴² The Court then found that even if some signatory states viewed the obligations of Article 33 to apply wherever an alien might be located, certainly other states "carefully—and successfully—sought to avoid just that implication."¹⁴³

The lone dissent in *Haitian Centers Council* found the obligations of Article 33 to apply extraterritorially. Justice Blackmun, in a scathing dissent, focused primarily upon the obligations of the U.N. Convention. Blackmun found the plain language of Article 33.1 to be unambiguous and reliance upon the negotiating history to be misguided.

Blackmun found the use of the term "return" to be unambiguous. He noted that treaties are usually construed according to their ordinary meaning, and that the majority's insistence on giving the word "return" a more narrow legal meaning is inconsistent with this general canon of treaty interpretation.¹⁴⁴ Taking the meaning ascribed to the word *refouler* in the French-English dictionaries quoted by the majority,

138. See 8 U.S.C. § 1252(b) (1992) (regarding deportation) and 8 U.S.C. § 1226 (1992) (regarding exclusion).

139. *Haitian Centers Council*, 1993 WL 211610, at *10 ("the term 'return (refouler)' refers to the exclusion of aliens").

140. *Id.* at n.40 (commentators opinions), and *Id.* at *11 (the definitions of "return" and "refouler"). The Court found that the meaning of the French word "refouler" controlled the meaning of "return" in Article 33. Because "refouler" means "repulse, repel, drive back," the Court found that for the purposes of the U.N. Convention, "'return' means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination." *Id.*

141. *Id.* at *11-13. See also *supra* notes 43-46 and accompanying text.

142. See *supra* note 44.

143. *Haitian Centers Council*, 1993 WL 211610, at *13.

144. *Id.* at *15 (Blackmun, J., dissenting). See also *supra* note 38.

Blackmun found that even though the word "return" is not among the definitions, the other words used in English to describe the meaning of *refouler* described the United States' action in this case precisely.¹⁴⁵ Blackmun even noted that current articles in French newspapers used the word *refouler* to describe the repatriation program being conducted by the United States.¹⁴⁶ Next, Blackmun dismissed the majority's analysis of Article 33.2. Blackmun observed that simply because the U.N. Convention permits contracting states to return serious criminals once they have arrived within the borders of a contracting state in no way implies that contracting states intended to allow the return of people who are not criminals and who are found outside of the contracting state's territory.¹⁴⁷

Blackmun concluded his discussion of the U.N. Convention with a critique of the majority's reliance upon the negotiating history of a treaty,¹⁴⁸ and in particular the oral statements of the representatives at a drafting meeting.¹⁴⁹ Blackmun stated that "a treaty's plain language must control absent 'extraordinarily strong contrary evidence.'" ¹⁵⁰ Blackmun then insisted that there is no way to discern to what extent the comments the majority relied upon were accepted by the Conference, nor precisely what those comments actually meant.¹⁵¹ Blackmun concluded by pointing out that even if the interpretation relied upon by the majority is correct—that a nation has the right to close its borders to a massive flow of refugees—there is no indication that the drafters intended to permit a

145. Taking the definitions of "*refouler*" accepted by the majority, Blackmun stated: "Thus construed, Article 33.1 of the Convention reads: 'No contracting state shall expel or [repulse, drive back, or repel] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened' That, of course, is exactly what the Government is doing." *Haitian Centers Council*, 1993 WL 211610, at *15 (Blackmun, J., dissenting) (brackets in original).

146. *Id.*

147. At this point, Blackmun showed his exasperation with the majority. "One wonders what the majority would make of an exception that removed from the Article's protection all refugees who 'constitute a danger to their families.' By the majority's logic, the inclusion of such an exception presumably would render Article 33.1 applicable only to refugees with families." *Id.*

148. "Reliance on a treaty's negotiating history (*travaux préparatoires*) is a disfavored alternative of last resort, appropriate only where the terms of the document are obscure or lead to 'manifestly absurd or unreasonable' results." *Id.* at *16 (citations omitted).

149. This general rule "has no application to oral statements made by those negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." *Id.* (quoting *Arizona v. California*, 292 U.S. 341, 360 (1934)).

150. *Id.*

151. *Id.*

contracting state to go forth and seize aliens who have not even reached its borders and return them to persecution.¹⁵²

The majority and dissent in *Haitian Centers Council* disagreed so fundamentally on each and every legal aspect of the *refoulement* issue that it is hard to believe that both opinions were addressing the same problem. Nevertheless, the result of the Supreme Court's decision in *Haitian Centers Council* is likely to have a far-reaching impact. The U.S. government will rely upon the legal shield provided by the majority's opinion as it confronts other situations with refugees on the high seas.¹⁵³ Other nations are also likely to turn to the U.S. Supreme Court decision when political exigencies make it desirable for them to do so. Right or wrong, this new interpretation of the U.N. Convention's prohibition against *refoulement* is likely to have a profound impact upon the field of refugee law.

IV. TOWARD A UNIVERSAL DEFINITION AND WORKABLE PRACTICE

International practice is unquestionably disparate in determining when the right against *refoulement* should be extended to individuals fleeing their homeland. The recent decision of the United States Supreme Court is likely to lend support to a modest interpretation of *non-refoulement* obligations.¹⁵⁴ In order to prevent protectionist, and ultimately short-sighted policies from prevailing, a universal definition of the *non-refoulement* obligation must be developed. Fundamentally, *non-refoulement* should be extended to all refugees who have escaped their home country—law, morality, and practical politics all dictate a broad interpretation of this international obligation.

152. *Id.* at *17 (Blackmun, J., dissenting).

153. In the summer of 1993, the United States was confronted with yet another refugee crisis. Three ships approached the United States carrying 659 Chinese people. Tim Golden, *Mexico in Switch Decides to Accept Stranded Chinese*, N.Y. TIMES, July 15, 1993, at A1, A12. The United States Coast Guard kept the ships outside of the United States' territorial limits, and re-routed the ships to a position off the Mexican Coast. *Id.* Because Mexico is not a party to the U.N. Convention or U.N. Protocol, Mexico planned to return the Chinese to China without screening. *Id.* The United States, relying on the recent Supreme Court decision, deemed it was not obligated to provide screening when it encountered the ships in international waters. *Id.* Apparently, the United States has adopted a new "policy, intended to combat illegal immigration, [which] calls for the interception and 'redirection' of boats smuggling aliens." Deborah Sontag, *Despite Statements, Mexico has Deported Illegal Aliens*, N.Y. TIMES, July 15, 1993, at A12.

154. See *supra* part III.

A. *Universal Definition*

Some might question the wisdom of a consistent, universal definition of the principle of *non-refoulement*. If a state wants to adhere to its own set of rules in this field, some might argue, it should be able to do so. Such a view is short-sighted and detrimental to the entire international community. First, the treatment of refugees is an international problem demanding an international response. Second, refugees rarely are in control of their ultimate destination, and it is unfair that the extent of the *non-refoulement* protection is dependent on the refugees' proximity to a state with a favorable interpretation. Third, by allowing flexible interpretations, no minimum protection is assured, limiting the practical benefit of the *non-refoulement* principle.

A history of the *non-refoulement* obligation is instructive. Following World War II, the victorious powers realized that the problem of displaced persons in Europe was not a problem that could be effectively solved by individual nations.¹⁵⁵ In the intervening years, this realization has become even more profound when applied to the myriad refugee problems that have developed throughout the world. The costs of supporting refugees fleeing persecution, and the burden of finding new homes for these people are simply too great to be borne by individual nations.¹⁵⁶ This is particularly true when so many of the world's refugee problems arise in the poorest regions, with refugees fleeing destitution in one land only to arrive at a neighbor with no wealth of its own to share.¹⁵⁷ A cohesive approach to refugee problems can only help to make the world's assistance to refugees more effective and efficient.

Refugees are victims of circumstance. By definition, no one chooses to be a refugee. As a result, the fact that a country 2000 miles away from a refugee has a more beneficial policy towards *non-refoulement* than the

155. The Preamble of the U.N. Convention reaffirms this notion: "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation. . . ." U.N. Convention, *supra* note 4, pmbl. at 150.

156. In 1991, the UNHCR spent nearly \$883 million on refugee assistance. This money was spent on emergency assistance, care and maintenance, voluntary repatriation, local settlement, and resettlement. 1992 Report of the UNHCR, *supra* note 1, at 47-52 (Tables 1 and 2).

157. Over a third of UNHCR expenditures in 1991 were in African states, which accounted for less than 0.02% of total member contributions (\$207,000 out of \$745.6 million). The contributions from African states accounted for less than 1% of expenditures on refugee assistance in Africa. 1992 REPORT OF THE UNHCR, *supra* note 1, at 47-56 (Tables 1 and 3). Without a cohesive international system, African states could not deal effectively with the crises.

asylum-seeker's nearest neighbor is of no practical benefit to the individual seeking immediate protection. The asylum-seeker must seek refuge in the closest place, with few exceptions. Thus, without a universal definition, the ability of a potential refugee to gain protection from *refoulement* depends as much on chance as on the will of nations. A minimum standard defining the obligations of states toward asylum-seekers will ensure that regardless of the good or ill fortune of asylum-seekers, the protection they need will be there.

Without a minimal standard, the practical benefit of the principle of *non-refoulement* is dubious. Nations will take the politically expedient path of least resistance, and unfortunately, those faced with the greatest refugee burdens will offer the least protection.¹⁵⁸

Thus, a universal definition would not only be beneficial—it is a practical necessity. Only by approaching the refugee situation globally can nations find effective solutions, and provide true protection for the people most in need.

B. *Universal Application*

Fortunately, there already exists a universal definition of the *non-refoulement* principle that, although not adhered to consistently, sets the appropriate standard for the behavior of nations: the *non-refoulement* obligation should apply to all states as soon as a refugee crosses any international boundary, which includes that of the refugee's country of origin. Such a definition is legally correct, it is morally correct, and perhaps, most importantly, it creates the best policy incentives from an international perspective.

Non-refoulement in its broadest sense is firmly entrenched in the international legal system. The most fair reading of the U.N. Convention indicates that nations are obligated to avoid *refoulement* whenever a refugee is found.¹⁵⁹ Other international legal principles also strengthen the extraterritorial applicability of the *non-refoulement* obligation.¹⁶⁰

158. The situation in Africa today appears to contradict this statement. However, as noted above, the refugee system in Africa is heavily dependent on the international community for support. See *supra* note 157. It is doubtful that African states would be as hospitable as they are if it were not for the tremendous financial assistance provided. Furthermore, the O.A.U. Convention firmly established a high standard of respect for refugee rights from which African states have been loathe to derogate. See *supra* notes 113-118 and accompanying text.

159. See *supra* notes 33-42 and accompanying text.

160. See *infra* notes 171-173 and accompanying text.

Article 33 inescapably provides that *non-refoulement* applies to contracting states extraterritorially. The Vienna Convention on the Law of Treaties¹⁶¹ requires interpretation of language in treaties in accordance with the ordinary meaning of the terms.¹⁶² As noted above, the language of Article 33 of the U.N. Convention is sufficiently unambiguous to not require reference to anything other than the text itself.¹⁶³ The requirement that no contracting state expel or return a refugee does not limit the location of the refugee, as the Convention does in numerous other articles. In fact, the word "refugee" is repeatedly modified in the Convention by clauses limiting the scope of particular articles to refugees located *physically*¹⁶⁴ or *legally*¹⁶⁵ within the territory of a contracting state. Even clause 2 of Article 33, which is the national security and prior serious crime limitation on the *non-refoulement* principle, applies only to refugees who constitute a danger to the country in which they are found.¹⁶⁶ The lack of restrictive, limiting language following the word "refugee" in clause 1 of Article 33 strongly supports an interpretation extending protection to refugees wherever they may be found.¹⁶⁷

Furthermore, the term "refugee" is defined geographically in Article 1 of the Convention (and Article 1 of the Protocol). A "refugee" is defined as someone who is "outside the country of his nationality"¹⁶⁸ without regard to exactly where outside his country of nationality. Thus, once the international boundary is crossed, an individual fleeing persecution attains refugee status and acquires all the concomitant rights of a refugee,

161. *Vienna Convention on the Law of Treaties*, *supra* note 38.

162. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Vienna Convention on the Law of Treaties*, *supra* note 38, art. 31, at 691-92.

163. *See supra* notes 33-42 and accompanying text.

164. *See, e.g.*, U.N. Convention, *supra* note 4, art. 2, art. 4, art. 14, art. 25, art. 27, art. 30, art. 31, and art. 33(2).

165. *See, e.g.*, U.N. Convention, *supra* note 4, art. 15, art. 17, art. 18, art. 19, art. 21, art. 23, art. 24, art. 26, art. 28, and art. 32.

166. "The benefit of the present provision may not, however, be claimed by a refugee who presents 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." U.N. Convention, *supra* note 4, art. 33(2), at 176 (emphasis added).

This, of course, is the section relied on by the majority of the United States Supreme Court to show that *non-refoulement* does not apply outside the territory of a contracting state. *See supra* part III.

167. *See* Brief for Respondents, at n.31-37, *Sale v. Haitian Centers Council*, No. 92-344, 1993 WL 211610 (U.S. June 21, 1993).

168. U.N. Convention, *supra* note 4, art. 1(A)(2), at 152.

including the right against *refoulement*.¹⁶⁹

Finally, reliance on the negotiating history, which is inconclusive at best,¹⁷⁰ is inappropriate. When the plain language of a treaty is clear, no purpose is served by attempting to discern "legislative" intent.¹⁷¹

The extraterritorial application of the *non-refoulement* obligation finds legal support in other contexts as well. The Universal Declaration of Human Rights,¹⁷² for example, assures everyone the right to seek asylum and the right to leave their country.¹⁷³ If the principle of *non-refoulement* does not obligate nations once an asylum-seeker has crossed the outer boundary of the nation he or she is fleeing, then the right to seek asylum and the right to leave one's country, as guaranteed by the Universal Declaration of Human Rights, are empty promises.¹⁷⁴

Not only is an extraterritorial interpretation legally correct, it is morally correct. At its core, *non-refoulement* is a humanitarian concept. Though nations are somewhat hesitant to relinquish control over their

169. Other refugee rights include the right against deportation, the right against unjustified detention, the right to seek a gainful occupation, and the right to pursue education. 1988 Report of the UNHCR, *supra* note 5, at 6-7.

170. See *supra* notes 43-46 and accompanying text.

171. The Vienna Convention on the Law of Treaties allows reference to preparatory work only when the meaning is "ambiguous or obscure" or if the result from such interpretation would be "manifestly absurd or unreasonable". Vienna Convention on the Law of Treaties, *supra* note 38, art. 32, 8 I.L.M. 679, 692.

In the United States, this is a major canon of statutory interpretation:

[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "Judicial inquiry is complete."

Connecticut National Bank v. Germain, ___ U.S. ___, 112 S.Ct. 1146, 1149 (1992) (citations omitted). Similar principles are extended to interpretation of treaties. U.S. v. Stuart, 489 U.S. 353, 361-62, 365-66 (1989). See also *Haitian Centers Council*, 1993 WL 211610, at *16 (Blackmun, J., dissenting).

172. *The Universal Declaration of Human Rights*, G.A. Res. 217 (III(A)) U.N. GAOR, 3rd Sess., 183d Plen. Mtg. (1948).

173. *Id.* art 14 (for the right to seek asylum). See also *id.* art 13 (for the right "to leave any country, including [one's] own").

174. It should be noted that there has been no general agreement concerning the right to asylum itself, beyond the right to *seek* asylum. There have been attempts to secure such a right in a Draft Convention on Territorial Asylum. See *Draft Convention on Territorial Asylum*, U.N. GAOR Conference on Territorial Asylum, 30th Sess., U.N. Doc. A/Conf.78/12 (1977). Sadly, this convention has not garnered enough support to be opened for signature, in what has been called "the only failure of its kind in the history of law-making in the United Nations." Gervase Coles, *Approaching the Refugee Problem Today*, in *REFUGEES AND INTERNATIONAL RELATIONS* 373, 383 (Gil Loescher and Laila Monahan eds., 1989).

sovereign power of regulating admission to their territories, the aftermath of World War II illustrated the importance of providing some protection for those in flight.¹⁷⁵ *Non-refoulement* is thus not a threat to territorial sovereignty.¹⁷⁶ Rather, *non-refoulement* is largely a protective device for refugees who lack the protection of fundamental rights from their origin country because they have fled from that country.¹⁷⁷

In addition to being legally and morally correct, an extraterritorial interpretation of the *non-refoulement* obligation creates the best policy incentives for dealing with refugee situations. By placing a burden on states capable of providing refuge, the *non-refoulement* principle forces disinterested states to recognize the deplorable circumstances in other states. It has often been said that there are three solutions to a refugee problem: (1) returning the refugees to their home country; (2) granting permanent asylum in the country of first refuge; and (3) finding a third country to grant permanent asylum.¹⁷⁸ This syllogism is clearly correct once a refugee crisis exists. Yet there is a fourth option, a preventive measure, which ideally should be tried first. Nations will only work to avert the types of situations that cause refugee crises if doing so is in their best interest. A legal environment that places responsibilities on those nations from the outset provides incentives for those nations to work harder to avert such situations.¹⁷⁹

175. The tragedy of the *St. Louis* is well known to be a leading source of the development of the moral resolve against *refoulement* among Western states. In 1939, over 900 Jews boarded a ship, the *St. Louis*, "in an effort to flee Nazi Germany. But port after port refused to allow them to enter and they were eventually forced to return to Germany, where almost all eventually perished in German concentration camps." Patricia Camp, *Jewish Union Plans National Drive To Resettle Indochinese Refugees*, WASH. POST, Sept. 8, 1979, at B3. For a full account of this frightening abandonment of people in need see GORDON THOMAS AND MAX MORGAN WITTS, *VOYAGE OF THE DAMNED* (1974).

176. At most, *non-refoulement* creates an obligation for temporary refuge. There is technically no requirement that any state admit anyone into their territory, even someone who qualifies as a refugee under the U.N. Convention definition. Such individuals are protected from return to the hands of their persecutors, but they are not protected from being delivered anywhere else. Some commentators have argued that a customary norm of providing temporary refuge has emerged. See Deborah Perluss and Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551. Even so, temporary refuge is not a challenge to state sovereignty.

177. See *supra* notes 47 and 49.

178. See, e.g., Perluss and Hartman, *supra* note 176, at 554; Gil Loescher, *Introduction: Refugee Issues in International Relations*, in REFUGEES AND INTERNATIONAL RELATIONS 1, 27 (Gil Loescher and Laila Monahan eds., 1989).

179. This might, in fact, be an excellent place for an application of the Coase Theorem. There are very clearly high transaction costs associated with averting massive refugee flows. If the obligation to attempt to avoid such crises is placed on the country of origin, which in all likelihood is

C. *Practical Considerations*

International law is largely the law of consent. As noted above, even with the strict legal obligation of *non-refoulement* in place, many states have derogated from their duty.¹⁸⁰ Perhaps the only way to ensure that the obligation of *non-refoulement* is respected extraterritorially is to draft a protocol to the U.N. Convention clearly delineating such an interpretation. As the refugees of the world continue to suffer, nations simply must not turn their backs on a legal obligation that is also morally correct and that creates policy incentives for the world to deal responsibly with problems that confront it. The Appendix, which follows, is a draft protocol which would accomplish just this result. This draft protocol commits signatory states to the principle of *non-refoulement* regardless where a refugee may be found so long as he or she is outside the country of his or her nationality and unable to avail himself or herself of the protection of that country. The draft protocol further clarifies the obligation of *non-refoulement* by extending the prohibition against expulsion or return to refugees in international waters. Humanity compels continued adherence to a higher moral ground, it is hopeful that states in the new world order will be able to hold themselves legally responsible to the helpless in the world.

CONCLUSION

As the U.N. Convention stands today *non-refoulement* requires international protection of asylum-seekers once they escape the frontiers of the country they are fleeing. Yet states are inconsistent in adhering to this obligation. A new Protocol to the U.N. Convention, clearly delineating the extraterritorial reach of the *non-refoulement* obligation, is

economically troubled, then there is essentially no potential for the country of origin to pay others to take on the obligation. Yet if the obligation were shifted, by changing the international legal order, other countries may be willing to pay countries of origin to assume the obligation of avoiding refugee-creating problems. The payment itself would likely be great enough to rectify circumstances to avert massive refugee flows. This is, in fact, probably why nations have bound themselves to the principle of *non-refoulement*.

Coase, however, has complained about extending his observations about the impact of transaction costs on economic theory to other fields. R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* 15 (1988). Nevertheless, his fundamental observation has considerable applicability in many fields. Coase did not argue that the assignment of legal rights does not matter because parties will bargain to find an efficient outcome. Rather, Coase argued that such a proposition can only be true in a world without transaction costs. The existence of transaction costs can make the initial assignment of rights determinative of the outcome. *See id.* at 10-16.

180. *See supra* part II.

perhaps the only way to establish consistent protection for refugees that comports with morality and practical politics. At a minimum nations must be obligated to provide screening to determine whether an asylum-seeker is a true refugee, and if so, to provide all the concomitant rights to which refugees are entitled, including the right of *non-refoulement*. Only strict adherence to this principle can lead to a moral, efficient, and fair system of refugee protection.

Robert L. Newmark

APPENDIX

A DRAFT PROTOCOL RELATING TO THE STATUS OF
REFUGEES¹⁸¹

The States Parties to the Present Protocol,

Considering the inconsistent application of obligations arising out of the convention relating to the Status of Refugees done at Geneva on 28 July 1951 [hereinafter referred to as the "Convention"] and the Protocol relating to the Status of Refugees done at New York on 31 January 1967 [hereinafter referred to as the "Protocol I"], particularly obligations arising out of Article 33 of the Convention,

Noting with great dismay the disparity of treatment afforded refugees depending upon the interpretation of obligations undertaken by signatory states,

Believing that it is desirable that equal treatment should be enjoyed by all refugees covered by the definitions in the Convention and in the Protocol I irrespective of the signatory state they encounter,

Have agreed as follows:

ARTICLE I
GENERAL PROVISIONS

1. The States Parties to the present Protocol undertake to apply Article 33 of the Convention as hereinafter clarified.
2. The prohibition against expulsion or return ("refouler") of a refugee to the frontiers of territories where his or her life or freedom would be threatened applies to States Parties to the present Protocol regardless where such a refugee may be found so long as, in accordance with Article 1 of the Convention and Article 1 of the Protocol I, he or she is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country.
3. Without limiting the obligation of Article 33 of the Convention, the prohibition against expulsion or return ("refouler") expressly applies to refugees in international waters, and to refugees who have arrived at

181. The format of this Draft Protocol follows closely the format of The 1967 U.N. Protocol, *supra* note 4. The language in Articles II-XI, regarding implementation, mirrors the language in the relevant articles from the 1951 U.N. Convention, *supra* note 4, and the 1967 U.N. Protocol, *supra* note 4.

the border of a State Party to the present Protocol regardless whether such arrival be deemed lawful.

4. Nothing in the present Protocol shall be deemed to prevent a State Party to the present Protocol from applying an exception to the prohibition of expulsion or return ("refouler") as provided for in Article 33(2) of the Convention.

5. The existence of the present Protocol in no way implies that States party to the Convention or the Protocol I are not obligated to the standards set forth in the present Protocol. The present Protocol is not a change of the obligation of contracting states; it is merely a clarification of already existing obligations.

ARTICLE II CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

- a. The implementation of the present Protocol;
- b. The screening of refugees;
- c. Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees and the *non-refoulement* obligation.

ARTICLE III INFORMATION ON NATIONAL LEGISLATION

The States Parties to the Present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

ARTICLE IV SETTLEMENT OF DISPUTES

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

ARTICLE V ACCESSION

The present Protocol shall be open for accession on behalf of all the States Parties to the Convention or the Protocol I and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE VI FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention and the Protocol I to be applied in accordance with Article I of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention and the Protocol I to be applied in accordance with article I of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provi-

sion of the Convention or the Protocol I to be applied in accordance with article I of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE VII RESERVATIONS AND DECLARATIONS

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

3. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

4. Declaration made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect to the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

5. Reservations made by States Parties to the Protocol I in accordance with article VII thereof shall, unless withdrawn, be applicable in relation to the obligations under the present Protocol.

ARTICLE VIII ENTRY INTO FORCE

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

**ARTICLE IX
DENUNCIATION**

1. Any State Party hereto may denounce this Protocol at anytime by a notification addressed to the Secretary-General of the United Nations.
2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

**ARTICLE X
NOTIFICATIONS BY THE SECRETARY-GENERAL
OF THE UNITED NATIONS**

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

**ARTICLE XI
DEPOSIT IN THE ARCHIVES OF THE SECRETARIAT
OF THE UNITED NATIONS**

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.