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Non-Refoulement: The Search for a Consistent Interpretation of Article 33

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NOTES

Non-Refoulement: The Search for a Consistent Interpretation of Article 33

ABSTRACT

The international community rose to the challenge of addressing mass migration with the 1951 Convention Relating to the Status of Refugees (1951 Convention). The 1951 Convention established several important concepts as binding international law, including the requirements for refugee classification and the principle of non-refoulement. The duty of non-refoulement prohibits state-parties from expelling or returning a refugee in any manner whatsoever to the frontiers or 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. According to the definition in Article 33, non-refoulement is applicable only where there is an affirmative classification of refugee status as articulated in Article 1. The 1951 Convention and its 1967 Protocol are currently the guiding instruments on refugee law, and the 1951 Convention provides a minimum foundation for the rights of refugees.

Even though the 1951 Convention clearly outlines non-refoulement as an obligation of the 133 state signatories, the international debate focuses on the correct interpretation and scope of the principle in practice. A restrictive reading of Article 33 suggests that non-refoulement has narrow application to only those refugees who have already entered the territory of a receiving state. Opponents to the restrictive reading of Article 33, however, maintain the duty of non-refoulement is limited only by the affirmative classification of refugee status—the 1951 Convention imposes no other restrictions or requirements for persons seeking asylum.

States have adopted a variety of positions for implementation, which fall on a continuum based on their interpretation of non-refoulement. In addition, states have formulated legal mechanisms that coincide with their beliefs as to the extent of domestic obligations under Article 33. Because of these varied interpretations, the implementation of non-refoulement is inconsistent among states and the destiny of many refugees depends upon whether they reach the border of a state that interprets Article 33 more favorably than its neighbor. This Note argues for the necessity of a consistent international approach to the implementation of non-refoulement and analyzes the differing interpretations of Article 33 through judicial decisions to determine the state's legal, rather than political, position on the duty of non-refoulement.

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I. INTRODUCTION

1946: the International Refugee Organization (IRO), operating under the United Nations, assisted 1.6 million refugees in resettling and reintegrating into their European communities after the conclusion of World War II, not including those who fled Europe completely.¹ 1987: a staggering 13 million refugees were concentrated solely in Africa and Asia.² 2005-2006: the world experienced a global increase of 56 percent from 21 million to 32.9 million persons of interest to the United Nations High Commissioner for Refugees.³ 2006: of the recoverable data, 3.5 million refugees are under the age of eighteen.⁴

As globalization increases, problems that often faded into the backdrop of domestic policy now require international attention. Suddenly, the challenges facing one state become the challenges facing many, and the rest of the world feels even the smallest developments. In the context of refugees, issues surrounding the movement of people across borders necessitate collective action in response to massive amounts of people displaced by the most horrific conflicts and conditions in modern history.⁵ The era of stagnant domestic solutions has ended.

The international community rose to the challenge of addressing mass migration with the 1951 Convention Relating to the Status of Refugees (1951 Convention).⁶ The 1951 Convention established several important concepts as binding international law, including the requirements for refugee classification and the principle of non-refoulement.⁷ Non-refoulement prohibits states from returning refugees to territories where their life or freedom would be

1. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 119 (2d ed. 1996).

2. Ved P. Nanda, *Refugee Law and Policy*, in *REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES* 3, 5 (1989).

3. U.N. High Comm'r for Refugees [UNHCR], Div. of Operational Serv., Field Info. & Coordination Support Sec., *2006 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons*, at 4 (July 16, 2007), available at <http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf>.

4. *Id.* at 9.

5. *See, e.g., id.* at 4 (stating a fifty-six percent increase in the number of persons of interest in just one year).

6. *See generally* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention] (entered into force April 22, 1954; attempting to answer issues concerning refugees following World War II).

7. *Id.* art. 1(A)(2).

[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, [a refugee] is unwilling to avail himself of the protection of that country.

threatened for one of the reasons listed in the 1951 Convention.⁸ The principle pertains to the refugee's right not to be sent back to his or her country of origin unless there is a negative determination of refugee status.⁹ Under Article 33, non-refoulement is only applicable where there is an affirmative classification of refugee status as defined by Article 1.¹⁰

Non-refoulement is articulated in the 1951 Convention as a binding legal duty imposed on the signatories of the treaty; however, it is also considered by some scholars to be a foundational principle in the protection of refugee rights and customary international law.¹¹ Domestic courts of various states and scholars have found that non-refoulement applies not only to the parties that have signed and ratified the 1951 Convention but also to non-signatories as a norm established by state practice.¹² "The prohibition on refoulement, contained in art. 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all states, which arise when states follow certain practices generally and consistently out of a sense of legal obligation."¹³

The history of the principle of non-refoulement coincides with the increasing pressure to acknowledge the growing refugee problem in the twentieth century. The 1933 Refugee Convention marked the first time a multilateral international treaty contained a non-

8. *Id.*

9. *Id.* art. 33(1) ("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.")

10. *See id.* (restricting non-refoulement to refugees, as defined previously in Article 1, and noting that the threat to the refugee must be on account of the same factors used in considering whether a person qualifies for refugee status).

11. *See* GOODWIN-GILL, *supra* note 1, at 143 (arguing that non-refoulement is a binding norm under customary international law).

12. *See, e.g.,* Zaoui v. Attorney-General, [2005] 1 N.Z.L.R. 690, ¶ 34 (C.A.), *aff'd*, [2005] 1 N.Z.L.R. 577 (S.C.) (exercising court's power of judicial review from 1951 Convention application to nonparties, i.e. refugees such as Mr. Zaoui); Revenko v. Sec'y of State for the Home Dep't, [2001] Q.B. 601, ¶ 18 ("[I]t is common ground that Articles 31 and 33 [of the 1951 Convention] sufficiently reflect customary international law."). *See also* GOODWIN-GILL, *supra* note 1, at 143; Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 149 (Erika Feller, Volker Turk, & Frances Nicholson eds., 2003) (discussing whether non-refoulement is a principle of customary international law); *cf.* Haitian Ctr. for Human Rights v. United States, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 88 (1997) (holding that the principle of non-refoulement was part of customary international law).

13. *Zaoui*, [2005] 1 N.Z.L.R. 690, ¶ 34.

refoulement provision.¹⁴ The prohibition on refoulement, however, applied only to those refugees received as state-authorized arrivals.¹⁵ Subsequent to the 1933 Refugee Convention, the United Nations General Assembly established the United Nations High Commissioner for Refugees (the UNHCR).¹⁶ Through official resolutions, the UN charged the UNHCR with providing aid to refugees entitled to protection by prior treaties and arrangements.¹⁷ In addition, the UNHCR's mandate included overseeing "protection activities"; "for example, [the UNHCR was responsible for] ensuring that no refugee is returned to a country in which he or she will be in danger."¹⁸

Despite state protest, the drafters included the non-refoulement provision in Article 33 of the 1951 Convention, influenced by the vestiges of World War II, the 1933 Refugee Convention, and the work of the UNHCR.¹⁹ The 1951 Convention and its 1967 Protocol are currently the guiding instruments on refugee law, and the 1951 Convention provides a minimum foundation for the rights of refugees.²⁰ Various regional instruments subsequent to the 1951 Convention solidified states' obligations of non-refoulement by explicitly delineating that a state may not reject a person at the border if it would force that person to return or remain in a territory where his life, liberty, or physical integrity would be threatened.²¹

14. Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 159 L.N.T.S. 3663 [hereinafter 1933 Refugee Convention]; JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 302 (2005).

15. HATHAWAY, *supra* note 14, at 302.

16. G.A. Res. 428 (V), annex, ¶¶ 1–2, U.N. Doc. A/1775 (Dec. 14, 1950).

17. GOODWIN-GILL, *supra* note 1, at 7.

18. *Id.* at 8.

19. *Id.* at 119–24; *see also* HATHAWAY, *supra* note 14, at 279–80 (citing the example of the German Jews aboard the *St. Louis* who were refouled by several countries and thus, returned to Europe where they were exterminated).

20. Daniel J. Steinbock, *The Refugee Definition As Law: Issues of Interpretation*, in *REFUGEE RIGHTS AND REALITIES* 13, 13 (Frances Nicholson & Patrick Twomey eds., 1999). There are many regional instruments that were developed subsequent to the 1951 Convention, which grant more rights to refugees, but the 1951 Convention still serves as a minimum baseline of rights for refugees. *See, e.g.*, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, OAU Doc. CM/267/Rev. 1, 1001 U.N.T.S. 45, *reprinted in* 8 I.L.M. 1288 (1969) [hereinafter OAU Convention] (outlining specific context where refugees in Africa have rights); Protocol No. 4 to Amend the European Convention on Human Rights art. 3, Nov. 4, 1950, Europ. T.S. No. 5 (extending protection from expulsion and deprivation of re-entry to national persons); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. Doc. OEA/ser. L/V/II. 23 doc. 21, art. 22(7), *reprinted in* 9 I.L.M. 99, 107–08 (1970) ("Every person has the right to seek and be granted asylum.").

21. *See, e.g.*, OAU Convention, *supra* note 20, art. II(3) ("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 or remain in a territory where his life, physical integrity or liberty would be threatened . . .").

These regional instruments, however, bind a small number of states in comparison to the 1951 Convention.²² The principle of non-refoulement is promulgated in other modern, non-binding instruments as a cornerstone of international refugee law.²³

While non-refoulement is clearly outlined as an obligation to the 133 signatories of the 1951 Convention, the international debate focuses on the correct interpretation and scope of the principle in state practice.²⁴ Some states advocate an expansive reading of Article 33 while others insist that the plain text of the 1951 Convention narrows the scope of non-refoulement.²⁵ Part II outlines the debate regarding the manner in which Article 33 should be interpreted as well as the methodology developed in this Note, setting forth the embodiment of different state positions. Part III applies the methodology and surveys the landscape analyzing various approaches that state parties have taken to implement non-refoulement. Part IV proposes suggestions for remedying the lack of uniformity in complying with the obligation of non-refoulement under Article 33 of the 1951 Convention. Finally, Part V concludes the Note.

II. FRAMING THE DEBATE AND ESTABLISHING THE METHODOLOGY

A. *Framing the Debate: Different Sides of the Refugee Issue*

The basic theory behind the principle of non-refoulement has been established within the international community, and the language is crystallized in the 1951 Convention for state parties.²⁶ The Convention and its subsequent protocol, however, are not self-

22. As of 2002, fifty-three countries signed and ratified the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. List of Countries, African Union (May 26, 2007), available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Convention%20on%20Refugees.pdf>. In contrast, 133 states are party to the 1951 Convention. United Nations Treaty Collection, Convention Relating to the Status of Refugees, Status Information and Text (Feb. 5, 2002), available at <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm>.

23. See generally *San Remo Declaration on the Principle of Non-Refoulement*, in International Institute of Humanitarian Law, International Congress: Humanitarian Action and State Sovereignty, Aug. 31–Sept. 2, 2000, at 195 (on file with author) (stating the role of non-refoulement in modern international refugee law).

24. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 8 I.L.M. 679 [hereinafter Vienna Convention] (articulating the principle of *pacta sunt servada*, meaning that as a signatory to the Convention, States are legally obligated to fulfill the duties distributed by the Convention).

25. For a discussion of the positions taken by different States, see *infra* Part III.

26. See, e.g., GOODWIN-GILL, *supra* note 1, at 143 (claiming that the principle of non-refoulement is well established in international law).

executing instruments²⁷ and lack specific guidelines for the implementation of non-refoulement.²⁸ The conceptual gap between obligation and implementation stems from the precondition that non-refoulement applies only to persons who are determined to be refugees under Article 1 of the 1951 Convention.²⁹ “The [1951] Convention does not, moreover, require that a contracting state adopt any particular procedure for determining refugee status.”³⁰ Because there are no standardized procedures for determining those falling within the refugee definition, and because non-refoulement protection is limited to those defined as refugees, states have significant latitude in deciding which asylum-seekers have access to 1951 Convention protections.³¹ “The [1951] Convention defines a status to which it attaches consequences, but says nothing about procedures for identifying those who are to benefit.”³² States are bound only by a good faith effort to take necessary steps to implement the provisions of the 1951 Convention.³³ This standard affords states broad authority to subjectively implement non-refoulement as they deem appropriate, at the cost of international uniformity.³⁴

In addition to a lack of standardized application, there is no uniform interpretation of the scope of obligations encompassed under Article 33.³⁵ A restrictive reading of Article 33 suggests that non-refoulement would be limited to those who have already entered the territory of a receiving state.³⁶ This reading, proponents argue, is perfectly consistent with the text of the 1951 Convention, based on the drafters’ choice to use the key words “expel or return.”³⁷ “Expel or

27. Nanda, *supra* note 2, at 4–5 (“[E]ven for those states ratifying these instruments, the responsibility for operationalizing that definition and the provisions of the Convention and Protocol into domestic law is left to the states. Thus, without enabling acts incorporating the Convention into the municipal law of states, these conventions are not effective.”).

28. See generally 1951 Convention, *supra* note 6, art. 35 (noting that states agree to give information on their own implementation of the 1951 Convention; no specific guidelines are included in the Convention).

29. M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 A.L.R. 290, ¶ 9 (Austl.).

30. *Id.* ¶ 10.

31. Nanda, *supra* note 2, at 9.

32. *Id.* at 4–5 (explaining that the 1951 Convention is not self-implementing, thus “the responsibility for operationalizing [the 1951 Convention] definition and [its] provisions . . . into domestic law is left to the individual states.”) (citing GOODWIN-GILL, *supra* note 1).

33. See *id.*

34. For a discussion of the issues surrounding broad discretion in implementation and lack of uniformity, see *infra* Part IV.

35. Compare GOODWIN-GILL, *supra* note 1, at 121–22 (describing a restrictive reading of Article 33), with HATHAWAY, *supra* note 14, at 315 (explaining a more expansive reading of Article 33).

36. See GOODWIN-GILL, *supra* note 1, at 121–22 (explaining this interpretation of non-refoulement as the more restrictive reading).

37. 1951 Convention, *supra* note 6, art. 33.

return” implies that only refugees within the territory of the receiving state cannot be subject to refoulement.³⁸ Records from the Conference of the Plenipotentiaries in 1951 indicate that several delegates had this conception of Article 33, including the Swiss and Dutch delegations.³⁹ Furthermore, Article 33, read in light of Article 32, crystallizes the meaning of “expel or return,” because the language of Article 32 specifically addresses refugees in the territory of a receiving state with regard to expulsion.⁴⁰

Following the restrictive interpretation of Article 33, states have devised a variety of approaches to keep refugees outside their borders while declaring that such practices are consistent with their obligations under the 1951 Convention.⁴¹ Refugee law, including non-refoulement, is derived from the premise that states have no duty under international law to admit refugees at their borders.⁴² State mechanisms, such as visa controls and agreements with other states to divert the passage of refugees, keep refugees from reaching state borders and are used to exert control over territorial integrity as a sovereign right.⁴³ The next section will outline in detail the various mechanisms devised by states to avoid assuming responsibility for refugees, especially in cases of mass migration, and the compatibility of those mechanisms with legal obligations imposed by the 1951 Convention.

38. See GOODWIN-GILL, *supra* note 1, at 121–22 (stating that the restrictive reading of Article 33 did not coincide with the European view of immigration law in the mid-twentieth century).

39. See U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 16th mtg., UN Doc. A/CONF.2/SR.16 (Nov. 23, 1951), available at <http://www.unhcr.org/protect/PROTECTION/3ae68cdc14.html> (indicating the Swiss position on the correct interpretation of Article 33); see also U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 35th mtg., UN Doc. A/CONF.2/SR.35 (Dec. 3, 1951), available at <http://www.unhcr.org/protect/PROTECTION/3ae68ceb4.html> (indicating the Dutch position on the correct interpretation of Article 33).

40. See GOODWIN-GILL, *supra* note 1, at 206 (“The words ‘expel or return’ . . . have no precise meaning in general international law. . . . [A]lthough article 32 possibly implies that measures of expulsion are reserved for lawfully resident aliens.”).

41. For an explanation of the different schemes devised by States, see *infra* Part III.

42. GOODWIN-GILL, *supra* note 1, at 25–28; Nanda, *supra* note 2, at 9 (“[States] retain the sole discretion to determine who enters their territory and on what terms.”); see also NAGV & NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs (2005) 213 A.L.R. 6, ¶ 14 (Austl.) (“First, customary international law deals with the right of asylum as a right of states not individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a state of which the individual is not a national.”).

43. HATHAWAY, *supra* note 14, at 310–11 (stating that visa controls imposed on nationals of states tending to produce large numbers of refugees is a classic tool used by states to reduce the probability of receiving refugee). This tool is commonly referred to as *non-entrée*. *Id.* Article 33 does not invalidate these types of procedures. *Id.*

Critics of the restrictive reading of Article 33 maintain that the language contained within the 1951 Convention is limited only by an affirmative classification of refugee status and imposes no other restrictions for persons seeking asylum.⁴⁴ Critics argue, “[t]he duty of non-refoulement has ordinarily been understood to constrain not simply ejection from within a state’s territory, but also non-admittance at its frontiers.”⁴⁵ This reading is consistent with the derivation of Article 33 from its predecessor, Article 3 of the 1933 Refugee Convention, which “explicitly codified non-admittance as an aspect of refoulement.”⁴⁶ Records also indicate that the drafters of the 1951 Convention intended the principle of non-refoulement to prohibit states from engaging in summary removal and denial of access.⁴⁷ In fact, critics argue the drafters meant the language “expel or return” to convey a broad proscription against non-admittance and ejection, rather than a restrictive interpretation of non-refoulement, applying only to those who successfully crossed the border.⁴⁸

B. *Establishing the Methodology: Discerning the Various Positions on Article 33*

This Note seeks to survey the determinations of states around the world regarding asylum policies and refugee classifications to discern state conceptions of obligations under Article 33. To provide a

44. See, e.g., *id.* at 315 (explaining the position that Article 33 only imposes limited obligations on States party to the 1951 Convention).

45. *Id.* at 315; see also U.N. Exec. Comm. on the Int’l Prot. of Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees 1975–2004*, No. 6 “Non-Refoulement,” at 8, ¶ c (1977), available at <http://www.unhcr.org/publ/PUBL/41b041534.pdf> (last visited Dec. 22, 2008) (describing the critical role of non-refoulement within the territory of a state and at the border); Lauterpacht & Bethlehem, *supra* note 12, at 122.

46. 1933 Refugee Convention, *supra* note 14, art. 3; HATHAWAY, *supra* note 14, at 315.

47. See U.N. Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session, 21st mtg.*, at 5, U.N. Doc. E/AC.32/SR.21 (Feb. 2, 1950) (documenting the position of the delegates of the United Kingdom and France that non-refoulement could apply to refugees seeking admission as well as those in the country).

48. HATHAWAY, *supra* note 14, at 316–17; see U.N. Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Belgium and the United States of America: Proposed Text for Article 24 of the Draft Convention Relating to the Status of Refugees*, UN Doc. E/AC.32/L.25 (Feb. 2, 1950) (providing evidence that “expel or return” was intended to have a broad meaning based on the statement of the Belgian co-sponsor [Mr. Cuvelier] of the text: “The duty [of non-refoulement] has been expanded to an undertaking ‘not to expel or in any way [return] refugees’ [with this article referring to] ‘various methods by which refugees could be expelled, refused admittance or expelled.’”); see also U.N. Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session, 22nd mtg.*, at 20, UN Doc. E/AC.32/SR.22 (Feb. 14, 1950) (recounting the statement of Mr. Cuvelier of Belgium).

descriptive and analytical account of a state's position, this Note determines the *opinio juris*⁴⁹ of the international community by examining domestic, regional, and supra-national court decisions of different actors in the international arena.⁵⁰ *Opinio juris*—states' perceptions of their legal duties as signatories to the 1951 Convention and under subsequent implementing legislation—is best reflected by judicial decisions.⁵¹ Three main reasons explain why *opinio juris* is correctly reflected in court decisions, as opposed to state policy positions or other political products.

First, because the 1951 Convention lacks a supra-national enforcement mechanism with de facto power to compel state behavior, *opinio juris* is critical to determining state behavior.⁵² If the state believes that it has a genuine obligation of non-refoulement under international law, compliance with Article 33 will be much more consistent and widespread. The debate regarding the scope of obligations of states under Article 33 leaves the door open for states to shape how refugee issues will be handled.⁵³ With freedom of interpretation, states will pursue their national interests, even if those interests conflict with the state's obligations under the 1951 Convention.⁵⁴ Therefore, *opinio juris* translates into what the state perceives it can do in its national interest while remaining within the confines of its binding legal obligations under international law.

Second, examining judicial decisions serves as an indicator of what the state believes it must do as a matter of international legal obligation deriving from its signature to the 1951 Convention. Judicial decisions of the courts examined in the following section constrain the ability of policy-makers to enact legislation concerning

49. BLACK'S LAW DICTIONARY 1125 (8th ed. 2004) ("The principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.").

50. For a sampling of the different court decisions used to comprise the *opinio juris* of States, see *infra* Part III.

51. Advocating this methodology of examining judicial decisions of various international actors, which leads to a discernable sense of *opinio juris* in the international community, supports the case that non-refoulement is solidified in customary international law. For a discussion of whether non-refoulement is part of customary international law, see *supra* Part I.

52. See 1951 Convention, *supra* note 6, art. 38 (showing that Article 38 is the main enforcement mechanism in the Convention). The text of Article 38 follows: "Any dispute between Parties to this Convention relating to its interpretation or application, 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." *Id.*

53. See the discussion *supra* Part II.A for an outline of the debate regarding the obligations of states under Article 33.

54. See M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541, 542 (2006) (arguing that States are not motivated by values that bind humanity but rather by changing and finite interests).

non-refoulement.⁵⁵ This is not to suggest that the judicial decisions create, or even best describe, the political policy of the state.⁵⁶ Instead, in judicial decisions the legal obligations of the state are set forth in a way that marks outer boundaries limiting policy-makers.⁵⁷ Furthermore, these outer boundaries are accompanied by thorough explanations of the reasoning behind the court's conclusion and the effect that conclusion has on compliance with Article 33.⁵⁸

Third, the concrete limits articulated by judicial decisions better indicate the state's belief that it must comply with Article 33 as a matter of international obligation than any isolated piece of legislation or policy statement. Legislation and policy statements are often reactionary and based on the current status of domestic politics.⁵⁹ Legislation is not typically binding on future legislative acts, unless otherwise specified, and does not necessarily represent overarching societal norms.⁶⁰ Judicial decisions, on the other hand, more carefully weigh the potential long-term effects of a particular policy and provide jurisprudential analysis of how that policy coincides with the legal commitments of the state.⁶¹ Similarly, the legal obligations of a state set forth in Article 33 are fixed.⁶² They tend to be more ideologically stable than the political climate of a state, and as such, the judicial framework best captures the interplay

55. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537–38 (1991) (stating the doctrine of precedent in U.S. courts where a higher court issues an authoritative ruling on a matter of law, that ruling must be applied in subsequent cases to similarly situated parties); *Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)*, (1977) 1 W.L. 1345, 1346 (H.L.) (U.K.) (“[A]fter a decision of the House of Lords has been delivered with all appearance of finality . . . [i]n the absence of such a change of circumstances . . . it requires more than doubts as to the correctness of such an opinion to justify departing from it.”).

56. See, e.g., *Airedale N.H.S. Trust v. Bland*, (1993) A.C. 789, 880 (H.L.) (U.K.) (“The judges’ function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society.”).

57. *Id.*

58. See Gillhams Solicitors LLP, *Legal Meanings, Ratio Decidendi*, <http://www.gillhams.com/dictionary/243.cfm> (last visited Dec. 23, 2008) (explaining *ratio decidendi* as the legal reasoning of a judge in reaching his conclusion, which is binding on lower courts).

59. Cf. D. MICHAEL SHAFER, *WINNERS AND LOSERS: HOW SECTORS SHAPE THE DEVELOPMENTAL PROSPECTS OF STATES* 42–45 (1994) (arguing that all actors, especially leading-sector actors, pressure State actors in an attempt to influence policy that will reflect their current interests).

60. See HANS KELSEN, *PURE THEORY OF LAW* 277 (Max Knight trans., The Lawbook Exchange Ltd. 2002) (describing how legal norms [legislation] can be annulled [repealed] making it inapplicable to future acts at the time of annulment).

61. Donald E. Childress III, *Using Comparative Constitutional Law To Resolve Domestic Federal Questions*, 53 DUKE L.J. 193, 210 (2003) (explaining in the context of common law systems that judicial decisions allow for great flexibility by looking at the totality of evidence to render an appropriate decision).

62. See generally Vienna Convention, *supra* note 24 (defining the obligations of States as fixed by a treaty unless the treaty is amended or repealed).

between what the 1951 Convention mandates and what the state thinks is permissible under international law.⁶³

This methodology will be applied in Part III in an attempt to survey the different positions of states regarding the specific obligations imposed by Article 33. In addition to the descriptive survey of state positions, Part III analyzes each position's validity in terms of the plain reading of Article 33 and its fundamental, yet controversial, status as part of customary international law. Ultimately, the *opinio juris*, derived from judicial decisions in this Note, leads to Part IV, which attempts to propose durable solutions for regularizing the interpretation of Article 33 and its application to refugees.

III. SURVEYING THE LANDSCAPE: DIFFERENT APPROACHES STATES HAVE TAKEN TO IMPLEMENT THE PRINCIPLE OF NON-REFOULEMENT

State approaches vary without clear guidelines for the best, or even sufficient, implementation of non-refoulement in domestic legal systems. Approaches to implementation fall along a spectrum, ranging from heavily restrictive border access to loosely restrictive border access.⁶⁴ None of the following states, however, have a position on either extreme of the spectrum, because settled notions of international refugee law establish that non-refoulement is an enforceable legal obligation under the 1951 Convention and that it does not entitle a person to refugee status or asylum.⁶⁵ Instead, the range of positions on the spectrum indicates disagreement over the extent of the legal obligation Article 33 articulates.

This Note addresses four distinct state positions that represent different domestic approaches to implementing non-refoulement. The

63. The case for the methodology used in this Note is largely based on the selection of primarily common-law judicial decisions as evidence of the *opinio juris* of the international community. With that understanding, however, civil law examples are also considered to support the accurate analytical approach taken in this Note to characterize the *opinio juris* of the international community. For a discussion involving evidence from a civil law system, see the discussion of the French approach, *infra* Part III.C.

64. See Framing the Debate, *supra* Part II.A (explaining the distinctions between a restrictive reading and a more liberal reading of Article 33).

65. HATHAWAY, *supra* note 14, at 300–01 (noting that non-refoulement does not entitle a person to refugee status or require a state to accept all refugees at its borders); Jens Vedsted-Hansen, *Non-Admission Policies and the Right To Protection: Refugees' Choice Versus States' Exclusion?*, in REFUGEE RIGHTS AND REALITIES 269, 274–75 (Frances Nicholson & Patrick Twomey eds., 1999) (suggesting that non-refoulement is an obligation binding states that are party to the 1951 Convention and also an obligation stemming from a state's duty to protect basic human rights within its jurisdiction).

first position is the approach of absolute state sovereignty and, in turn, interprets obligations of non-refoulement narrowly in relation to other approaches.⁶⁶ The second position is a collective approach to non-refoulement. Using this approach, states have developed a series of mechanisms—usually legal procedure—to retain control over the final destination of refugees without violating non-refoulement.⁶⁷ The third position, known as the collective approach with a twist, outlines certain procedural mechanisms that allow states to refuse review of asylum claims and thus remove applicants from their borders.⁶⁸ The final position, or the restrictive definitional approach, uses the textual ambiguity of Article 33 to exclude certain classifications of applicants, though already acknowledged as refugees under Article 1, from non-refoulement protections.⁶⁹ Examining each approach, the states' jurisprudence not only reveals their positions but also their interests and concerns in devising legal mechanisms that reconcile the tension between treaty obligations and conflicting state policies.

A. *The Absolute State Sovereignty Approach*

States following the absolute state sovereignty approach conceive of their non-refoulement obligation under the 1951 Convention as applicable only when a person seeking refugee status successfully makes it to their borders.⁷⁰ These states find no obligation in the 1951 Convention requiring parties to facilitate the arrival of refugees into their territory.⁷¹ By itself, the proposition is relatively uncontroversial—the 1951 Convention has no language requiring states to assist refugees in leaving their country of origin and arriving at the border of a receiving state.⁷² States that support this approach, however, submit that affirmatively preventing potential refugees from reaching their borders is also consistent with Article 33 obligations.⁷³ The absolute state sovereignty approach recognizes the 1951 Convention as support for a crucial distinction between expelling a refugee who has gained access to a state's border, which

66. For an in depth discussion of this approach, see *infra* Part III.A.

67. For an in depth discussion of this approach, see *infra* Part III.B.

68. For an in depth discussion of this approach, see *infra* Part III.C.

69. For an in depth discussion of this approach, see *infra* Part III.D.

70. See HATHAWAY, *supra* note 14, at 310 (pointing to the language of the 1951 Convention as not requiring states to assist refugees in leaving their country of origin).

71. *Id.*

72. *Id.* at 310 (reaffirming that Article 33 is not concerned with ensuring a successful escape of refugees from their country of origin) (quoting *R (European Roma Rights Ctr. and 6 Others) v. Immigration Officer at Prague Airport*, (2003) E.W.C.A. Civ. 666, *rev'd on other grounds*, (2004) A.C. 55 (H.L.) (appeal taken from E.W.C.A. Civ.)).

73. See, e.g., *Sale v. Haitian Ctr. Council*, 509 U.S. 158, 187–88 (1993) (ruling that Article 33 does not impose a prohibition on states to take measures, which prevent refugees from reaching their borders).

Article 33 does not permit, and actively inhibiting a refugee from gaining access to the border, which Article 33 does permit.⁷⁴

States following the absolute sovereignty approach use various methods to prevent refugees from reaching their borders. One method is to send national authorities of the receiving state to a country producing an influx of refugees to implement pre-entry clearance procedures.⁷⁵ Pre-entry clearance procedures allow the receiving state to forestall the flow of refugees by denying them access to the receiving state's border before they leave their country of origin.⁷⁶ A British Court of Appeals upheld this approach in *European Roma Rights*.⁷⁷ The court reasoned that no permissible construction of Article 33 confers a right on refugees to access the territory of another country.⁷⁸ In fact, the court noted that the 1951 Convention does not address whether states should be obligated to help refugees escape their country of origin; rather, it addresses only where refugees must not be sent.⁷⁹ From this foundation, the court concludes that states have no duty to facilitate the arrival of refugees and that states are entitled to take active steps to prevent their arrival.⁸⁰ The court linked these two concepts by stressing that Article 33 does not address action that causes a refugee to remain in his country of origin, and any such action does not constitute refoulement.⁸¹

The U.S. approached non-refoulement in a similar manner by taking active steps to prevent refugees from reaching its borders. The U.S. government ordered the Coast Guard to intercept vessels on the high seas containing Haitians attempting to immigrate to the United States and return them to Haiti.⁸² Using a similar methodology as the UK, the U.S. Supreme Court in *Sale v. Haitian Ctr. Council* ruled the correct textual interpretation of Article 33 did not prohibit the U.S. Coast Guard from intercepting Haitian refugees

74. HATHAWAY, *supra* note 14, at 310.

75. See *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 3 (describing the use of these procedures at the Prague airport to prevent large numbers of ethnic Romas from reaching the United Kingdom).

76. HATHAWAY, *supra* note 14, at 308.

77. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 3.

78. *Id.* ¶ 37.

79. *Id.* ¶ 37.

80. *Id.* ¶ 43.

81. *Id.* ¶ 31.

For good measure article 33 forbids "refoulement" to "frontiers" and, whatever precise meaning given to the term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier.

Id.

82. See *Sale v. Haitian Ctr. Council*, 509 U.S. 158, 158 (1993) ("President has directed the Coast Guard to intercept vessels.").

before they reached the border.⁸³ The Court began by noting that based on a plain textual reading, Article 33 cannot apply extraterritorially given the parallel use of the terms “expel or return,” the interplay between Article 33(1) and Article 33(2), and the negotiating history of the 1951 Convention.⁸⁴ The Supreme Court held “because the text of Article 33 cannot reasonably be read to say anything at all about a nation’s actions towards aliens outside its own territory, it does not prohibit such actions [of preventing asylum-seekers from reaching the border].”⁸⁵

The reasoning of the British Court of Appeals and the U.S. Supreme Court seems strikingly similar in principles of statutory construction and in the effects of the preferred interpretation.⁸⁶ Both courts began with the proposition that no reasonable reading of Article 33 would support extraterritorial application.⁸⁷ Next, the courts determined that Article 33’s lack of specific language extending its scope beyond refugees already within the state’s territory renders it incapable reaching action taken towards people outside the state’s territory.⁸⁸ In essence, under the British and American approaches, the language of Article 33 effectively places a geographic limitation on the application of non-refoulement.⁸⁹ The UK and U.S. reach the same pivotal conclusion: states have the right under non-refoulement to take positive action to prevent refugees’ access to their borders.⁹⁰

83. Compare *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶¶ 49–50, with *Sale*, 509 U.S. at 187.

84. *Sale*, 509 U.S. at 179–83, 186–87; cf. HATHAWAY, *supra* note 14, at 339 (arguing that states have a duty to respect non-refoulement rights wherever a state exercises effective or *de facto* jurisdiction outside its own territory; thus, there is not a specific geographic limitation on Article 33).

85. *Sale*, 509 U.S. at 183; cf. GOODWIN-GILL, *supra* note 1, at 124 (“Certain factual elements may be necessary . . . before the principle [of non-refoulement] is triggered, but the concept now encompasses both non-return and non-rejection [of the asylum-seeker at the border].”).

86. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 31; *Sale*, 509 U.S. at 183.

87. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 37; *Sale*, 509 U.S. at 182.

88. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 31; *Sale*, 509 U.S. at 183.

89. Cf. *Haitian Ctr. for Human Rights v. U.S.*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 157 (1997) (“The Commission shares the view advanced by the UN High Commissioner for Refugees in its *amicus curiae* brief in its argument before the Supreme Court, that Article 33 had no geographic limitations.”).

90. See *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶¶ 30–31 (holding that the screening procedures at Prague airport were not a violation of Article 33); see also *Sale*, 509 U.S. at 187–88 (holding that the interception of Haitian refugees on the high seas and returning them to Haiti was not a violation of Article 33).

Despite nearly identical reasoning, the British Court of Appeals distinguished the *European Roma Rights* case from *Sale*.⁹¹ In fact, the British court regarded *Sale* as wrongly decided because it used an outdated approach.⁹² The Court of Appeals stated that “preventing an aspiring asylum seeker from gaining access from his own country to its territory and on the other hand returning such a person to his own country . . . is a crucial distinction.”⁹³ The British Court of Appeals, however, seems to overstate the distinction between these two cases. While UK procedures stop the refugee in his country of origin, rather than the high seas, the UK procedures had the same effect as the U.S.—ensuring refugees did not gain access to the border.⁹⁴ The UK simply saved the trouble of returning the asylum-seekers to the Czech Republic by intercepting them before they left.⁹⁵ The British court’s distinction is not legally sustainable; in both cases, the state took affirmative action to secure its borders from refugees by using state procedures to ensure asylum-seekers could not access the border.⁹⁶ The methods—interception on the high seas and interception in the country of origin—are indistinguishable in terms of implications for the principle of non-refoulement.

Equally unfounded is the distinction between access denial procedures, such as that of the UK and the U.S., and visa

91. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 43.

92. *Id.* ¶ 34 (“I propose to regard the *Sale* case as wrongly decided; it certainly offends one’s sense of fairness.”). Instead, the court referenced Justice Blackmun’s dissenting opinion as the approach consistent with the Inter-American Commission on Human Rights decision and thus, the approach to be followed. *See Sale*, 509 U.S. at 190 (Blackmun, J., dissenting).

The terms [of Article 33] are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry . . . Article 33.1 is clear not only in what it says, but also in what it does not say: It does not include any geographical limitation. It limits only where a refugee may be sent “to,” not where he may be sent from. This is not surprising, given that the aim of the provision is to protect refugees against persecution.

Id.; see also GOODWIN-GILL, *supra* note 1, at 143 (arguing that the majority opinion in *Sale* was not based on proper analysis of United States obligations under international law, but rather an attempt to confer domestic legal principles on the practice of returning refugees to their country of origin).

93. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 43.

94. Compare *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, with *Sale*, 509 U.S. at 187 (both cases resulting in the active prevention of refugees from reaching the receiving state’s border).

95. See generally *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶¶ 2–3 (noting that the pre-entry screening clearance took place in Prague, prohibiting refugees from leaving the Czech Republic if their destination was the United Kingdom).

96. *Id.* ¶ 6; *Sale*, 509 U.S. at 187–88.

requirements.⁹⁷ This distinction maintains that visa controls are a passive mechanism with no need for the state to actively establish its presence outside its own territory.⁹⁸ The British Court of Appeals addressed the possibility that visa controls could, in fact, be more harmful to asylum-seekers due to a lack of selectivity and routine scrutiny.⁹⁹ The terms “active” and “passive” are misnomers; the visa process is an affirmative procedure just as the pre-entry clearance procedure is an affirmative procedure used to secure the border.¹⁰⁰ The claim that visa procedures constitute passive legal mechanisms because states use them without intent to deny potential refugees border access is controversial and insignificant in the non-refoulement analysis.¹⁰¹ In either case, the state knowingly assumes the risk that its actions prevent potential refugees from reaching the border. Furthermore, suggesting that visa procedures are inconsistent with Article 33 would be contrary to an appropriate reading of the 1951 Convention and customary international law—there is little debate that states have the sovereign right to control immigration and secure their borders.¹⁰²

Although British and American courts have upheld the use of affirmative procedures to prevent refugees’ access to the state’s border as consistent with non-refoulement, critics argue that such procedures, while not prohibited under a literal reading of Article 33, are inconsistent with the general intent of the 1951 Convention.¹⁰³ The British Court of Appeals responded to this argument by pointing out that many other refugees can take advantage of non-refoulement besides those asylum-seekers prevented from accessing the receiving state’s border; thus, Article 33 is not nullified in light of affirmative procedures denying border access.¹⁰⁴ In addition, the court noted that its critics’ argument leads to the conclusion that states cannot control immigration by inhibiting refugees from reaching their shores, which either precludes the application of the definition of “refugee” as a limiting factor or places obligations on the state that were not part of the 1951 Convention.¹⁰⁵

97. HATHAWAY, *supra* note 14, at 310 n.163 (arguing that visa requirements are not *de facto* contrary to Article 33; yet, visas may have the effect of refoulement due to their inability to distinguish between persons at risk of persecution and others).

98. *Id.* at 311.

99. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶¶ 49–50; HATHAWAY, *supra* note 14, at 312.

100. HATHAWAY, *supra* note 14, at 311–12.

101. *See, e.g., id.* at 310 n.163 (claiming that visa requirements are not issued with the intent to prevent refugees from leaving their country of origin.).

102. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶¶ 49–50.

103. *Id.* ¶ 47.

104. *Id.*

105. *Id.* ¶ 47.

The argument that denying border access is contrary to the 1951 Convention drafters' intent is unpersuasive for other powerful reasons. If the language of Article 33 placed an obligation on states not to expel refugees from their territory and prohibited states from preventing refugees' access to their territory, then the approaches the U.S. and the UK took would constitute a clear violation of the non-refoulement duty.¹⁰⁶ Article 33, however, contains neither any language illustrating this effect nor any language that clearly demonstrates the drafters' intent to prohibit states from denying refugees border access.¹⁰⁷ Instead, Article 33 places a much more limited obligation on states—not to expel refugees from within their territory.¹⁰⁸

Related to the "intent of the drafters" argument, some critics maintain that the good faith principle of treaty interpretation should prevent states from denying refugees access to their territory as a part of their legal obligations agreed to as part of the 1951 Convention.¹⁰⁹ The good faith principle—to be bound by the provisions of the treaty and perform obligations in good faith—governs legal obligations created through treaties.¹¹⁰ The good faith principle, though, cannot be relied upon as the source of a legal obligation but can only dictate the way in which states perform treaty duties, freely and voluntarily agreed.¹¹¹ Cast in such a way, the principle would incorrectly impose more duties on states than the limited obligations to which they consented through the treaty.

Opponents' portrayal of the absolute sovereignty approach as unsympathetic to the plight of refugees betrays a superficial understanding of the approach. First and foremost, both the UK and U.S. noted in their decisions the severe consequences when a refugee is unable to reach the receiving state's border and that states face difficult decisions in balancing those consequences with other

106. See HATHAWAY, *supra* note 14, at 315 (stating the initial purpose of non-refoulement was to prevent countries with summary removal laws or denial of access laws from relying on those laws to undermine the general restrictions on the expulsion of refugees); see also Lauterpacht & Bethlehem, *supra* note 12, at 106–07 (pointing out the humanitarian nature of the 1951 Convention).

107. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 43; *Sale v. Haitian Ctr. Council*, 509 U.S. 158, 183 (1993).

108. *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 43.

109. See *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275, 297 (June 30); *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 43.

110. See *Vienna Convention*, *supra* note 24, art. 26 (containing the good faith principle); *Cameroon Boundary*, 1998 I.C.J. at 297 (“[T]he principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969.”).

111. *Cameroon Boundary*, 1998 I.C.J. at 297.

domestic effects related to immigration.¹¹² Yet, states that subscribe to this approach are not inherently opposed to proscribing affirmative action preventing refugees from reaching the border.¹¹³ Rather, they interpret denying refugees border access as consistent with the duty of non-refoulement because they find no explicit or implied contrary intent in the 1951 Convention.¹¹⁴ To these states, the issue presented here is a matter of treaty interpretation rather than proper policy regarding refugees.¹¹⁵ This argument provides an ideal example of the intersection between the legal force of a treaty and the normative overlay driving the treaty. Strong normative principles drive the 1951 Convention; however, only those principles the treaty embodies can provide the source of binding legal obligations on states.¹¹⁶

112. See *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 43 (“None of this [the current scheme of visa requirement and liability], I readily acknowledge, is entirely satisfactory. In an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities by allowing entry into their own country.”); see also *Sale*, 509 U.S. at 187–88 (holding that deciding whether the President’s chosen method of migration control poses a greater risk of harm to the Haitians is not the province of the Court; rather, the Court will only pass upon whether the President had the authority to take such action, which he did).

113. *Haitian Ctr. for Hum. Rts. v. U.S.*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 76 (1997).

It should be noted in this regard that no state party to the Refugee Convention, including the last session of the Executive Committee of the UN High Commissioner for Refugees, which was held after the Supreme Court rendered its decision that the non-refoulement obligation of art 33 does not apply with respect to Haitians interdicted on the high seas, has lodged any objection with respect to the United States’ interpretation of its treaty obligation as applied to the case at hand. No other country in the region appears to take the view that it is bound to let Haitian refugees into its country.

Id.

114. The Inter-American Commission on Human Rights noted in its decision that while it was not the appropriate body to decide whether the United States was complying with its obligations under the 1951 Convention in the *Sale* case, no state-party, including the UNHCR, issued an official complaint regarding the Supreme Court’s interpretation of Article 33. *Haitian Ctr. for Hum. Rts. v. U.S.*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 76 (1997). *But see* HATHAWAY, *supra* note 14, at 338 (arguing that the 1951 Convention explicitly states a broader conception of non-refoulement obligations by an amendment to include the phrase “in any manner whatsoever” in Article 33).

115. See *European Roma Rights Ctr.*, (2003) E.W.C.A. Civ. 666, ¶ 46 (“It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.”) (quoting *A v. Minister for Immigr. and Ethnic Aff.* (1997) 190 C.L.R. 225, 248 (Austl.)); see also *Sale*, 509 U.S. at 187 (“While we must, of course, be guided by the high purpose of [the treaty] . . . [due to our textual interpretation] we are not persuaded that . . . [it limits] the President’s authority to repatriate aliens interdicted beyond the territorial seas of the United States.”).

116. *Sale*, 509 U.S. at 183.

B. *The Collective Approach to Non-Refoulement*

The collective approach to non-refoulement involves an intricate series of mechanisms used by states, ensconced by multilateral and bilateral agreements, to relocate refugees from one state to another.¹¹⁷ The refugee redistribution follows two main procedures: the “first country of arrival” rule and the “safe third country” rule.¹¹⁸ The first country of arrival mechanism, best exemplified by the European Union through the Dublin Convention, requires the first member state at whose border the applicant presents himself to be responsible for reviewing the asylum claim and granting or refusing asylum.¹¹⁹ The safe third country rule allows states to send an applicant to another member country through which the applicant has passed so long as that country will review the applicant’s asylum claim.¹²⁰ These agreements permit states to redistribute refugees to other “safe countries of asylum” in order to better allocate the responsibility of providing asylum.¹²¹

Proponents support the legality of the collective approach to non-refoulement by arguing that while Article 33 prohibits states from expelling refugees to a territory where their life or freedom would be threatened, non-refoulement does not impose an affirmative obligation to admit refugees into the receiving state’s territory.¹²²

The drafters of the Convention and the parties . . . may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.

Id.

117. For a discussion of first country of arrival and safe third country rules, see *infra* Part III.B.

118. See Guy S. Goodwin-Gill & Kathleen Newland, *Forced Migration and International Law*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 123, 126 (2003) (explaining how refugees can be diverted to countries other than the one in which they presently reside).

119. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities art. 8, June 15, 1990, 1997 O.J. (C 254) 1 [hereinafter *Dublin Convention*] (entered into force Sept. 1, 1997); see also Nazaré Albuquerque Abell, *Safe Country Provisions in Canada and in the European Union: A Critical Assessment*, 31 *INT’L MIGRATION REV.* 569, 571–72 (1997) (describing the first country of asylum rule in the broader scheme of safe country of asylum policies).

120. HATHAWAY, *supra* note 14, at 312.

121. See Goodwin-Gill & Newland, *supra* note 118, at 126 (stating that burden-sharing is an effect of the introduction of safe third country rules).

122. See *S115/00A v. Minister for Immigr. & Multicultural Aff.*, (2001) 180 A.L.R. 561, ¶ 6 (Austl.) (“[Art. 33] imposes obligations falling short of creating a right in a refugee to seek asylum, or a duty on the part of Australia (as a Contracting State) to grant it.”).

Since no obligation to grant asylum exists, receiving states subscribing to the collective approach send refugees to third states as long as the third state does not expel the applicant to a fourth state that would endanger the applicant's life or freedom.¹²³ This approach, however, is subject to substantial variation regarding the extent to which a receiving state is responsible for ensuring a third state does not expel the applicant to a territory that does not provide the protections guaranteed under the 1951 Convention.¹²⁴

Canadian case law supports state involvement in multilateral agreements with other countries under the safe third country rule as consistent with Article 33.¹²⁵ Canada's Immigration Act, implementing non-refoulement in the Canadian domestic legal system, allows a refusal to review an applicant's asylum claim if coming from a receiving state that has agreed to share the responsibility of examining asylum applications.¹²⁶ The Canadian Court of Appeals points out that according to the Immigration Act, safe third country agreements can only be made with "countries that comply with Art. 33 of the [1951] Convention."¹²⁷ In fact, the Canadian Supreme Court held that Canada shares responsibility for any breach, even if Canada's involvement is indirect, when Canada sends an applicant to a safe third country that then violates Article 33.¹²⁸ Thus, Canada seeks to minimize the risks inherent to safe asylum country schemes by statutorily requiring that other countries involved in the scheme are signatories to the 1951 Convention and implement Article 33 domestically.

On the other hand, some countries utilize the safe third country rule without any requirement that the third state comply with the 1951 Convention. Australia, for example, does not require the safe third country be party to the 1951 Convention.¹²⁹ Instead, Australian

123. See *M38/2002 v. Minister for Immigr. & Multicultural & Indigenous Aff.*, (2003) 199 A.L.R. 290, ¶ 39 (Austl.) ("[Art. 33] is an obligation not to expel from its territory a person who is determined to be a refugee within Art. 1 to the frontiers of a territory in which there is a threat to his or her life or freedom for a Convention reason.").

124. Compare *Thabet v. Minister of Citizenship & Immigr.*, [1998] 4 F.C. 21 (Can.) (requiring Canada to ensure that a country to which a refugee is sent will not violate Article 33), with *S115/00A*, (2001) 180 A.L.R. 561, ¶ 6 (allowing Australia to send a refugee to a country that is not bound by Article 33).

125. See, e.g., *Thabet*, 4 F.C. at 9 (affirming Canada's use of agreement to divert refugees to other countries).

126. Immigration Act, R.S.C., ch. I 2 §§ 46.01(1), 114(1)(s) (1985) (Can.); see *Thabet*, 4 F.C. at 9 (explaining the application of § 46.01(1) and § 114(1)(s)).

127. *Thabet*, 4 F.C. at 9 (citing § 114(1)(s) of the *Immigration Act*).

128. See *Suresh v. Can.*, [2002] 1 S.C.R. 3 (Can.) (ruling primarily in regards to breach of a domestic duty but containing analysis helpful for understanding the international obligation under Article 33); see also HATHAWAY, *supra* note 14, at 335.

129. See *S115/00A v. Minister for Immigr. & Multicultural Aff.*, (2001) 180 A.L.R. 561, ¶ 6 (Austl.).

courts have held that it is consistent with Article 33 to permit the receiving state's removal of an applicant to a third country if the third country has accorded the applicant effective protection.¹³⁰ One Australian court articulated the standard for effective protection as follows: "[S]o long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where he will not be under any risk of being refouled to his original country, that will suffice."¹³¹ This standard places the onus on the fact-finder to assess the realistic situation and current practices of the third country and to determine whether there is a likely chance that the refugee will receive effective protection.¹³²

Importantly, in order to find that a third country affords effective protection such as described above [in accordance with Article 33], it is not necessary to show that (i) the applicant has already been granted refugee status in that country (ii) the third country is a party to the Convention . . . or (iii) the applicant has a right of resident in that country.

Id.; see also HATHAWAY, *supra* note 14, at 328. This position is demonstrated by Australia's "Pacific Strategy," which allows refugees to be removed from Australia to States not party to the 1951 Convention. For a detailed discussion regarding the objectives of the "Pacific Strategy" and its inconsistency with Australia's responsibility under international refugee law, see Susan Kneebone & Sharon Pickering, *Australia, Indonesia, and the Pacific Plan*, in *NEW REGIONALISM AND ASYLUM SEEKERS* 167, 167-68 (Susan Kneebone & Felicity Rawlings-Sanaei eds., 2007).

130. See Minister for Immigr. & Multicultural Aff. v. Thiyagarajah, (2000) 199 C.L.R. 343, 364 (Austl.) ("The decision of the Tribunal could be sustained on the basis that . . . protection obligations under the Convention do not extend to a person who has established residence and acquired effective protection as a refugee in another country."); see also *Al-Rahal v. Minister for Immigr. & Multicultural Aff.*, (2001) 110 F.C.R. 73, 74-75 (Austl.).

It was sufficient to permit a contracting state to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status if it was proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee and had accorded that person effective protection, including a right to reside, enter and re-enter that country.

Al-Rahal, (2001) 110 F.C.R. at 74-75.

131. *Al-Rahal*, (2001) 110 F.C.R. at 96 (quoting *Al-Zafiry v. Minister for Immigr. & Multicultural Aff.*, (1999) F.C.A. 443, 558-59 (Austl.)); see also *S115/00A*, (2001) 180 A.L.R. 561, ¶ 6.

Where an applicant for a protection visa in Australia is "as a matter of practical reality and fact," likely to be given "effective protection" in a third country by being permitted to enter and live in that country where he or she will not be at risk of being returned to his or her original country, Australia can (consistent with Article 33) return the applicant to that third country without considering whether he or she is a refugee.

S115/00A, (2001) 180 A.L.R. 561, ¶ 6.

132. See *id.* (stressing that an assessment of "practical reality and fact" is the most appropriate methodology to determine the question of effective protection).

The Australian approach provides an interesting anomaly in considering the legality of "safe asylum country" rules under the 1951 Convention. Australia requires that a safe third country provide effective protection to the applicant; yet, the safe third country is not required to be a signatory of the 1951 Convention.¹³³ This implies that states not party to the 1951 Convention can provide adequate or above adequate protection to an asylum-seeker, even though they are not legally required to afford the asylum-seeker all the protections guaranteed by the 1951 Convention.¹³⁴ The Australian courts have advocated this methodology by emphasizing that states must take a practical look at the safe third country, realizing that parties to the 1951 Convention can just as easily violate the non-refoulement provision as non-party states.¹³⁵ This approach seems to comply with Article 33, pending careful scrutiny of the safe third country's intentions, to ensure that refugees are not refouled.¹³⁶ Yet, it also deprives applicants of any rights they would have acquired by virtue of reaching Australian jurisdiction, since Australia, as a party to the 1951 Convention, is required to give the applicant all the 1951 Convention protections, including, but not limited to, non-refoulement, while a non-party third state has no such obligation.¹³⁷

Another interesting facet of the Australian approach is that safe third countries need not consent to granting the applicant asylum before the sending state can transfer the refugee to the safe third country.¹³⁸ Australian courts have held that Article 33 does not require Australia to ensure that a third state has consented to protect the refugee and grant him the right to reside within its borders before

133. See *Thiyagarajah*, 199 C.L.R. at 364 (requiring that a "safe third country" be able to provide effective protection to an asylum seeker); see also *S115/00A*, (2001) 180 A.L.R. 561, ¶ 6 (explaining that it is not necessary for the "safe third country" to be party to the 1951 Convention).

134. *Al-Rahal*, (2001) 110 F.C.R. at 96 (defining effective protection).

135. *Id.* at 97 ("Is there a 'real chance' of persecution for a Convention reason in country A [the safe third country]? That real chance may exist whether or not country A is a party to the [1951] Convention.").

136. See 1951 Convention, *supra* note 6, art. 33 (missing language that obligates a State to either grant asylum to a refugee or prevent the refugee from residing in a State not party to the 1951 Convention).

137. HATHAWAY, *supra* note 14, at 328, 331.

None of the "safe third country" rules now in place requires the destination state to respect even the rights of all refugees as established by the [1951] Convention itself, including for example the to freedom of internal movement, to freedom of thought and conscience, or even to have access to the necessities of life.

Id. For further criticism of the Australian approach, see generally Kneebone & Pickering, *supra* note 129 (noting Australia's Pacific Strategy improperly aims to achieve deterrence of asylum applicants rather than focusing on protection needs and the right to seek asylum).

138. *Al-Rahal*, (2001) 110 F.C.R. at 75-76.

Australia may utilize safe third country procedures.¹³⁹ This view is consistent with the interpretation that non-refoulement grants no positive rights to refugees.¹⁴⁰

With the lack of settled international law on this point, it seems that the Australian approach of securing effective protection by the third state meets the obligations of non-refoulement, even if effective protection does not indicate assurance that the third state will grant asylum.¹⁴¹ If the third state does not grant asylum, there is no inherent violation of non-refoulement by the sending state or the third state—Article 33 requires only that the third state not send the applicant to a territory where he has a genuine belief that his life or freedom would be in jeopardy under the Convention.¹⁴²

The collective approach to non-refoulement creates a unique set of complications in determining the proper implementation of Article 33. Unlike the absolute state sovereignty approach, the collective approach makes allocating responsibility more difficult when there are violations of non-refoulement.¹⁴³ In this context, Article 33 does not contain sufficient language to ensure that states do not use “safe country of asylum” procedures to circumvent their obligations of non-refoulement.¹⁴⁴ On the other hand, states’ use of first country of arrival and safe third country rules to help allocate the burden of

139. *Id.*

[Art. 33] does not necessarily require that a third country has already accepted an obligation to protect the person who is an applicant for a protection visa, with the consequence that that person has a right to reside in that country and a right to have issued to him travel documents that permit departure from and re-entry into that country.

Id.

140. Critics of this position argue that without explicit consent of the third State to grant the refugee asylum, the refugee has no guarantee of non-refoulement and thus, the sending State is not relieved of its international obligations. *Id.* at 84.

States have no authorization under international law to expel persons to third States without the consent of the third State . . . Accordingly, tacit agreement to admit is not sufficient evidence that the third State will refrain from refoulement and so does not relieve the returning State of its international obligations.

Id.; see also A. Achermann & M. Gattiker, *Safe Third Countries: European Developments*, 7 INT’L J. REFUGEE L. 19, 25 n.24 (1995) (“With regard to refugees who are in the country’s territory, this means that they may not be turned back or expelled if no other State in which they are safe from persecution is obliged or willing to take them.”).

141. See *Al-Rahal*, (2001) 110 F.C.R. at 84 (stating there is no settled international law on whether consent of a third state is required).

142. 1951 Convention, *supra* note 6, art. 33.

143. Compare The Absolute State Sovereignty Approach, *supra* Part III.A, with The Collective Approach, *supra* Part III.B for clear examples of this point.

144. This conclusion is evidenced by the fact that States have the opportunity to choose from a variety of approaches in implementing Article 33. See *supra* Part III.

accommodating influxes of refugees can be an appropriate solution to distribute the burdens of migration while maintaining heightened protection for refugees.¹⁴⁵ The collective approach, however, can also provide a convenient tool to avoid asylum claims and international obligations under the 1951 Convention.¹⁴⁶

C. *The Collective Approach with a Twist*

Other countries use a variation on the collective approach to non-refoulement, utilizing procedural measures to avoid reviewing asylum claims applications, depriving the refugee of the opportunity to legally reside in the receiving state.¹⁴⁷ France, for example, has designated portions of its territory as "transit zones"¹⁴⁸—usually around airports through which large portions of asylum applicants arrive.¹⁴⁹ Initially, the French government argued that national law did not pertain to transit zones, rendering inapplicable any guarantees provided to refugees under French domestic law and French international obligations.¹⁵⁰ Subsequent reforms tailored to the concept of the transit zone began in the late 1980s due to internal and external political pressure.¹⁵¹ The current conception of transit zones gives applicants more rights, especially in terms of detention; however, the French Constitutional Court has condoned refusal to review asylum applications made within the transit zone in certain situations.¹⁵²

The French Constitutional Court examined the practice within transit zones and considered whether procedures allowing administrative officials to deny review of asylum applications were de facto a refusal by the government to comply with its international obligations in territory over which it controlled.¹⁵³ The Court recognized the legality of transit zones by noting "an alien who has not been authorised to enter France . . . or who has appealed for admission as an asylum-seeker may be detained in the transit

145. See Goodwin-Gill & Newland, *supra* note 118, at 126 (mentioning that burden-sharing is a potential result for first country of arrival and safe third country rules).

146. HATHAWAY, *supra* note 14, at 322.

147. *Id.* at 321.

148. Transit zones may also be referred to as "international zones," "administrative zones," or "waiting zones." See, e.g., *Amuur v. France*, 22 Eur. Ct. H.R. 533, 541, 542 (1996) (using these terms interchangeably).

149. HATHAWAY, *supra* note 14, at 321; John Foot, *The Logic of Contradiction: Migration Control in Italy and France, 1980-93*, in *MIGRATION AND EUROPEAN INTEGRATION* 132, 143-44 (Robert Miles & Dietrich Thränhardt eds., 1995).

150. Foot, *supra* note 149, at 143; Judith Hippler Bello & Juliane Kokott, *International Decisions: Amuur v. France*, 91 AM. J. INT'L L. 147, 148 (1997).

151. Foot, *supra* note 149, at 143.

152. *Id.* at 143-44.

153. *Id.*; HATHAWAY, *supra* note 14, at 321.

area.”¹⁵⁴ Next, the Court held that administrative authorities may make decisions regarding expulsion and repeal of orders resulting in expulsion without requiring that those decisions be subject to judicial review.¹⁵⁵ The Court’s acceptance of lack of judicial review was based on the premise that “the State is entitled to define the conditions for entry of aliens into its territory, subject to compliance with international agreements.”¹⁵⁶ Thus, under the French scheme, administrative authorities are given the legal power to oversee applicants within the transit zone and decide—not entirely unilaterally as legislative criteria do exist¹⁵⁷—whether to proceed with an asylum claim or to detain or deport the applicant.¹⁵⁸

The European Court of Human Rights has heavily criticized France’s use of transit zones to avoid examining asylum applications.¹⁵⁹ The Court addressed the fallacy that a “transit zone” is not considered within French territory for the purposes of requiring France to adhere to its duties under the 1951 Convention.¹⁶⁰ “Even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945’ [declaring the existence of transit zones], holding them in the international zone of Paris-Orly Airport made them subject to French law.”¹⁶¹ In addition, the Court held that there must be sufficient safeguards in French law applicable to asylum-seekers within the transit zone, protecting their rights under the 1951 Convention.¹⁶² The opinion of the Court essentially eviscerated the distinction between a state refusing to consider the

154. CC decision no. 92-307DC, ¶ 4, Feb. 25, 1992 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a92307dc.pdf (quoting Act Amending Ordinance 45-2658 of 2 Nov. 1945 on the Conditions for Entry and Residence of Aliens in France, as amended).

155. The Court has repeatedly affirmed the legislature’s decision to exclude a provision for intervention by the judicial authority to review decisions by administrative authorities to intercept applicants in the transit zone and detain or expel them. CC decision no. 93-325DC, ¶ 35, Aug. 13, 1993 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a93325dc.pdf; CC decision no. 92-307DC, ¶ 16, Feb. 25, 1992 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a92307dc.pdf; Bello & Kokott, *supra* note 150, at 148.

156. CC decision no. 92-307DC, ¶ 8, Feb. 25, 1992 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a92307dc.pdf.

157. See Ordinance No. 45-2658 of Oct. 19, 1945, § 31bis(1)-(4), Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 2, 1945 (stating the criteria according to which the examination of an application of an asylum-seeker to France may be refused).

158. Foot, *supra* note 149, at 144.

159. HATHAWAY, *supra* note 14, at 321.

160. *Amuur v. France*, 22 Eur. Ct. H.R. 533, ¶ 52 (1996).

161. *Id.*

162. *Id.* ¶ 53 (“There must be adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the [1951] Convention.”).

application of an asylum-seeker within a transit zone and a state refusing to consider the application of an asylum-seeker clearly within its own territory.¹⁶³

The practice of states creating procedural devices, such as transit zones, to avoid determining whether an asylum-seeker is entitled to refugee status and any subsequent protections is motivated by the same interests as first country of arrival and safe third country rules—the receiving state eliminates the possibility of asylum in that state for the applicant.¹⁶⁴ Similarly, transit zone procedures are justified by states in the same way that first country of arrival and safe third country rules are:¹⁶⁵ the state has not violated its obligations under Article 33 as long as the receiving state deports the applicant in the transit zone to a third country that offers the applicant asylum or sends the applicant to a fourth state where the applicant does not fear persecution.¹⁶⁶

Notwithstanding the similar reasoning, first country of arrival and safe third country rules enjoy better legal justification than the creation of transit zones: the basis for deporting applicants under safe country of asylum schemes is a legally binding bilateral or multilateral agreement.¹⁶⁷ The transit zone scheme, on the other hand, has no legal justification for declaring certain areas, which are part of the sovereign territory of the state, as outside the jurisdiction of domestic law.¹⁶⁸ In addition, there is no requirement that the receiving state, France, have an a priori legal agreement with a third state before deporting an applicant held within the transit zone to that third country.¹⁶⁹ Rather, the transit zone scheme represents a bolder attempt to circumvent Article 33 obligations under the 1951 Convention.¹⁷⁰

163. See HATHAWAY, *supra* note 14, at 322 (arguing that the distinction created in the use of transit zones is legally untenable).

164. See Foot, *supra* note 149, at 144 (arguing that transit zone procedures amount to summary expulsion or explicit turning back at the frontier).

165. For a discussion of the justification of first country of arrival and safe third country rules, see *supra* Part III.B.

166. *But see* HATHAWAY, *supra* note 14, at 322 (“Where the refusal to process a refugee claim results, directly or indirectly, in the refugee’s removal to face the risk of being persecuted, Art. 33 has been contravened.”).

167. For a discussion of the role of bilateral and multilateral agreements among first country of arrival and safe third country rules, see *supra* Part III.B.

168. See *Amuur v. France*, 22 Eur. Ct. H.R. 533, ¶ 52 (eviscerating any legal distinction between the law applicable inside of and outside of the transit zone).

169. See Foot, *supra* note 149, at 143–44 (noting that under the transit zone scheme summary expulsion of asylum-seekers occurs in France without mention of any agreement between France and the country to which asylum-seekers are being deported).

170. See *id.* at 144 (reporting the following numbers for the expulsion of asylum-seekers from France: “[I]n 1986, 51,436 were turned back at France’s borders, 71,063 in 1987 (an average of 195 people a day) and 37,038 in the first seven months of 1988.”).

D. *The Restrictive Definitional Approach*

The restrictive definitional approach, similar to the absolute sovereignty approach, exploits the ambiguous wording of the 1951 Convention to return certain refugees to their country of origin even after an affirmative finding of refugee status. As explained in Part I, Article 33 rights are only applicable to asylum-seekers classified as refugees based on the qualifications listed in Article 1.¹⁷¹ States following this approach, however, argue not all applicants classified as refugees are eligible for non-refoulement benefits.¹⁷² Instead, according to a narrow textual reading of Article 33, only a subset of refugees cannot be refouled—those whom the receiving state determines would be returned to a place where their “life or freedom would be threatened.”¹⁷³ This distinction translates into the “legal” refoulement of refugees if the receiving state determines there is no threat to their life or freedom since the “well founded fear” required for refugee status is not by itself sufficient to prove an inherent “threat to life or freedom.”¹⁷⁴

The U.S. Supreme Court adopted the restrictive definitional approach for refugees that crossed the border in *Cardoza-Fonseca*. The Court began by pointing out that “[art.] 33.1 requires that an applicant satisfy two burdens: first, that he or she be a ‘refugee,’ *i.e.*, prove at least a ‘well-founded fear of persecution’; second, that the ‘refugee’ show that his or her life or freedom ‘would be threatened’ if deported.”¹⁷⁵ By establishing a two-prong test for Article 33 protection, the Court implicitly acknowledged that not all applicants determined to be refugees would automatically receive non-refoulement protection.¹⁷⁶ Instead, only those applicants who could successfully demonstrate refugee status and a clear threat of persecution, beyond the “well founded fear” required for refugee status, would be entitled to non-refoulement.¹⁷⁷ Although some applicants classified as refugees are not entitled to Article 33

171. For a discussion of refugee status as a precondition to non-refoulement rights, see *supra* Part II.A.

172. See HATHAWAY, *supra* note 14, at 304 (noting that a narrow textual analysis may lead to the conclusion that not all refugees are guaranteed Article 33 rights).

173. *Id.*

174. *Id.*

175. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987).

176. See HATHAWAY, *supra* note 14, at 307 (stating that at least some refugees, under this approach, would be refouled to their country of origin).

177. See *Cardoza-Fonseca*, 480 U.S. at 444 (“Out of the entire class of ‘refugees,’ those who can show a clear probability of persecution are *entitled* to mandatory suspension of deportation [non-refoulement] . . . while those who can only show a well-founded fear of persecution are not *entitled* to anything.”).

benefits, the United States approach entitles all refugees to seek discretionary relief from the Attorney General.¹⁷⁸

The decision in *Cardoza-Fonseca* has been criticized by commentators for interpreting Article 33 in disharmony with the overarching framework of the 1951 Convention and reaching a result contrary to the intentions of the drafters according to the *travaux préparatoires*.¹⁷⁹ The *travaux préparatoires* indicate that the drafters had no intention of distinguishing between those applicants entitled to refugee status and a sub-class of refugees entitled to non-refoulement guarantees.¹⁸⁰ The Secretariat draft of the 1951 Convention indicates that reference to Article 1 in the non-refoulement provision was used simply to refer to the timeline established by Article 1(2) marked by January 1, 1951. The reference was not intended to specify more restrictive criteria than that already set forth in Article 1.¹⁸¹ In addition, "the reference to 'life or freedom' was intended to function as a shorthand for the risks that give rise to refugee status under the terms of Art. 1."¹⁸² As a result, the *travaux préparatoires* of the 1951 Convention indicate that the drafters intended to guarantee all refugees the benefits of non-refoulement and provide no evidence to support the argument of limited coverage.¹⁸³

The interpretation of the U.S. Supreme Court, which is also consistent with the absolute sovereignty approach, mobilizes a narrow, strictly-construed conception of Article 33. The Court's conservative interpretation, however, is juxtaposed with supporters of the opposite extreme who suggest that Article 33 protections should be broader than simply a risk of persecution based on convention grounds.¹⁸⁴ This position suggests Article 33 protections should include threats to the life or freedom of refugees as a consequence of persecution based on convention grounds and threats that may arise from but are not consequences of persecution based on convention grounds.¹⁸⁵ In advocating for the more expansive reading of Article 33, supporters point to the humanitarian objectives of the 1951

178. *Id.*

179. *See, e.g.*, James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 486 (2000) (criticizing heavily the reasoning and result of the Supreme Court in *Cardoza-Fonseca*).

180. HATHAWAY, *supra* note 14, at 304 n.132 (citing PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 303, 341 (1995)).

181. *Id.*

182. *Id.* at 304–05.

183. *Id.* at 305; *see also* R. v. Sec'y of State for the Home Dep't, *ex parte* Sivakumaran, [1988] A.C. 958, 1001 (H.L.) (appeal taken from Q.B.D.) (stating that the *travaux préparatoires* of the 1951 Convention indicate that Article 33 was intended to apply to all applicants classified as refugees under Article 1).

184. *Id.*

185. Lauterpacht & Bethlehem, *supra* note 12, at 124.

Convention and the liberal interpretation that should be given to human rights instruments to protect refugees against refoulement.¹⁸⁶

Several states have rejected the restrictive reading of the United States Supreme Court as well as the expansive reading of Article 33 and settled on a moderate position, affording non-refoulement protections to all applicants successfully classified as refugees.¹⁸⁷ Australia, for example, endorsed this moderate position in *M38/2002*.¹⁸⁸ The court, like the U.S. Supreme Court, acknowledges the difference in language between Article 1 and Article 33; however, the Australian court concludes that “although the definition of ‘refugee’ in Art 1 and the identification of persons subject to the non-refoulement obligation in Art 33 differ, it is clear that the obligation against non-refoulement applies to persons who are determined to be refugees under Art 1.”¹⁸⁹ In reaching this conclusion, the Court references the *travaux préparatoires* and the lack of different standards of proof for Article 1 and Article 33 at the national and international level.¹⁹⁰ New Zealand jurisprudence also accepts this approach, as the New Zealand Court of Appeal has concluded that Article 33 “is usually interpreted as covering all situations where the refugee risks any type of persecution for a Convention reason.”¹⁹¹

The position adopted by the Australian and New Zealand Courts—the correct interpretation of Article 33 makes its scope identical to Article 1—has the strongest legal justification when examining non-refoulement in international law and the relationship of Article 33 with the 1951 Convention as a whole.¹⁹² The Australia and New Zealand position places Article 33 in the larger context of the convention structure with the overarching purpose of ensuring that state parties guarantee refugees the rights listed in the 1951 Convention.¹⁹³ In construing Article 33 to cover a subset of refugees, the United States position inevitably results in the denial of a basic right mandated by the instrument—the guarantee of non-

186. HATHAWAY, *supra* note 14, at 305.

187. *M38/2002 v. Minister for Immigr. & Multicultural & Indigenous Aff.*, (2003) 199 A.L.R. 290, ¶ 38 (Austl.).

188. *Id.*

189. *Id.*; see also *Minister for Immigr. & Multicultural & Indigenous Aff. v. Savvin*, (2000) 98 F.C.R. 168, ¶ 140 (Austl.) (affirming the congruence between Article 1 and Article 33).

190. *M38/2002*, (2003) 199 A.L.R. 290, ¶ 38.

191. *Zaoui v. Attorney-General*, [2005] 1 N.Z.L.R. 690, ¶ 36 (C.A.), *aff'd*, [2005] 1 N.Z.L.R. 577 (S.C.).

192. See HATHAWAY, *supra* note 14, at 305–07 (arguing that the Australian and New Zealand position most accurately describes the scope of Article 33 by construing it as part of the larger purpose of the 1951 Convention).

193. See generally 1951 Convention, *supra* note 6 (reading Articles 2–34 shows that the overall purpose of the 1951 Convention was to give refugees certain basic rights on the territory of state parties).

refoulement—to many refugees.¹⁹⁴ Thus, a restrictive reading of the scope of Article 33 would create an anomalous provision that allows states to use one article to undermine another.

In addition to looking at the operation of Article 33 in terms of the larger convention structure, the *travaux préparatoires* are particularly informative for this issue. The U.S. Supreme Court is correct to point out the difference in language between Article 1 and Article 33 in its statutory analysis;¹⁹⁵ however, this distinction, once informed by the *travaux préparatoires*, should not be overstated. After it becomes clear that the interpretation championed by the U.S. leads to a result plainly contrary to the larger goals of the instrument, other information should be engaged to discern the true intent behind the different phrases used for Article 1 and Article 33. In this instance, the *travaux préparatoires* provide an accurate and unambiguous source of supplemental information that indicates a more restrictive reading of Article 33 is not appropriate.¹⁹⁶ After considering the *travaux préparatoires*, reading the scope of Article 33 as identical to the scope of Article 1 does not contradict the plain language of Article 33; instead, it elucidates a duplicitous provision of the 1951 Convention.

The Australia and New Zealand position also enjoys more coherent legal justification than the expansive reading of Article 33, whereby refugees are entitled to non-refoulement protection even if the threat to their life or freedom is a consequence of persecution based on non-convention grounds.¹⁹⁷ There is no provision in the 1951 Convention that reasonably leads to such an expansive reading of Article 33.¹⁹⁸ In fact, this interpretation stands in direct contrast to the qualifications for refugee status under Article 1, which is specifically limited to a well-founded fear resulting in persecution based on convention grounds.¹⁹⁹ Since refugee status is a precondition to non-refoulement, expanding the scope of Article 33 beyond that of Article 1 would cause the two provisions to operate in disharmony. Furthermore, complete reliance on broader humanitarian objectives is not sufficient to justify the expansion of state parties' legal obligations; the position must be derived from the

194. HATHAWAY, *supra* note 14, at 307.

195. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440–41 (1987).

196. See HATHAWAY, *supra* note 14, at 304–05 (claiming that the *travaux préparatoires* show that a restrictive reading of the scope of Article 33 was not the intent of the drafters).

197. Lauterpacht & Bethlehem, *supra* note 12, at 124.

198. See HATHAWAY, *supra* note 14, at 306 (suggesting that this position is based upon a reliance on sources outside of refugee law rather than on the actual international instrument itself).

199. 1951 Convention, *supra* note 6, art. 1.

1951 Convention to impose a duty of non-refoulement that covers a broader class of applicants.²⁰⁰

The restrictive definitional approach demonstrates the weaknesses of a multilateral human rights instrument: ambiguous wording unintentionally provides a convenient method for states to circumvent burdensome international obligations. Unlike the ambiguity surrounding implementation, which leads to the absolute sovereignty approach of states, there is a much stronger argument that the correct scope of Article 33 is reasonably discernable from the provisions of the 1951 Convention and the *travaux préparatoires*. Compellingly, a particularly restrictive or liberal reading of the scope of Article 33 obligations simply does not make sense in terms of the broader 1951 Convention. Moreover, the existence of ample evidence revealing the intent of the drafters from the *travaux préparatoires* presents the best legal case that Article 1 and Article 33 should cover the same class of asylum applicants.

IV. MOVING TOWARD UNIFORMITY: FINDING CONSENSUS ON THE OBLIGATION OF NON-REFOULEMENT

The positions described in Part III are only a small sample of the many ways that states approach non-refoulement.²⁰¹ The lack of uniformity in approach needs attention because of the profound difference in consequences that result from one interpretation as opposed to the other. Furthermore, varying approaches diminish the legal force of the 1951 Convention and the rights it bestows upon refugees. The international community should recognize the benefits of a consistent approach to implementing Article 33 rather than the current patchwork and contemplate the correct scope of non-refoulement and durable solutions to asylum problems left unanswered by the non-refoulement provision.

A. *The Need for a Uniform Interpretation*

As an initial matter, legal instruments cannot maintain binding force and simultaneously tolerate the varying levels of interpretation accorded to Article 33. For the 1951 Convention to impose meaningful obligations on states, those obligations must be agreed upon and be equal among all signatories. If a multilateral treaty permits the reinterpretation of its provisions to the extent that the obligations it imposes become so incongruent, states may dilute the

200. HATHAWAY, *supra* note 14, at 306.

201. For an in depth discussion of the Absolute Sovereignty Approach, the Collective Approach, and the Collective Approach with a Twist, see *supra* Part III.A-C.

provisions into superficial quasi-obligations. At this point the treaty, as a source of binding legal obligations, loses all power to constrain state behavior. The non-refoulement provision still maintains its force to constrain state practice even under the most restrictive reading; yet, much of its binding force is undermined by the inconsistency of Article 33 interpretations.

Equally important, inconsistent interpretations of Article 33 create a fundamental sense of unfairness in addition to undermining the binding force of the treaty. The absolute sovereignty approach understands non-refoulement to impose a more relaxed international duty than the Canadian interpretation under the collective approach.²⁰² Allowing states to pursue vastly different interpretations results in the more onerous burden for some states of providing asylum as the direct result of another state's choice of interpretation. States cannot make asylum-seekers disappear by denying asylum-seekers access to its borders. Instead, neighboring states subscribing to more favorable readings of Article 33 will be forced to shoulder the burden of accepting the refugee population.

On a practical level, the lack of uniformity in state domestic implementation means the success of an asylum claim and the guarantee of non-refoulement are highly dependent upon the refugee's state of entry.²⁰³ This is problematic, because refugees rarely have any significant choice in their destination country and are usually in dire need of aid.²⁰⁴ In addition, refugees will often falsify documents or resort to illegal trafficking in order to make it to the border of a state willing and able to grant asylum.²⁰⁵ These issues, states claim, justify more rigorous border security, often less favorable to refugees.²⁰⁶ More rigorous border security leads to a cycle of states passing the asylum-seekers among themselves until refugees finally find states with more favorable asylum policies.²⁰⁷ In addition, first country of arrival and safe third country rules contribute even more ambiguity to the geographic location in which the refugee will settle. With the constant cycle of human shuffling,

202. See *supra* Part III.A–C.

203. To observe the variety of attitudes taken towards asylum-seekers, see *supra* Part III.

204. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 35–37 (2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/template?page=publ&src=static/sowr2006/toceng.htm>.

205. See Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 185, 207 (Erika Feller, Volker Turk, & Frances Nicholson eds., 2003) (noting that some States will treat applications for asylum as unfounded if they discover the use of falsified documents).

206. *Id.*

207. *Id.*

refugees may find it hard to settle into another society and become a contributing member, socially and economically. Refugees lack the decision making autonomy normal citizens enjoy.

B. *The Role of Durable Solutions*

Taking into account the diverse interests of states and asylum-seekers, durable solutions, focused on both short-term and long-term effects, can serve as the medium to find progressive approaches to issues surrounding refugees. Using integrative tactics, the international community should strive to secure a safe destination for refugees while easing the concerns that states have in accepting asylum-seekers.²⁰⁸ Integrative tactics require that the international community and NGOs assume a greater role in contributing time and resources to states receiving heavy flows of refugees to relieve the practical concerns that states have in opening the border.²⁰⁹ Integration and cooperation in the international community is critical, especially with respect to countries lacking resources to accommodate refugees.²¹⁰ Contributions of resources and aid can help alleviate the short-term strains refugees cause on a receiving state.²¹¹

While the international community must play a larger role in addressing and alleviating the concerns flowing from mass migrations, individual states can also take active steps to ensure refugees are adequately received and protected. For many refugees,

208. See Eur. Council on Refugees & Exiles, *Asylum in the EU, Asylum Procedures*, http://www.ecre.org/topics/asylum_in_eu/asylum_procedures (last visited Dec. 23, 2008) (suggesting that EU member states can use asylum procedures in accordance with EU standards for human rights to control migration and still offer protection to refugees where possible).

209. See, e.g., UNHCR, *The U.N. Refugee Agency*, <http://www.unhcr.org/cgi-bin/texis/vtx/home> (last visited Dec. 23, 2008) (describing an organization working to address the problems facing refugees and advocate on their behalf).

210. One pertinent example of a state requiring help to relieve the burden of the migration of refugees is Chad. Eastern Chad received hundreds of thousands of refugees who were fleeing the violence occurring in Darfur. Chad has scarce resources and often citizens of Chad are not guaranteed food on a daily basis. With the influx of refugees from Sudan, there is competition in Chad for the scarce resources that are available. *Darfur's Refugees in Chad*, RED CROSS RED CRESCENT, Issue 2, 2005, at 22, 22–23, available at http://www.redcross.int/EN/mag/magazine2005_2/22-23.html.

211. See Refugees International, *Return and Reintegration*, <http://www.refugeesinternational.org/who-we-are/our-issues/return-and-reintegration> (last visited Jan. 19, 2009).

When conditions allow refugees and internally displaced people to go home, donor governments and international agencies often fail to ensure that the displaced are able to care for themselves in a secure environment. Without adequate support, fragile communities can rapidly disintegrate and a tenuous peace can be shattered, leading to further displacement.

the fate of their asylum claims rests with the state official with whom they have first contact at the border.²¹² It is critical for refugees, therefore, that the state provides competent, well-trained border officials to regulate applicants at the border. These officials need a high degree of knowledge regarding the current status of domestic refugee law and need to be able to discern whether applicants have a valid claim to asylum, or, at a minimum, refugee status that entitles them to the guarantee of non-refoulement.²¹³ States must also update information essential to determining asylum claims regularly to guarantee that asylum decisions are based on current and accurate data.²¹⁴ By utilizing these domestic measures in addition to the resources available among the international community, states can mobilize integrative tactics to find practical and durable solutions rather than “quick fixes” that may lead to more detrimental and complicated problems in the future.

Incentives that result in a more equal distribution of refugees will also result in uniform approaches to implementing non-refoulement and help alleviate long-term effects that influxes of refugees have on states.²¹⁵ Finite resources force states to pursue alternatives to housing refugees in light of the cost of opening the border.²¹⁶ To more closely align state interest with a favorable approach to Article 33 for refugees, convention states should attempt to distribute the burden of asylum applicants more evenly among capable countries.²¹⁷ With fewer disincentives to open their borders to refugees, states are more likely to approach Article 33 with a response that grants applicants a safe haven within their territory.

V. CONCLUSION

The most common response to the varying legal interpretations of non-refoulement is to emphasize the plight of the refugee, which is

212. See HATHAWAY, *supra* note 14, at 287 (pointing out that the success of many asylum claims is based on border officials, especially in countries such as Austria and South Africa).

213. See *id.* at 287 nn. 49–50 (giving two specific examples of countries that have refused applicants asylum due to poorly trained or informed border officials).

214. *Id.* at 287.

215. See Goodwin-Gill & Newland, *supra* note 118, at 126 (noting that the collective approach, for example, is one way for States to engage in burden-sharing with regards to refugee issues).

216. See generally DAVID S. NORTH, ESTIMATES OF THE FINANCIAL COSTS OF REFUGEE RESETTLEMENT: THE CURRENT SYSTEM AND ALTERNATIVE MODELS (1997), available at <http://www.utexas.edu/lbj/uscir/respapers/efc-feb97.pdf> (displaying different factors such as financial cost to be considered in refugee resettlement).

217. Geoff Leane & Barbara Van Tigerstrom, *Introduction*, in INTERNATIONAL LAW ISSUES IN THE SOUTH PACIFIC 1, 34 (Geoff Leane & Barbara von Tigerstrom eds., 2005) (discussing the burden-sharing as “the only acceptable policy response”).

not to be understated. For asylum-seekers, a state's violation of its non-refoulement obligations is tantamount to assured destruction. A refugee returned to his country of origin faces as a near certainty death or persecution. When an asylum applicant is not provided with adequate protection of life or freedom by his country of origin, the applicant typically has no other option but to flee to another country—legally or illegally. The grave consequences for refugees exemplify why the obligation of non-refoulement is so fundamental to international refugee law.

States have equally pressing interests in refugee situations. The preservation of state sovereignty is invoked as the theoretical appeal to less international regulation of refugees. States often lean on the proposition that it has always been the right of the sovereign state to control its borders according to domestic prerogative. Following the refugee situation created by World War II, it became apparent that an international instrument was necessary to address the mass influx of applicants seeking asylum. States also reference the rise in globalization, resulting in quick and easy movement of people across borders, as a new challenge to maintaining the integrity of territorial borders.

Mass movements of refugees also accompany practical concerns for states, including consumption of resources, national security problems, and issues surrounding domestic infrastructure. Refugees often lead to increased financial burdens on states by requiring a redistribution of domestic resources to social welfare programs and immigration regulation. Moreover, refugees from countries engaged in internal combat can often raise security concerns for states. If asylum-seekers are still engaged in hostilities in their country of origin, the receiving country may face domestic and international security concerns. Domestic infrastructure is strained when refugee movements foment social or political unrest in the receiving country.²¹⁸ Many domestic populations simply do not want to open their borders to asylum-seekers. In addition, mass movements of refugees may strain international relationships between states, especially if one state becomes increasingly burdened by mass migrations.

In addition to these concerns, the international community must also consider issues of socialization and integration of refugees into national societies. Much time and scholarly research should be devoted to examining solutions, such as voluntary repatriation or cultural integration, to understand how best to accommodate refugees and the communities to which they can contribute. Repatriation may be a positive tool that allows for the return of refugees to their

218. UNHCR, THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM UNHCR, *supra* note 204, at 42.

country of origin once the conflict initially driving them out has stabilized. Yet, it is not uncommon for states to use repatriation schemes to remove refugees from their territory before it is legitimately safe to do so.²¹⁹ When repatriation is not safe or feasible, states must seriously consider how to facilitate the integration of refugees into national communities. These issues should not be an afterthought for states, as unsuccessful integration of refugees into domestic culture and lifestyles has been linked to many problems plaguing the twenty-first century, including terrorism and economic collapse. Given the proper rights and opportunities, however, refugees can also be a valuable part of the national fabric.

Non-refoulement is only applicable if there are refugees moving across state borders. Because it is unlikely that situations leading to the creation of asylum-seekers will cease, a collective response to these situations provides a positive result for states and refugees alike. Historically, refugees were the problem of neighboring countries, but the ease of movement in modern times has incapacitated isolationist methods of thinking about asylum. Failure to acknowledge conflicts that lead to the creation of mass numbers of refugees has also resulted in severe consequences that were previously unforeseen by states. It is clear now more than ever: the refugee problem is everyone's problem. Once the international community accepts the proposition that collective action benefits all states in the long run, states will be better able, and perhaps even more willing, to accommodate refugees, and refugees will be more likely to secure the guarantee of non-refoulement.

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219. *Id.* at 130.

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