The Principle of Non-Refoulement:

Its Standing and Scope in

International Law

A Study prepared for the
Division of International Protection
Office of the United Nations High Commissioner for Refugees

by

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International Journal of Refugee Law

July 1993
(Rev.1:12/93)
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Introduction

1. The purpose of this paper is to establish as clearly as possible the present standing and scope of the principle of non-refoulement in international law. It looks at the modern meaning of the rule, at its origins and at the discussions which accompanied its incorporation into the 1951 Convention relating to the Status of Refugees. Non-refoulement is not only important as a treaty-based rule, however, but also as a principle of customary international law. The differences between the two types of norms are examined, and the variations in nature, scope and content are considered with reference to the inclusion of the principle in a variety of treaties, declarations and resolutions. The views of States, particularly as expressed in the Executive Committee of the UNHCR Programme are reviewed, and compared with the practice of States in their treatment of refugees and asylum seekers.

2. The scope of the principle is examined against the background of specific issues which tend to recur in the context of protection: the question of 'risk', the personal scope of the principle, including its application to certain categories of asylum seekers, such as stowaways, exceptions to the principle, extraterritorial application, extradition, and the 'contingent' application of the principle in situations of mass influx. The
possible application of *non-refoulement* or an analogous principle of refuge to those outside the 1951 Convention/1967 Protocol is briefly considered, as is the relationship between *non-refoulement* and asylum.

3. The paper concludes that the principle of *non-refoulement*, both as a treaty and as a custom-based norm, extends to every individual having a well-founded fear of persecution, or who faces a substantial risk of torture, or possible other serious violations of fundamental human rights. Moreover, the principle of *non-refoulement* prohibits the return of such individual by any means whatsoever, including refusal of admission at the frontier, deportation, expulsion, forcible return no matter the place of interception, and extradition.

1. *Non-refoulement: Meaning and Origins*

1.1 The Modern Meaning of the Rule

4. The cornerstone of refugee protection is the principle of *non-refoulement* — the principle that no State shall return a refugee in any manner whatsoever to where he or she would be persecuted. This principle is widely held to be part of customary international law, binding on all States irrespective of their ratification of or accession to international instruments;
and in this wider field of application, *non-refoulement* now extends to prohibit the return of *anyone* to a situation in which he or she runs the risk of torture. As an international legal obligation, *non-refoulement* must be distinguished from the principle of asylum, according to which States retain *discretion* with respect to the grant of permission to remain on their territory. The protection which flows from *non-refoulement* is specific and fundamental, but independent of the question of admission and residence.

5. The 1951 Convention relating to the Status of Refugees,¹ together with the 1967 Protocol,² now ratified by one hundred and sixteen States, prescribes a fundamental system of protection for some of the world’s displaced peoples. The structure of rights and standards of treatment is built upon two key articles, from which no derogation is permitted, and in respect of which no reservations may be made: *article 1*, which defines a refugee for the purposes of the Convention;³ and *article 33*, which sets out the norm of *non-refoulement*.

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¹ 189 UNTS 150.
² 606 UNTS 267.
³ Although no reservations are permitted, a State on ratification may elect to limit its ‘definitional’ obligations to refugees whose fear of persecution is attributable to ‘events in Europe.’ The original (1951) temporal limitation, restricting the application of the Convention definition to refugees with a fear of persecution attributable to events occurring before 1 January 1951 was ‘removed’ by the 1967 Protocol, which also had the purpose of encouraging States progressively to drop the geographical restriction which today is maintained by only five States.
6. Article 1 of the 1951 Convention, as amended, provides that the term 'refugee' shall apply to any person who, 

(2) ... owing to 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, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ..., is unable or, owing to such fear, is unwilling to return to it. (Emphasis supplied)

Article 33(1) provides,

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. (Emphasis supplied)

7. A literal interpretation of these provisions might suggest that different standards of proof applied to the question whether someone is a refugee, and whether such refugee is entitled to the benefit of non-
refoulement. The practice of States mostly reflects a common approach, which is to accord protection, including non-refoulement through time and asylum, to the refugee having a well-founded fear of persecution. So far as State practice may diverge from this approach, it is in turn the product of an incomplete international system, which leaves States with discretion in the grant of asylum, while nevertheless obliging them to abide by the principle of non-refoulement.

8. The language of article 33 and of complementary regional instruments is nevertheless broad and unequivocal. It prohibits both the expulsion of a refugee from a contracting State and the return of a refugee to a territory where his or her life or freedom would be endangered. The term ‘return’ necessarily looks to the place ‘to’ which a refugee is returned. The word ‘expel,’ by contrast, refers to the treatment of refugees present in a State’s territory, since, by definition, refugees cannot be expelled from a country in which they are not present. Non-refoulement or non-return thus bars the involuntary repatriation of refugees ‘in any manner whatsoever’ to a place where their lives or freedom would be threatened, including by way of deportation, expulsion, rejection at the frontier, extradition, as well as any other method of forced repatriation.
9. Analysis of the scope of *non-refoulement* today requires full account to be taken of State practice since 1951, as well as that of international organizations. Over the last forty years, the broad sense of *non-refoulement* has been confirmed in a process of development which has emphasized the central, all-embracing aspect of the principle, namely, no return in any manner whatsoever; hence, the attention to non-rejection at the frontier, non-extradition, and the irrelevance of entry status.

1.2 Origins of the Rule

10. The idea that a State ought not to return persons to other States in certain circumstances is of comparatively recent origin. Common in the past were formal agreements between sovereigns for the reciprocal surrender of subversives, dissidents, and traitors. In the early- to mid-nineteenth century, the concept of asylum and the principle of non-extradition of political offenders began to emerge, in the sense of protection which the territorial sovereign can, and perhaps should, accord. At that time, the principle of non-extradition reflected popular sentiment that those fleeing their own, generally despotic, governments for

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political reasons were worthy of protection.\(^5\) Not until after the First World War, however, did international practice begin to recognize an emerging principle of non-return of refugees, and only in 1933 does the first reference to the principle that refugees should not be returned to their country of origin occur in an international instrument.\(^6\) In article 3 of the *Convention relating to the International Status of Refugees*, the contracting parties undertook not to remove resident refugees or keep them from their territory, ‘by application of police measures, such as expulsions or non-admittance at the frontier (refoulement)’, unless dictated by national security or public order.\(^7\) Moreover, in the second paragraph, each State undertook ‘in any case not to refuse entry to refugees at the frontiers of their countries of origin’. Only eight States ratified this Convention; three of them, by reservations and declarations, emphasized their retention of sovereign competence in the matter of expulsion, while the United Kingdom at that time expressly objected to the principle of non-rejection at the frontier.

\(^5\) See, for example, the views cited in 6 *British Digest of International Law*, 53-4, 64-5.

\(^6\) Under a 1928 arrangement (89 LNTS no. 2005), States had adopted a recommendation (no. 7), ‘that measures for expelling foreigners or for taking such other action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner’. However, the recommendation was not to apply to a refugee who had entered a State in intentional violation of national law.

\(^7\) 159 LNTS no. 3663; official text in French.
11. Agreements regarding refugees from Germany in 1936 and 1938 also contained limitations on expulsion or return. The instruments varied slightly: broadly, refugees required to leave a contracting State were to be allowed a suitable period to make arrangements; lawfully resident refugees were not to be expelled or sent back across the frontier save 'for reasons of national security or public order'; and even in such cases, governments undertook not to return refugees to the German Reich, 'unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object'.

12. The focus during this period was principally on improving administrative arrangements to facilitate local integration and resettlement; the need for 'protective principles' began to emerge, but limited ratifications of instruments containing equivocal and

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8 Art. 4, Provisional arrangement concerning the status of refugees coming from Germany, 1936: 171 LNTS no. 3952; official text in English and French. The arrangement was definitively signed by seven States; the United Kingdom excluded refugees subject to extradition proceedings from the ambit of art. 4, and likewise, for most purpose, refugees admitted for a temporary visit or purpose. Art. 5, Convention concerning the Status of Refugees coming from Germany, 1938: 192 LNTS no. 4461; official texts in English and French. The Convention was ratified by only three States; the United Kingdom repeated its 1936 reservations.

9 The 1938 Convention substituted 'measures of expulsion or reconduction...'

10 The 1936 arrangement read: 'refugees shall not be sent back across the frontier of the Reich'; the 1938 Convention provided that States parties 'undertake' not to reconduct refugees to German territory.
much qualified provisions effectively prevented the consolidation of a formal principle of *non-refoulement*. 13. After the Second World War, a new era began. In February 1946, the United Nations General Assembly expressly accepted that ‘refugees or displaced persons’ who have expressed ‘valid objections’ to returning to their country of origin should not be compelled to do so. This was followed by the creation of the International Refugee Organization as a specialized agency, charged with resolving the problems of displacement left from the Second World War, the Universal Declaration of Human Rights proclaimed the right to seek and to enjoy asylum from persecution, and in due course the United Nations turned its attention to new instruments and agencies.

1.3 Incorporation of the Rule in the 1951 Convention

14. In 1949, the United Nations Economic and Social Council (ECOSOC) decided to appoint an *Ad hoc* Committee to ‘consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the

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11 UNGA res. 8(1), 12 Feb 1946, para. (c)(ii).

12 See also the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention of 12 August 1949), below, section 2.3.
text of such a convention'.\textsuperscript{13} The \textit{Ad hoc} Committee on Statelessness and Related Problems met twice in New York in January-February and August 1950.\textsuperscript{14} In turn, it decided to focus upon the refugee, and duly offered the text of a draft convention.\textsuperscript{15} In August 1950, ECOSOC returned the draft convention to the \textit{Ad hoc} Committee for further review, prior to its being considered by the General Assembly, and finalised the Preamble and refugee definition. In December 1950, the General Assembly decided to convene a Conference of Plenipotentiaries to complete the draft convention relating to the status of refugees.\textsuperscript{16}

1.2.1 \textbf{The Ad hoc Committee and the 1951 Conference of Plenipotentiaries}

15. In the course of its discussions, the \textit{Ad Hoc} Committee drew up the following provision, which was considered so fundamental that no exceptions were proposed:\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{13} ECOSOC res. 248(IX)B, 8 Aug. 1949.
\item \textsuperscript{14} The most important United Nations documents from this period are usefully collected in Takkenberg, A. and Tahbaz, C.C., \textit{The Collected Travaux Préparatoires of the 1951 Convention relating to the Status of Refugees}, 3 volumes, Dutch Refugee Council/European Legal Network on Asylum, Amsterdam, 1988.
\item \textsuperscript{15} See \textit{Report} of the \textit{Ad hoc} Committee: UN doc. E/1618, Annex III.
\item \textsuperscript{16} UNGA res. 429(V), 14 Dec. 1950. See generally \textit{Report} of the \textit{Ad hoc} Committee on Refugees and Stateless Persons, Second Session: UN doc. E/1850. The Committee had been renamed in the interim.
\item \textsuperscript{17} UN doc. E/1850, para. 30.
\end{itemize}
No contracting State shall expel or return 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 or political opinion.

16. During one session of the Ad hoc Committee, a member of the United States delegation, Louis Henkin, stated: 18

54. . . . Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.

55. Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.

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18 Ad hoc Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR.20 (1950). Speaking next, the Israeli delegate reiterated that the prohibition on return 'must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance'; he concluded that '[t]he Committee had already settled the humanitarian question of sending any refugee whatever back to a territory where his life or liberty might be in danger.' Ibid., paras. 60-61. The British delegate also concluded from the discussion that the notion of refoulement 'could apply to ... refugees seeking admission': UN doc. E/AC.32/SR.21, para. 16.
17. The drafters of the Convention clearly intended that refugees not be returned, either to their country of origin or to other countries in which they would be at risk. The United Kingdom successfully proposed substituting the words ‘to the frontiers of territories’ for ‘to the frontiers of their country of origin, or to territories ...’ where the lives or freedom of refugees would be threatened. The U.K. representative expressly noted that this would not alter the purport of the article, and the Ad hoc Committee reported in its comments that article 33’s predecessor referred ‘not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened.’

18. The 1951 Conference found the Swedish representative proposing a more specific addition, that would rule out the return of a refugee to a country ‘where he would be exposed to the risk of being sent to a territory where his life or freedom’ would be threatened. Such country, for example, might be disposed to extradite the refugee or otherwise to resort to expulsion. Sweden eventually withdrew this proposal, while stressing that the text of what became article 33 should nevertheless be interpreted as

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19 See UN doc. E/AC.32/SR.20, p. 3, for the United Kingdom’s proposal; also UN doc. E/1618, E/AC.32/5, p. 61, for the comment of the Ad hoc Committee.

covering at least some of the situations envisaged. The Danish representative noted that a government expelling a refugee to an intermediate country could not foresee how that State might act. But if the expulsion presented a threat of subsequent forcible return to the country of origin, then the life or liberty of the refugee would be endangered, contrary to the principle of *non-refoulement*.\(^1\)

19. Those who have since argued in favour of the restrictive view of the obligations of States under article 33 have sometimes relied on comments made by the Swiss and Dutch delegates to the Conference of Plenipotentiaries in 1951. The Swiss interpretation of *non-refoulement* would have limited its application to those who have already entered State territory.\(^2\) The Dutch delegate expressed the view that the word 'return' related only to refugees already within the territory and that 'the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by Article 33.'\(^3\) This narrow view, premised on the notion that a State was not obliged to

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\(^1\) See UN doc. A/CONF.2/SR.16, p. 9f. In *Re Musisi* [1987] 2 ULR 606, at 620, the U.K. House of Lords struck down a decision to deny asylum to a Ugandan refugee and return him to Kenya, his country of first refuge. The reasons given by the Secretary of State indicated that he had failed to take into account, or to give sufficient weight to, a relevant consideration, namely, that on a number of occasions Kenya had handed over Ugandan refugees to the Ugandan authorities.

\(^2\) UN doc. A/CONF.2/SR.16, 6; see also Weis, P., 'Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees' 30 *BYIL* 478, at 482 (1953).

\(^3\) UN doc. A/CONF.2/SR.35 (3 Dec. 1951); note the critical distinction between the obligation of non-return and the discretionary competence to grant asylum.
allow large groups of asylum-seekers to cross its frontiers, did not fully square with the meaning of *refoulement* in European immigration law or with the letter of article 3 of the 1933 Convention. The words 'expel or return' in the English version of article 33 have no precise meaning in general international law. The former may describe any measure, judicial, administrative, or police, which secures the departure of an alien, although article 32 possibly implies that measures of expulsion are reserved for lawfully resident aliens. The word 'return' is even vaguer; to the Danish representative it suggested such action as a State might take in response to a request for extradition.\(^\text{24}\)

Probably the most accurate assessment of views in 1951 is that there was no unanimity, perhaps deliberately so.\(^\text{25}\) The Dutch delegate's comments primarily reflected concern that the draft article would require his government to grant *entry* in the case of a mass migration.\(^\text{26}\)

\(^{24}\) UN doc. A/CONF.2/SR.16, 10.

\(^{25}\) The views of commentators have varied over time; see Goodwin-Gill, G.S., *The Refugee in International Law* (1983), 74-6.

\(^{26}\) For the Dutch delegate's comments, see UN doc. A/CONF.2/SR.35 at 21: Baron van Boetzelaer of the Netherlands, 'recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("refoulement") related to a refugee already within the territory but not yet resident there...At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation...in order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33....There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on the record.' (Emphasis added). Earlier, the Dutch delegate explained that his concern was that of 'a country bordering on others...about
'official' interpretation of the Convention nor a binding limitation on the Convention’s plain language. Rather, as UNHCR noted in its amicus curiae brief to the U.S. Supreme Court in 1993, it is in the nature of a parliamentary gesture by a delegate whose views did not prevail upon the negotiating conference as a whole. Earlier in the proceedings, the Ad hoc Committee made clear that the principle of non-refoulement proscribed the rejection of refugees at a country’s frontier.

2. Treaty Rules and Rules of Customary International Law

20. States may be bound not only by international treaties, whether general or particular, establishing rules expressly recognized by them and to which they have given their formal assent, but also by ‘international custom, as evidence of a general practice accepted as law.’

2.1 Treaties and Treaty Interpretation

21. Treaties are equivalent to international legal obligations voluntarily and formally undertaken, on a basis of reciprocity with another State or States. They are like contractual relationships, creating rights, duties

\[26\] (continued)
assuming unconditional obligations as far as mass influxes of refugees were concerned . . . unless international collaboration was sufficiently organized to deal with such a situation: UN doc. A/CONF.2/SR.16 at 11 (emphasis added).
and expectations, but also often laying down standards for future conduct. Their subject matter is practically unlimited, and treaties may create international organizations, transfer title to territory, regulate commerce, investment, or extradition, or lay down general norms for future conduct, for example, with respect to refugees, human rights, or the law of the sea. In principle, treaties bind only the parties; but the rules they reflect or consolidate may yet come to bind non-parties, for example, through the medium of custom.

22. No treaty is self-applying and the meaning of words, such as 'expel', 'return' or 'refouler,' is not always self-evident. Under the rules established by the Vienna Convention on the Law of Treaties, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose.' Interpreting article 33 of the 1951 Convention according to the ordinary meaning of its terms—preventing the return of refugees 'in any manner whatsoever'—is clearly consistent with its object and purpose, which are to extend the protection

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27 Art. 31, 1969 Vienna Convention on the Law of Treaties: UN doc. A/CONF.39/27. Text also in Brownlie, I., Basic Documents in International Law, (3rd ed., 1983), 349. 'Context' is defined as follows: '(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'
of the international community to refugees, and 'to assure refugees the widest possible exercise of...[their]...fundamental rights and freedoms.'

23. Article 31 of the 1969 Vienna Convention on the Law of Treaties, which restates principles of customary international law, also requires that the 1951 Convention be interpreted consistently with international law, including therefore the content of the norm of non-return in customary international law. In international law, the subsequent practice of States parties to a treaty is relevant to its interpretation. Article 31 of the 1969 Vienna Convention provides with respect to the general rule of interpretation,

(3) There shall be taken into account together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties ...

The subsequent agreement and practice of States parties can be derived or inferred, inter alia, from their

28 1951 Convention, Preamble.
actions at diplomatic level, including the adoption or promulgation of unilateral interpretative declarations; and at the national level, in the promulgation of laws and the implementation of policies and practices.

24. The rules of treaty interpretation permit recourse to 'supplementary means of interpretation' (including the preparatory work of a treaty) only where the meaning of the treaty language is 'ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.'

When the meaning of the treaty is clear from its text when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable, and recourse to such sources is discouraged. The use of a treaty's negotiating history is appropriate only where the terms of the document are obscure or lead to 'manifestly absurd or unreasonable' results.

25. During the Conference which concluded the text of the Vienna Convention on the Law of Treaties, the United States and the United Kingdom adopted opposing positions on the use of preparatory work. The

\[\text{Art. 32, 1969 Vienna Convention on the Law of Treaties.}\]

This principle has long been established in international law. See, for example, Interpretation of Article 3(2) of the Treaty of Lausanne, 1925 P.C.I.J. (ser. B) No. 12, at 22; The Lotus Case, 1927 P.C.I.J. (ser. A) No. 10, at 16; Admission to the United Nations Case, 1950 I.C.J. Reports, 8.

Article 32 of the Vienna Convention provides: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'
United States argued in favour of such use, and the United Kingdom, together with France, argued against the practice. The United Kingdom objected that, preparation work was almost invariably confusing, unequal and partial: confusing because it commonly consisted of the summary records of statements made during the process of negotiations, and early statements on the positions of delegations might express the intention of the delegation at that stage, but bear no relation to the ultimate text of the treaty; unequal, because not all delegations spoke on any particular issue; and partial because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation.

Or as the French said, ‘It was much less hazardous and much more equitable when ascertaining the intention of the parties to rely on what they had agreed in writing, rather than to seek outside the text elements of intent which were far more unreliable, scattered as they were through incomplete or unilateral documents.’

26. Although the plain meaning of article 33 of the 1951 Convention would appear to rule out all forms of
forced repatriation of refugees, there is still some controversy regarding precisely what the drafters 'intended'. The preliminary sampling of the travaux préparatoires given above illustrates the uncertainty that often results from turning to the Convention's origins; the issues in dispute are considered further below.

2.2 Customary International Law

27. *Custom* is a shorthand way of referring to the fact of a practice followed by States in the persuasion that it is binding: custom as *evidence of a general practice accepted as law*. What States actually do is what counts, rather than what they just claim or say; and when it ceases to be mere usage and is followed under the conviction that it must be, so emerges a rule of customary international law.

28. In the present context two questions arise: Does the principle of *non-refoulement* form part of customary international law? It certainly binds the one hundred and sixteen States party to the 1951 Convention; but does it also bind non-parties? Secondly, if the rule is part of customary international law, is its scope identical with article 33 of the 1951 Convention; or does it protect a broader or narrower class of people in flight?
29. In trying to answer these questions and to assess State practice, it is relevant to establish empirically, what is the practice. If States in certain cases abstain from removing non-nationals, what criteria and circumstances govern the practice. How general is the practice, and is it common on a bilateral, regional or universal basis? Is the practice qualified in any way, for example, by reference to its 'exceptional' or 'temporary' nature? Finally, is there any evidence that abstention from removal is due to a 'sense of obligation', rather than to discretion?

30. The proof of international customary law requires consistency and generality of practice, but no particular duration; universality and complete uniformity are not required, but the practice must be accepted as law. In many cases, this *opinio juris* may be assumed on the basis of evidence of a general practice, or a consensus in the literature. A multilateral agreement may become part of customary international law where it 'is designed for adherence by States generally, is widely accepted, and is not rejected by a significant number of important States.' Evidence of State practice includes the activities of State organs, declarations by

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States in the governing and assembly bodies of international organizations, public pronouncements by heads of State, and empirical evidence of the extent to which the customary law rule is observed.\textsuperscript{34}

\textsuperscript{34} North Sea Continental Shelf Cases, 1969 ICJ Reports, 37. Among the 'material sources of custom', Brownlie includes: 'diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces, etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Obviously, the value of these sources varies and much depends on the circumstances': Principles of Public International Law, (4th ed., 1990), 5 (footnotes omitted).
2.3 International Conventions and Related Instruments

31. In addition to the 1951 Convention/1967 Protocol, the principle of non-refoulement is expressed particularly powerfully in the 1984 UN Convention against Torture, article 3 of which provides,

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

32. The 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War defines 'protected persons' as 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.'35 Article 44 provides that refugees

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who do not in fact enjoy the protection of any government should not be treated as enemy aliens solely by reason of being nationals of an enemy State; while article 45 declares in part:

Protected persons shall not be transferred to a Power which is not a party to the Convention...
In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. (Emphasis supplied).

33. *Non-refoulement* is also embodied in several regional instruments. Article II(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa\(^{36}\) provides that,

\[\text{n}o \text{ person shall be subjected } \ldots \text{ to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.}\]

34. Article 12(3) of the 1981 African [Banjul] Charter of Human and Peoples' Rights focuses specifically on asylum:

\(^{36}\) 1001 U.N.T.S. 45.
Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

35. The central features of non-refoulement are also present in the 1969 American Convention on Human Rights,\(^{37}\) article 22(8) of which declares,

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

36. In the Americas, regional protection of asylees goes back to the 1889 Montevideo Treaty on International Penal Law;\(^{38}\) article 16 proclaims that 'Political refugees shall be afforded an inviolable asylum', and article 20 excludes extradition for political crimes.\(^{39}\) Each of these regional instruments has been widely accepted, with no reservations recorded or

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\(^{38}\) OAS Official Records, OEA/Ser.X/1. Treaty Series 34. Text also in UNHCR, Collection of International Instruments concerning Refugees, (1979), 237. See also art. 20. 1940 Montevideo Treaty on International Penal Law: ibid., 252; art. 3, 1954 Caracas Convention on Territorial Asylum ('No State is under the obligation to surrender to another State, or to expel from its own territory, persons persecuted for political reasons or offenses'): ibid., 264

\(^{39}\) Other relevant provisions include art. 4(5), 1981 Inter-American Convention on Extradition; art. 3(2), 1957 European Convention on Extradition.
attempted with respect to the basic principle of non-return.

37. *Non-refoulement* is covered, at least in part, by article 3 of the 1950 European Convention on Human Rights, which prohibits torture, or cruel, inhuman or degrading treatment or punishment. In the view of the European Commission on Human Rights,\(^{40}\)

> If conditions in a country are such that the risk of serious treatment and the severity of that treatment fall within the scope of article 3, a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility ... of the contracting State which so decides.

This example illustrates the general issue of State responsibility in regard to the removal of persons from State territory, and is founded on 'the unqualified terms of article 3 - and the requirement which this, read in conjunction with article 1, imposes upon the Contracting States - to protect ‘everyone within their jurisdiction’ from the real risk of such treatment, in the light of its unremediable nature.'\(^{41}\)

\(^{40}\) *Kirkwood v. United Kingdom* (10479/83), 37 D & R 158.

\(^{41}\) Art. 3 of the European Convention has been interpreted as an obligation to afford humanitarian assistance in cases of gross violation of human rights by other States, although it has been argued that this gives rise to no general right of 'temporary refuge', and that the article's focus on conduct of particular gravity attracts a heavy evidential burden ('substantial grounds to fear', 'actual concrete danger'): Hailbronner, K., 'Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' 26 *Virginia Journal of International Law* (1986), 857-96; also published in Martin, D., *The New Asylum-Seekers*, (1988). So far as this is indeed borne out by the caselaw, art. 3 may fail to (continued...)
2.4 Declarations and Resolutions

38. Besides the range of obligations formally undertaken by States, the standing of the principle of non-refoulement in international law must also be assessed by reference to formally non-binding declarations and resolutions. States are able to express their views and policies in a variety of international fora; if their practice in turn conforms to such statements, it may in turn give further support to the concretization of a norm of customary international law.

39. Thus, the 1967 Declaration on Territorial Asylum, adopted unanimously by the General Assembly, recommends that States be guided by the principle that no one entitled to seek asylum 'shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution'.

40. Very similar language was used in article III(3) of the Principles concerning Treatment of Refugees, 

\[\text{\footnotesize (\ldots continued)}\]

\[\text{\footnotesize offer any additional protection to the refugee, while it nevertheless strengthens the basic principle of non-return to certain specifically threatening situations. See also the Soering Case (1/1989/161/217), Judgment of the European Court of Human Rights, Strasbourg, 7 Jul. 1989.}\]

\[\text{\footnotesize (\ldots continued)}\]

\[\text{\footnotesize Art. 3(1); UNGA Res. 2312(XXII) of 14 Dec. 1967. Note that art. 3(2) provides that an exception may be made to the principle stated in para. (1), "only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons". In such circumstances, the State contemplating such exception, "shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State": art. 3(3).}\]
adopted by the Asian-African Legal Consultative Committee in Bangkok in 1966:43

No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

41. A resolution adopted by the Committee of Ministers of the Council of Europe the following year similarly acknowledged that member States should 'ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution ...'44 The Committee of Ministers reiterated this principle in

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43 Report of the Eighth Session of the Asian-African Legal Consultative Committee, Bangkok, 8-17 Aug. 1966, 355; also in UNHCR, Collection, 201. Like the 1967 UN Declaration on Territorial Asylum, the Bangkok Principles also make provision for provisional asylum, should a State decide that an exception must be made to the general principle non-refoulement; see art. III(4).

44 Res. (67) 14 on Asylum to Persons in Danger of Persecution, adopted 29 June 1967; compare the formulation adopted in art. II(3) of the 1969 OAU Convention.
1984, 'regardless of whether [the] person has been recognized as a refugee...'.

In 1984 the Colloquium which adopted the Cartagena Declaration was yet more categoric, not only endorsing a broader, regional-specific refugee definition, but also reiterating, the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. The principle is imperative in regard to refugees and in the present state of international law should be acknowledged as a rule of *jus cogens*.

Within the United Nations, particularly close attention has been paid recently to the relationship between *non-refoulement* and the protection of human rights. So, for example, the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, endorsed by the General Assembly in 1989, provide:

5. No one shall be involuntarily returned or extradited to a country

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45 Rec. No. R (84) 1, Recommendation on the Protection of Persons satisfying the Criteria in the Geneva Convention who are not Formally Recognized as Refugees.

46 Cartagena Declaration, Conclusions and Recommendations, III, 5.

47 UNGA res. 44/162, 15 Dec. 1989. See also ECOSOC res. 1989/65, 24 May 1989, recommending that the principles annexed to the resolution be taken into account and respected by governments.
where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.

In 1992, the General Assembly also adopted the Declaration on the Protection of All Persons from Enforced Disappearance, article 8 of which declares, 48

1. No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Both of these provisions contribute to and confirm the meaning of persecution, and even if they do not expand the substantive scope of protection, nevertheless consolidate the legal standing of the principle in general international law.

2.5 The UNHCR Executive Committee

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2.5.1 Executive Committee Conclusions on International Protection

44. The UNHCR Executive Committee has consistently endorsed the fundamental character of the principle of non-refoulement, in its annual general and specific conclusions. In 1977, for example, the Executive Committee noted that the principle was ‘generally accepted by States,’ expressed concern at its disregard in certain cases, and reaffirmed,\textsuperscript{49}

the fundamental importance of the observance of the principle of non-refoulement—both at the border and within the territory of a State—of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.

45. Non-refoulement as a paramount consideration has also been reiterated in specific contexts. For example, ‘in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge’;\textsuperscript{50} similarly, ‘in situations of large-scale influx, asylum seekers should be admitted to the State in

\textsuperscript{49} Executive Committee, (1977), Conclusion No. 6 (XXVIII); text in UNHCR, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, (1980-) (hereafter, UNHCR, Conclusions), 14.

\textsuperscript{50} Executive Committee, (1980), Conclusion No. 19 (XXXI): UNHCR, Conclusions, 41.
which they first seek refuge...In all cases the fundamental principle of non-refoulement—including non-rejection at the frontier—must be scrupulously observed.'

46. In its 1982 general conclusion on protection, the Executive Committee expressed the view that the principle 'was progressively acquiring the character of a peremptory rule of international law.' Reported instances of breach of the principle have been consistently deplored, and in 1989, after the matter was raised expressly by UNHCR in its annual Note on International Protection, the Executive Committee expressed its deep concern 'that refugee protection is seriously jeopardized in some States by expulsion and refoulement of refugees or by measures which do not recognize the special situation of refugees.' The same year, when dealing with the problem of irregular movements, the Executive Committee affirmed that they 'refugees and asylum-seekers [who] move in an irregular manner from a country where they have already found protection...may be returned to that
country if (i) they are protected there against refoulement...'; and that in certain cases the physical safety or freedom of such refugee or asylum seeker may be endangered in that country, or that he or she may have good reason to fear persecution there, in which case their cases should be considered favourably.  

47. Similar language occurs in the Conclusions adopted in 1990 and 1991. On the latter occasion, the Executive Committee emphasized 'the primary importance of non-refoulement and asylum as cardinal principles of refugee protection', while underlining the protective purpose of the principle indirectly in the context of voluntary repatriation, by stressing the need for refugees to be able to 'return in safety and dignity to their homes without harassment, arbitrary detention or physical threats during or after return.'  

48. In 1992, the Executive Committee used its traditional language regarding the 'primary importance of the principles of non-refoulement and asylum as basic to refugee protection', but taking account of UNHCR's involvement in exceptional activities for internally displaced persons, also stressed that such

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'new approaches should not undermine the institution of asylum, as well as other basic protection principles, notably the principle of *non-refoulement*.\textsuperscript{59}'

49. The conclusions adopted by the UNHCR Executive Committee do not have force of law and do not, of themselves, create binding obligations. They may contribute, however, to the formulation of *opinio juris*—the sense of legal obligation with which States may or may not approach the problems of refugees. Some conclusions seek to lay down standards of treatment, or to resolve differences of interpretation between States or between States and UNHCR, while others are more hortatory, repeating and reaffirming basic principles without seeking either to expand their field of application.\textsuperscript{60} They must be reviewed in the context of States' expressed opinions, and in light of what they do in practice.

\section*{2.5.2 The Views of States}

50. The views and comments of States in the Executive Committee fall into two broad categories: first, general endorsements of the principle of *non-refoulement*, which usually say little about content or


\textsuperscript{60} See Sztucki, J., 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme,' 1 *IJRL* 285 (1989).
scope; and secondly, more focused comments, by which States seek to show where, in their opinion or practice, the limits to obligation lie.

51. One of the clearest statements in support of the principle of non-refoulement was made by Ambassador Jonathan Moore, United States Co-ordinator for Refugee Affairs, at the Executive Committee in 1987. Although general in approach, its precision gives it a substantive dimension: 61

The most abhorrent violation of the rights of refugees was forced repatriation, which denied them the most basic protection. Forced repatriation had occurred in almost every region of the world during the past year, resulting in death, serious injury and imprisonment. Considering that the most important element of a refugee’s protection was the obligation of non-refoulement, it was tragic that refugees had been forced to return to their countries against their will and without assurances that they would not face persecution on their return, especially when such violations were committed by, or with the concurrence of, States parties to international instruments prohibiting such acts. The threat to a

country posed by influxes of economic migrants should not serve as an excuse for refusing asylum. International standards for the humanitarian treatment of refugees must be respected and the international community must bring its weight to bear on countries in which violence and persecution perpetuated refugee flows.

52. Other comments in the years since 1987 have ranged from support for the idea that non-refoulement was a rule of jus cogens,\(^\text{62}\) to regret at reported instances of non-observance of fundamental obligations,\(^\text{63}\) to concern at current challenges to the related ‘principle of first asylum’,\(^\text{64}\) to the need, before implementing any form of compulsory return, to define objective criteria ‘to determine whether security concerns had been fully met,’ and further, with respect to the cessation clauses, ‘to ensure that refugees were not forced to return to unsafe countries’.\(^\text{65}\)

53. The more focused comments raised issues of specific application. For example, in 1987, the


\(^{63}\) ‘The refoulement of refugees must not be allowed to occur under any circumstances.’ Mr. Ceska (Austria): UN doc. A/AC.96/SR.439, para. 9 (1989).

\(^{64}\) Mrs. Lafontant (USA): UN doc. A/AC.96/SR.437, para. 49 (1989). Mrs. Lafontant had succeeded Jonathan Moore, and was Ambassador-at-Large and U.S. Coordinator for Refugee Affairs.

\(^{65}\) Mr. de Sa Barbuda (Brazil): UN doc. A/AC.96/SR.475, para. 83 (1992), commenting on temporary protection and its eventual termination as a possible alternative to the right of asylum in mass influx situations.
representative for Zimbabwe disputed allegations that his government was returning Mozambican refugees contrary to the UN and OAU Conventions, referring amongst other matters to the ‘close relationship between Zimbabwe and Mozambique, [and] the prevailing security situation in the region.’ The Turkish representative raised a yet more serious question.

The principle of non-refoulement was a sacred one and had to be scrupulously observed. Nevertheless, the influx of asylum-seekers or refugees into countries of first asylum or transit involved a risk of that principle being eroded; those countries, faced with the difficulties of repatriation and the progressively more restrictive practices of host countries, might find themselves unable to continue bearing the burden and, for want of any other solution, come to regard refoulement as the only possible way out. If that should occur, they would not be the only ones at fault, since the responsibility for ensuring the conditions necessary for observance of the non-

refoulement principle rested with the international community as a whole.

54. This is neither the first nor the last occasion on which this precise point has been raised. In 1989, the Turkish representative remarked that the refugee problem today, ‘was such that it was no longer possible to disassociate international protection from international co-operation and assistance.’\(^{68}\) Back in 1977, at the abortive Conference on Territorial Asylum, Turkey had proposed an amendment whereby non-refoulement might not be claimed ‘in exceptional cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State’.\(^{69}\)

55. In practice, however, though not perfect, Turkey’s record and public statements are equally consistent with acceptance of the principle of non-refoulement. Commenting on developments in Iraq in April 1991 and the arrival on the border of some half million Kurdish asylum seekers, the Turkish representative noted that while his country had tried to meet the needs of those concerned, ‘[t]he scale of the operation had...been

\(^{68}\) Mr. Demiralp (Turkey): UN doc. A/AC.96/SR.442, para. 92 (1989); see also Mr. Cem Duna (Turkey): UN doc. A/AC.96/SR.456, para. 7 (1991). On several occasions, the Turkish representatives have both upheld the fundamental character of non-refoulement while simultaneously supporting the right of the asylum-seeker to choose in which country to seek asylum, thereby staking a claim for a form of ‘natural’ burden-sharing.

\(^{69}\) UN doc. A/CONF.78/C.1/L.28/Rev.1, adopted in the Committee of the Whole by 24 votes to 20, with 40 abstentions. The voting on this issue must be put in the context of somewhat premature or untimely efforts to secure agreement among States on a ‘right to asylum.’ See further, Grahl-Madsen, A., Territorial Asylum, (1980); Goodwin-Gill, G.S., The Refugee in International Law, (1983), 77, 111.
prohibitive, and Turkey had been compelled to call for urgent international assistance. As a result of the subsequent international cooperation, virtually all those displaced persons had now been resettled in the security zone established in the north of Iraq.\textsuperscript{70} If the reference to ‘security’ can be taken as controlling, then the rather unique situation of the Kurdish people in search of refuge might be interpreted consistently with a variant of \textit{non-refoulement} that prohibits only return or rejection to certain situations of ‘insecurity’. This is not particularly persuasive, but the ‘solution’ imposed on northern Iraq remains unique.\textsuperscript{71}

56. Since 1985, a number of States have stressed that \textit{non-refoulement} does not apply to non-Convention refugees, although many recognize at the same time that protection needs are involved. In 1988, the Swiss representative was apprehensive that the ‘dilution’ of the refugee concept ‘would ... weaken the basic principle of \textit{non-refoulement}.’ While others might be allowed to remain for humanitarian reasons, this would not be based on a Convention obligation, so much as on ‘considerations of humanitarian law or international solidarity, in other words, on a free decision by the

\textsuperscript{70} Mr. Atkan (Turkey): UN doc. A/AC.96/SR.468, para. 18 (1991).

State concerned." In 1990, several States called attention to the fact that they were parties to the 1984 United Nations Convention against Torture; they were consequently also bound by that treaty’s provision on non-refoulement, prohibiting return to situations of torture even of persons not technically within the refugee definition. Two delegations commented that ‘any responsibility not to return non-refugees was far less clear-cut in situations that do not involve torture.’

In the Sub-Committee of the Whole on International Protection in 1992, a number of delegations warned against ‘borrowing terminology and approaches from the Convention for new refugee situations, to which these instruments were not intended to apply.’ Several also did not accept that there was ‘a legal right of non-refoulement for non-1951 Convention refugees’; nevertheless, ‘minimum standards of protection’ were due, ‘including non-discrimination and other fair and humane treatment, as well as respect for the integrity of the family unit.’ While the ‘central importance’ of basic principles such as non-refoulement was reaffirmed, one delegation


stated its belief that there was no ‘rule of customary international law preventing repatriation because of generalized conditions of unrest or violence’. 75 The year before, on the other hand, the Swedish representative, while conscious that legal solutions did not suffice and that prevention must also be considered, was of the view that protection should be extended not only to Convention refugees, ‘but also to people fleeing persecution, armed conflict or other forms of violence and to victims of natural or ecological disasters and extreme poverty. It was often far from easy to differentiate between such categories and asylum-seekers motivated by purely economic considerations’. 76

58. On other occasions, States have taken the opportunity to describe practices which, in their view, did not amount to refoulement, such as normal immigration controls, visa policies and carrier sanctions. In 1988 again, the United Kingdom representative declared his country’s intention to abide fully by the principle. However, non-refoulement did not prevent the return of ‘failed asylum-seekers’, or

75 Ibid., para. 17.

returns to 'safe third countries'.\textsuperscript{77} The representative for Argentina, on the other hand, was careful to stress that practices such as 'the refusal of admission at a border for purely administrative reasons vitiated the principle of non-refoulement.'\textsuperscript{78}

59. The initiation of discussion on the 'safe country/safe country of asylum' question has also led States to consider its relation to non-refoulement, with several delegations emphasizing that 'the fundamental criterion when considering resort to the notion, was protection against refoulement.'\textsuperscript{79} Similarly, only a change of circumstances 'of a fundamental character' in the country of origin would justify the termination of protection against refoulement.\textsuperscript{80}

60. Perhaps the most significant attack on the principle of non-refoulement occurred in the Sub-Committee of the Whole on International Protection in 1989, when the United States representative attempted to establish some of the groundwork for its domestic litigation strategy in support of Haitian interdiction. Despite earlier U.S. declarations of support for the principle of

\textsuperscript{77} Mr. Wrench (United Kingdom): UN doc. A/AC.96/SR.430, para. 53, (1988). This interpretation was reiterated the following year; see UN doc. A/AC.96/SR.442, para. 51 (1989).

\textsuperscript{78} Mr. Strassera (Argentina): UN doc. A/AC.96/SR.442, para. 46 (1989).


'first asylum', the United States delegate sought to distinguish between legally binding obligations and non-binding 'generally-accepted moral and political principles of refugee protection'. The United States, he said, did not believe that States were under a legal obligation 'to admit persons seeking asylum':

As a matter of practice, the United States authorities did not return persons who were likely to be persecuted in their countries of origin...That was the practice, and...the policy of the United States, and not a principle of international law with which it conformed...It did not consider that the non-refoulement obligation under article 33 of the Convention included an obligation to admit an asylum-seeker. The obligation...pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination. Furthermore, there was nothing to suggest that an obligation

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81 See above, note 62 and text. United States concern to defend the principle of first asylum was motivated in particular by practices in South East Asia, where Indo-Chinese boat people were not infrequently denied access to coastal States, placed back on board ships returning to their country of origin, or towed out to sea, often with resulting loss of life.


83 Ibid., paras. 80, 82.
to admit asylum-seekers had ripened into a rule of customary international law.

The intervention, which attracted no support from other States, was clearly drafted with the Haitian interdiction programme in mind; equally clearly, it fails to notice that *non-refoulement* is not so much about *admission* to a State, as about not returning refugees to where their lives or freedom may be endangered. It is also inconsistent with U.S. support for the principle of first asylum, declared earlier in the same session, and even repeated in the present intervention.\(^84\) In fact, this strategic departure from the accepted meaning of *non-refoulement* came too late to excuse the United States from responsibility for the violation of international law.\(^85\)

### 2.6 State Practice: Some Aspects

61. The views of States and to some extent their practice also indicate a contingent dimension to application of the principle of *non-refoulement*. Reservations with respect to the security aspects of mass influxes have not died away since they were

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\(^84\) Ibid., para. 81.

\(^85\) See further below, Section 3.2.1.
formally recognized in the 1967 UN Declaration on Territorial Asylum. On the contrary, they continue to surface in the discourse of many ‘frontline’ States, such as Turkey or Thailand. Clearly, from 1979 onwards resettlement guarantees and substantial financial contributions were a major factor in preserving the so-called principle of first asylum. In October 1979, for example, Thailand announced the reversal of a policy which had earlier led to the forcible return of some 40,000 Kampucheans; henceforth, all asylum-seekers were to allowed to enter.\textsuperscript{86}

Likewise, the unnerving prospect of a repeat operation on behalf of Kurdish refugees imminently leaving northern Iraq for Turkey was a factor in the decision to establish a security zone, thereby removing or attenuating the factor of risk that would otherwise have triggered the principle of non-refoulement, if not its application in the particular circumstances.\textsuperscript{87}

Two aspects of State practice call for comment.\textsuperscript{88} First, the extent to which protection against refoulement is provided, either by domestic law or in the administrative process of States; and

\textsuperscript{86} See Report of the Secretary-General: UN doc. A/34/627, para. 48; annex 1, para. 8.

\textsuperscript{87} Note that art. 11.4, 1969 OAU Convention and paras. 3 and 4 of Council of Europe Resolution 67 (14) acknowledge that States may have difficulty in fulfilling their obligations without international co-operation.

\textsuperscript{88} The following summary and selective account is based on UNHCR field office protection reports for 1988-1991.
secondly, the occasions on which refoulement has happened or may have happened, and the reactions of States to protests by UNHCR or other States.

64. A full account of the extent to which States have incorporated the principle of non-refoulement into domestic law is beyond the scope of the present paper. Such provisions are common, however, particularly among States party to the 1951 Convention/1967 Protocol, but even where formal legislation is absent, observance and recognition of the principle in practice can frequently be observed among both ratifying and non-ratifying States.

65. Bilateral agreements between East African States which led to refoulement and a mutual exchange of refugees were the subject of protest in 1983-4, for example, followed by appeals for clemency on behalf of those tried and sentenced to death. In 1988, UNHCR protested the refoulement of four Iranians by Pakistan, to be assured in an informal reply that it had been a mistake. Pakistan also indicated that with respect to non-Afghan refugees, it intended to abide by the principles set out in the Handbook on Management

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89 For information on the related issue of procedures for determination of refugee status, see UN doc. A/AC.96/INF.152/Rev.8 (12 Sept. 1989).

90 Interestingly, the principle of non-refoulement was expressly included in the Memorandum of Understanding concluded between UNHCR and the Government of Honduras.

of Afghan Refugees,\textsuperscript{92} which had been derived from the basic refugee treaties.

66. In 1987, the United States and UNHCR also protested the action of the Singapore authorities in placing two Vietnamese stowaways back on board a ship returning to Vietnam, despite the offer of resettlement guarantees. Assurances were given that the disembarkation of stowaways would be allowed in future cases, provided resettlement was guaranteed and departure promptly arranged. A further protest followed when the Singapore authorities interpreted their undertaking restrictively, and as applying only to stowaways on boats returning to Vietnam. In a similar case in 1988, the High Commissioner intervened directly with the Prime Minister of Singapore; in the event, the stowaways were allowed to disembark from the vessel on condition that they went straight to the airport and left Singapore.

67. In December 1988, the High Commissioner sent a \textit{Note Verbale} to the Permanent Mission of Turkey, protesting the \textit{refoulement} of eleven persons, including seven recognized Mandate refugees. The following year, the Branch Office reported a marked decrease in the numbers of reported and confirmed cases of \textit{refoulement} (from 340 to 20 persons), during a period

\begin{footnotesize}
\textsuperscript{92} Handbook on Management of Afghan Refugees, Chief Commissioner for Afghan Refugees, Islamabad, 1984.
\end{footnotesize}
in which substantial numbers of Iraqi Kurds were granted temporary refuge.\textsuperscript{93} The Branch Office developed the practice of supplying the Turkish authorities with lists of persons of concern, as a practical means to ensure \textit{non-refoulement}. In a letter to UNHCR in June 1990, the Foreign Minister declared that \textit{non-refoulement} was considered a basic principle of international law and a ‘well-established tradition in Turkey’s practice.’ The situation remained relatively stable until the events of April 1991. In that year, some fifteen Iranians were \textit{refouled}, mostly by being escorted to the border rather than handed over directly to the Iranian authorities.\textsuperscript{94} Forcible returns of Iraqis, with whom there had so far been no problems, began with April’s large-scale influx. UNHCR was not allowed access to new arrivals which, together with military developments, meant that the Office was unable to prevent returns. The establishment of the security zone and UNHCR operations in northern Iraq led the Office to adopt a low profile on the issue.\textsuperscript{95}

\textsuperscript{93} Instances of \textit{refoulement} appeared to involve security cases, in particular, such as militant Iranian or Iraqi Kurds.

\textsuperscript{94} An unknown number of 'economic migrants' and undocumented individuals may also have been refused admission at the border.

\textsuperscript{95} See interventions by Turkish representatives in the Executive Committee, noted above. In practical terms, \textit{non-refoulement} is closely linked to, if not dependent on, resettlement, either official or unofficial. Turkey maintains the geographical limitation to its Convention and Protocol obligations. The practice in former Yugoslavia was likewise to respect the principle, on the assumption that recognized refugees would be resettled. When resettlement options for Albanians began to dry up in 1990, returns soon followed.
68. In Egypt in 1988 five Somali cadets were reportedly *refouled*. UNHCR protested and the Egyptian government replied, stating its intention to fulfil its international obligations generally and *non-refoulement* in particular. The government followed up with the circulation of instructions and demarches by the Egyptian Embassy in Somalia; three of the cadets returned to Cairo.

69. In Italy in 1989, UNHCR welcomed the inclusion of *non-refoulement* in a new decree, particularly given its broadening of criteria to cover those who could be persecuted for reasons of sex, language, personal or social conditions, or who risked being returned to another country in which they might run such risk. The Office expressed its concern, however, at the limitation of protection to expulsion proceedings, so that rejection at the frontier was not covered. When the decree was ‘converted’ to a law the following year, protection was also extended to certain categories of asylum seekers; a year later, however, it seemed that assumptions of protection elsewhere were increasing the risk of frontier rejections and possible *refoulement*. In June 1991, the Italian authorities sent back some 800-1,000 Albanian ‘boat people,’

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96 During the same year, Austria returned considerable numbers of asylum seekers to third countries, usually overland. ‘Protection elsewhere’ was also assumed, strengthened by a further assumption that all States party to the Convention or Protocol abide by their international obligations, particularly the principle of *non-refoulement*. Information about numbers and the practice was promised to UNHCR, but apparently not provided.
against guarantees from the country of origin. The non-penalization of the group led the authorities summarily to reject all of the 18,000 or so Albanians who arrived in early August that year. UNHCR did not intervene, on the basis that the Albanians were not of concern to the Office. At the same time, it was noted that those fleeing the conflict in former Yugoslavia were admitted and protected.

70. Also in 1991, the United States revised its policy and practice with respect to Haitians intercepted on the high seas, electing to abandon the procedure of screening for ‘colorable claims’ to asylum that had been applied over the previous ten years. The legality of this action is considered in more detail below.

71. The recent practice of States has frequently included the protection of persons fleeing situations of grave and urgent necessity, even as States resist formally classifying such persons as refugees when outside the terms of the 1951 Convention/1967 Protocol, and do not accept any obligation to accord them asylum or particular durable solution.97 The practice shows that States commonly accord refuge in such cases, and thereby confirm essential humanitarian

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principles deriving from a variety of sources, including the duties owed to the victims of armed conflict and to civilians caught up in or fleeing war; the obligation to protect those in danger of torture, as required by customary international law, now re-stated in article 3 of the United Nations Convention against Torture and Inhuman or Degrading Treatment and Punishment; and even the traditional practice whereby ships under force majeure or stress of weather are considered immune from the exercise of jurisdiction when entering a State, on the basis of urgent distress and grave necessity.

2.7 The Status of the Principle of Non-refoulement in International Law: The Views of Commentators

72. While there is little difficulty in showing the extent of treaty obligations of non-refoulement, establishing the status of the principle in general or customary international law presents greater problems. In 1954, twenty-seven States participating in the UN Conference on the Status of Stateless Persons unanimously expressed the view that the non-refoulement provision of the 1951 Refugee Convention was ‘an expression of the generally accepted principle’ of non-return; for that reason, it was considered unnecessary to include an
equivalent article for stateless persons. That assessment was premature, but the principle of non-refoulement has since been reiterated and refined, included in a range of regional refugee, human rights and extradition treaties, repeatedly endorsed in a variety of international fora, and its violation protested by UNHCR and States.

73. Both article 33 of the 1951 Convention and article 3 of the 1984 Convention against Torture are of a 'fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law', as that phrase was used by the International Court of Justice in the North Sea Continental Shelf cases. So far as both Convention provisions are formally addressed to the contracting Parties, the universality of the principle of non-refoulement has been a constant emphasis of other instruments, including declarations, recommendations and resolutions at both international and regional levels. The proof of international customary law requires consistency and generality of practice, but no particular duration; universality and complete uniformity are not required, but the practice must be accepted as

98 Final Act, UN Conference on the Status of Stateless Persons: 360 UNTS 117; text in UNHCR, Collection, 59.

99 [1969] ICJ Reports, 3 at 42.

law. In many cases, this *opinio juris* may be inferred from the evidence of a general practice, or a consensus in the literature.\(^{101}\)

74. Writing separately in 1982, Feliciano, Hyndman and Kälin all expressed varying degrees of reservation with respect to the scope of any customary international law rule prohibiting the return of refugees to countries in which they might be persecuted. Feliciano considered that, with one material qualification, 'the *non-refoulement* principle may properly be regarded as having matured into a norm of customary international law.' That qualification concerned the position of the 'socialist' countries: 'Thus it appears that *non-refoulement* is a principle not of *general* customary law but of *regional* or *hemispherical* customary law, being widely or generally acknowledged in the non-socialist part of the globe.'\(^{102}\)

75. Hyndman also thought that a good case could be made for a customary rule, but recognized that many States remained concerned to maintain an exception in the case of threats to national security, or in situations of mass influx: '...the oft-repeated...exceptions cannot be ignored and may be indicative that if *non-


refoulement has become a binding principle it has become so with these limitations.'\textsuperscript{103} Kälin was of the view that while the principle was customary law in the making, it was acknowledged as regional custom only in Europe, the Americas and Africa. In particular, he attached significance to the fact that in discussions on the UN Declaration on Territorial Asylum in the Sixth (Legal) Committee of the General Assembly, 'the great majority of delegations stressed that the draft...was not intended to propound legal norms, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum'.\textsuperscript{104} Kälin was also concerned by the inconsistency and divergencies in State practice, including application of the refugee definition and its exceptions, which further narrowed the reach of the principle itself.\textsuperscript{105}

76. After reviewing State practice, including voting patterns in the General Assembly, the protection

\textsuperscript{103} Hyndman, P., 'Asylum and Non-Refoulement—Are these Obligations owed to Refugees under International Law?' 57 Philippine Law Journal 43, 68-9 (1982). Grah-Madsen thought the exception relating to mass influx 'may be acceptable': Territorial Asylum, (1980), 65-6. See also Martin, D.A., 'Large Scale Migrations of Asylum Seekers,' 76 AJIL 598 (1982).

\textsuperscript{104} UN doc. A/6912, para. 13, quoted in Kälin, W., Das Prinzip des Non-Refoulement, (1982), 71. Grah-Madsen, writing in 1980, commented that by 'being adopted by the General Assembly...the principle of non-refoulement has most certainly acquired a high degree of general acceptance,' but he accorded it no greater legal status: Territorial Asylum, (1980), 42.

\textsuperscript{105} 'Zusammenfassend ist festzustellen, dass das refoulement-Verbot heute noch nicht den Rang von universellem Völkerrecht erlangt hat, dass aber eine deutliche Entwicklung in diese Richtung besteht. Insofer lässt sich sagen, das non-refoulement-Prinzip sei in Entstehung begriffenes universelles Völkerrecht...Die Bedeutung dieser Aussage darf nicht überschätzt werden. Ein Blick auf die heutige Staatenpraxis zeigt nämlich, dass der Inhalt und die Tragweite eines solchen gewohnheitsrechtlichen Rückschiebungsverbotes sehr begrenzt wären.' Kälin, W., Das Prinzip des Non-Refoulement, (1982), 80-1.
activities of UNHCR and the development of the refugee definition, the present writer noted in 1983 that,\textsuperscript{106}

...no state today claims any general right to return refugees or \textit{bona fide} asylum-seekers to a territory in which they may face persecution or danger to life or limb. Where states do claim not to be bound by any obligation, their arguments either dispute the status of the individuals in question, or invoke exceptions to the principle of \textit{non-refoulement}, particularly on the basis of threats to national security...The weight of the evidence...is in favour of the limits to discretion which flow, first, from an international legal definition of the refugee; and secondly, from general recognition of the principle of \textit{non-refoulement}.

\textbullet\quad 77. A monograph on non-expulsion and \textit{non-refoulement} published in 1989 took issue with Kälin's thesis of lack of generality of practice sufficient to found a rule of customary international law. Stenberg argued that 'there is at least persuasive evidence that Article 33... satisfies the criterion of generality. Moreover, the weightiest reason for the "persistent objection" by the South East Asian States does not

seem to stem from a disregard of the principle of non-refoulement as such, but from the fear that these States may be left...with a large backlog of persons who they feel they cannot admit on a permanent basis because of dangerous political, economic and social strains.\(^{107}\) Kälín also seems to have moved in the direction of customary international law, at least so far as non-refoulement in its narrow, Convention-refugee sense is concerned,\(^{108}\) and to a concept of non-refoulement that includes protection against torture, inhuman treatment or other serious violations of human rights.\(^{109}\)

78. Where those in flight have ‘valid reasons’ to seek refuge, but do not otherwise fall within the terms of the 1951 Convention/1967 Protocol, the responsibilities of States in general international law remain controversial. Differing approaches are evident in the UNHCR Executive Committee, with some States concerned to emphasize protection needs, and others to stress their sovereign discretion. In a 1986 paper

\(^{107}\) Stenberg, G., Non-expulsion and Non-Refoulement, (1989), 275; on uniformity and consistency of practice and opinio juris, see also at 275-9.

\(^{108}\) Kälín, W., Grundries des Asylverfahrens, (1990), 210-11: ‘Das Prinzip des non-refoulement im engeren Sinn ist ein Institut des Flüchtlingsrechtes: Es schützt Flüchtlinge vor Rückschiebung in einen Staat, in welchen ihnen Verfolgung im flüchtlingsrechtlichen Sinn droht. Dieses Prinzip gilt nicht nur kraft Vertragsrecht, sondern...auch kraft Völkerrechtsrechtsrecht.’ (Footnotes omitted).

somewhat ill-advisedly titled 'Non-Refoulement and the New Asylum-Seekers,' the present writer argued that while customary international law had incorporated the core meaning of article 33, it has also 'extend[ed] the principle of non-refoulement to include displaced persons who do not enjoy the protection of the government of their country of origin.'\textsuperscript{110} Although framed with reference to danger caused by civil disorder, domestic conflicts or human rights violations, the argument in terms of non-refoulement was not well chosen, particularly given States perceptions linking the principle closely to Convention refugees and asylum. Rather, the impact on State competence of the broader developments relating to human rights and displacement would have been better served by characterizing State responsibilities in terms of a general principle of refuge.

79. Hailbronner criticised the arguments for extended application of the non-refoulement principle as 'wishful legal thinking'.\textsuperscript{111} His critique focuses principally on the way in which article 3 of the European Convention on Human Rights has been interpreted, rather than on international responses to a rather loosely defined category of 'humanitarian refugees'. Hailbronner

\textsuperscript{110} Goodwin-Gill, G.S., 'Non-Refoulement and the New Asylum-Seekers,' 26 Virg. J. Int'l. L. 897, 902.

\textsuperscript{111} Hailbronner, K., 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' 26 Virg. J. Int'l. L. 857 (1986).
accepts that article 3 has been interpreted as an obligation to afford humanitarian assistance in cases of gross violation of human rights by other States, but concludes that neither this nor State practice at large gives rise to a general right of 'temporary refuge'.

This reverse individualistic approach to international obligations, which is also common to States and in the works of a number of commentators, unfortunately diverts attention from the human rights dimension: So far as a State's actions may expose an individual to risk of violation of fundamental human rights, its responsibility is duty-driven, rather than strictly correlative to any individual 'right'.

80. The potential scope of a principle of refuge going beyond the categories of the 1951 Convention is considered in more detail below.

3. Scope of the Principle of Non-refoulement

3.1 Personal Scope

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112 Ibid., 875f. Hallbronner rightly notes that art. 3 focuses on conduct of particular gravity and that this has attracted a heavy evidential burden ('substantial grounds to fear', 'actual concrete danger'); the victims of generalized violence or terror which is not specifically directed at them are thus unable to invoke its protection. For an alternative view, see Einarsen, T., 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum,' 2 IJRL 361 (1990).

113 See above, notes 80-1 and accompanying text, remarking the confusion between 'admission' and not returning a refugee to persecution.

114 See also Kälin, W., Grundriss des Asylverfahrens, (1990), 211: 'In seinem weiteren, menschenrechtlichen Sinn schützt [das Prinzip des non-refoulement] vor Aushändigung an einen Staat, welcher aus irgend welchen Motiven den betroffenen Ausländer Folter oder bestimmten anderen schwerwiegenden Menschenrechtsverletzungen aussetzen würde.'
81. The principle of *non-refoulement*, as it appears in article 33 of the 1951 Convention, applies clearly and categorically to refugees within the meaning of article 1. It also applies to *asylum seekers*, at least during an initial period and in appropriate circumstances, for otherwise there would be no effective protection. Those with a presumptive or *prima facie* claim to refugee status are therefore entitled to protection, as the UNHCR Executive Committee has stressed, for example, in Conclusion No. 6 (XXVIII), reaffirming ‘the fundamental importance of the principle of *non-refoulement*... irrespective of whether or not individuals have been formally recognized as refugees’.\(^{115}\)

82. Equally irrelevant is the legal or migration status of the asylum seeker. It does not matter *how* the asylum seekers comes within the territory or jurisdiction of the State; what counts is what results from the actions of State agents. If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is *refoulement* contrary to international law.

83. The status or personal circumstances of the asylum seeker, however, may control the options open to the receiving State. In the case of a stowaway

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\(^{115}\) Report of the 28th Session of the High Commissioner’s Programme: UN doc. A/AC.96/549 (1977), para. 53.4(c); also Council of Europe Recommendation No. R. (84) 1.
asylum seeker, for example, the port of call State may require the ship’s master to keep the stowaway on board and travel on to the next port of call; or it may call upon the flag State to assume responsibility where the next port of call is unacceptable; or it may allow temporary disembarkation pending resettlement elsewhere. Thus, by itself, a categorical refusal of disembarkation can only be equated with *refoulement*, if it actually results in the return of refugees to persecution.\(^\text{116}\) Similar considerations apply also to rescue at sea cases seeking disembarkation, and even to boats of asylum seekers arriving directly. From a practical perspective, however, a refusal to take account of their claims to be refugees, either on the specious basis that they have not ‘entered’ State territory or on any other (disputed) ground, such as the claim that they are the responsibility of another State,

\(^\text{116}\) In Conclusion No. 53 (XXXIX) on stowaway asylum seekers, the Executive Committee recognized the possibility of flag State responsibilities, while emphasizing that ‘like other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.’ Stowaways frequently arouse controversy. The issue of stowaway asylum-seekers was first briefly examined by a working group which met in Geneva in July 1982 to consider rescue at sea. It was agreed that the principle of *non-refoulement* should be upheld, but there were otherwise widely diverging views on how problems should be solved. The working group’s recommendations on stowaways were not adopted by the Executive Committee at its October 1982 session: Report of the Working Group on problems related to the rescue of asylum-seekers in distress at sea: UN doc. EC/SCP/21, paras. 22ff. Although there was more success in 1988 with Conclusion No. 53, the debate was not all plain sailing; see UNHCR, *Note on Stowaway Asylum-Seekers*: UN doc. EC/SCP/51 (22 Jul. 1988); Report of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/717 (3 Oct. 1988), paras. 36-42; Mr. Tayhardat (Venezuela): UN doc. A/AC.96/SR.431, para. 7; Mr. Robertson (Australia): ibid., para. 9 (1988). See also art. 5(2),(3), 1957 Brussels Convention on Stowaways: *Conférence diplomatique de droit maritime, 10ème session, Bruxelles*, 491-503 (1958).
would not suffice to avoid liability for breach of the principle of non-refoulement. 117

3.1.1 Non-refoulement: The Question of Risk

84. The legal, and to some extent logical, relationship between article 33(1) and article 1 of the 1951 Convention/1967 Protocol is evident in the correlation established in State practice, where entitlement to the protection of non-refoulement is conditioned simply upon satisfying the well-founded fear criterion. So far as the drafters of the 1951 Convention were aware of a divergence between the words defining refugee status and those requiring non-refoulement, they gave little thought to the consequences. Mr. Rochefort, the French representative, suggested that article 1 referred to examination at the frontier of those wishing to enter a contracting State, whereas article 33 was concerned with provisions applicable at a later stage. The co-existence of these two possibilities was perfectly feasible, though he felt that there was a distinct and somewhat uncomfortable inconsistency between article

117 Goodwin-Gill, G.S., The Refugee in International Law, (1983), 84, 87. See also at 95: 'In the case of measures designed to prevent landings and which fall short of returning refugees to a country in which they may be endangered, non-refoulement remains inapplicable. It does not follow that states enjoy complete freedom of action over arriving boats, even if they come in substantial numbers and without nationality. The range of permissible measures is limited by obligations relating to rescue at sea and arising from elementary considerations of humanity, while action which would directly effect return is enjoined by the principle of non-refoulement.'
33(1) and article 1;\textsuperscript{118} that inconsistency related not to the presence of conflicting standards of proof, however, or to issues of extraterritorial application, but to the class and extent of those, principally criminals, who were to be excluded from refugee status and/or denied the benefit of non-refoulement.

85. The intimate link between articles 1 and 33 was nevertheless recognized;\textsuperscript{119} in both, the status of 'refugee' was to be governed by the criterion of well-founded fear, and withdrawal of status or refoulement would always be exceptional and restricted.\textsuperscript{120} The travaux préparatoires do not explain the different wording chosen for the formulations respectively of refugee status and non-refoulement; but neither do they give any indication that a different standard of proof was intended to be applied in one case, rather than in the other. In practice, one and the same standard is accepted at both national and international levels, reflecting the sufficiency of serious risk, rather than


\textsuperscript{119} UN doc. A/CONF.2/SR.35, p. 22.

\textsuperscript{120} UN doc. A/CONF.2/SR.16, pp. 4, 8.
any more onerous standard of proof, such as the clear probability of persecution.\textsuperscript{121}

86. At the international level, no distinction is recognized between refugee status and entitlement to the non-refoulement. UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* comments on the 'objective' element in the refugee definition, at paragraph 42:

In general, the applicant's fear should be considered well-founded if he can establish, *to a reasonable degree*, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there. (Emphasis supplied)

87. In only one instance were articles 1 and 33, as a coherent structure of protection, severed by a judicial ruling on literal meaning; and on that occasion, the executive branch of government took steps by regulation to bridge the gap between the refugee eligible under the law for the discretionary grant of asylum and the refugee with a right to the benefit of

\begin{footnotesize}
\end{footnotesize}
non-refoulement. The relation of refugee status and non-refoulement was described more coherently by the United Kingdom House of Lords in 1987, in *R v. Secretary of State for the Home Department, ex parte Sivakumaran, et al*, a case in which UNHCR submitted an intervenor brief:

It is...plain, as indeed was reinforced in argument...with reference to the travaux préparatoires, that the non-refoulement provision in article 33 was intended to apply to all persons determined to be refugees under article 1 of the Convention.

Non-refoulement extends in principle, therefore, to every individual who has a well-founded fear of persecution, or where there are substantial grounds for believing that he or she would be in danger of torture if returned to a particular country.

### 3.1.2 Exceptions to the Principle of Non-refoulement

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122 See the U.S. Supreme Court decisions in *INS v. Stevic*, 467 U.S. 407 (1984) and *INS v. Cardoza-Fonseca* 480 U.S. 421 (1987); for comment, see 2 *IJRL* 461-7 (1990). The remedy was provided by the Final Rule on Asylum and Withholding of Deportation Procedures, issued by the U.S. Department of Justice Immigration and Naturalization Service in July 1990.


124 In determining the risk of torture, the competent authorities are required to take into account, for example, 'the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights': art. 3(2), 1984 UN Convention against Torture.
88. The Convention refugee definition is not an absolute guarantee of protection. Article 1 F, for example, expressly excludes those whom there are serious reasons to believe have committed war crimes, or crimes against humanity, a serious non-political crime prior to their entry to the State of refuge, or acts contrary to the purposes and principles of the United Nations. Article 33.2 also contains an exception to the prohibition on refoulement, designed to protect the community of refuge from those convicted of particularly serious crimes or who constitute a danger to security. The Ad hoc Committee had originally proposed no exceptions, given the fundamental character of the non-refoulement principle. By the time the 1951 Conference was held, however, the Cold War had consolidated its hold and 'security' was a major concern.

89. In debate over refugee status and ordinary criminals, the British representative was concerned that those guilty of trivial offences should not be excluded, and that refugee status or asylum

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125 An analysis of these terms is beyond the scope of the present paper; for comment see Goodwin-Gill, G.S., The Refugee in International Law, (1983), 58-65.

126 See UN doc. E/1850, para. 35.

127 '...the climate of opinion had altered since [article 33] had been drafted, and ... each government had become more keenly aware of the current dangers to its national security.' Mr. Hoare, United Kingdom: UN doc. A/CONF.2/SR.16, p. 8.

should not be revoked with respect to one who committed a crime after entry, in circumstances in which the exceptional limitations on non-refoulement did not apply.\textsuperscript{129} It was eventually agreed that article 1 F was directed at crimes committed prior to entry, and that the word 'crime' should be qualified by the word serious,\textsuperscript{130} thus moving the exclusion clause nearer to the exceptions to non-refoulement.\textsuperscript{131}

90. In contrast to the 1951 Convention, the 1969 OAU Convention declares the principle of non-refoulement without exception. No formal concession is made to overriding considerations of national security, although in cases of difficulty 'in continuing to grant asylum' appeal may be made directly to other member States and through the OAU. Provision is then made for temporary residence pending resettlement, although its grant is not mandatory. The absence of any formal exception to the principle is the more remarkable in view of the dimensions of the refugee problems which have faced individual African States. Indeed, Article 3 of the Declaration on

\textsuperscript{129} The summary records reveal shared concerns, but little consensus. The Netherlands thought it illogical to exclude common criminals from the benefits of the Convention, but right that they should not enjoy the right of asylum. Belgium thought there should be no denial of refugee status to a person simply because of conviction for a criminal offence, but that some reference to extradition was called for. Ibid.


\textsuperscript{131} In its final form in art. 33(2), the exception to non-refoulement provides that it may not be claimed 'by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'
Territorial Asylum, adopted by the General Assembly only two years before the OAU Convention, not only acknowledges the national security exception, but also appears to authorize further exceptions 'in order to safeguard the population, as in the case of a mass influx of persons'.

91. This exception reappeared at the 1977 Conference on Territorial Asylum when Turkey, in a prescient move, proposed an amendment whereby non-refoulement might not be claimed 'in exceptional cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State'.\footnote{See above, notes 63-7 and accompanying text.} It can be argued that a mass influx is not itself sufficient to justify refoulement, given the likelihood of an international response to offset any potential threat to national security. Turkey's decision to close its border to Kurdish refugees, and the support or non-objection of a substantial number of members of the international community, clearly violated the principle of non-refoulement, understood as a general principle of international law that includes the dimension of non-rejection at the frontier.\footnote{Turkey maintains the geographical limitation to its obligations under the 1951 Convention, and is thus not bound by treaty towards non-European refugees arriving on its territory or at its borders.} In the instant case, the international response was part of the problem, so far
as the creation of a safe zone for Kurds in Iraq arguably removed the (legal) basis for departure in search of asylum. The uniqueness of the circumstances, however, might suggest that they have little precedential value, and that the principle of non-refoulement has emerged relatively unscathed. However, the emerging notion of 'safe country' also poses a challenge to the field of application of non-refoulement, as does the concept of 'internal flight alternative', both of which put at issue precisely the question of 'risk'.

3.1.3 Non-refoulement and Human Rights

92. Even though the formal scope of the 1951 Convention/1967 Protocol has not been extended, the extent of protection due under international law to refugees, displaced persons and various other categories has developed. This is due in part to the cumulative effect of increasingly extensive human rights schemes, agreed by States at multilateral and regional levels, and including the 1966 International

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134 See decision of the Bundesverfassungsgericht = Federal Constitutional Court, 10 Jul. 1989, BverfGE 2 BvR 502/86, 2 BvR 1000/86, 2 BvR 961/86, noting that an internal flight alternative presupposes that the territory in question offers the asylum seeker reasonable protection against persecution: Case Abstract No. IJRL/0084: 3 IJRL 343 (1991); also Rasaratnam v. Canada (Minister of Employment and Immigration), Federal Court of Appeal of Canada, 5 Dec. 1991, holding that for an internal flight alternative to exist, the decision-maker should be satisfied, 'on a balance of probabilities that there was no serious possibility of the applicant being persecuted in Colombo, and that, in all the circumstances, including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the Appellant to seek refuge there': Case Abstract No. IJRL/0099: 3 IJRL 95 (1992).
Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1981 African (Banjul) Charter of Human and Peoples’ Rights, the 1969 American Convention on Human Rights, and the 1950 European Convention on Human Rights. In addition, more specifically focused instruments, such as the 1984 UN Convention against Torture, have enhanced the international law standing of the principle of non-refoulement, while the principles of customary international law have been consolidated in the practice of States and in the practice of international organizations, such as UNHCR.

93. Of particular relevance to the protection of refugees is the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction. This duty is recognized, for example, in article 2(1) of the 1966 Covenant on Civil and Political Rights,\(^1\) in article 1 of the 1950 European Convention,\(^2\) and in article 1 of the 1969 American Convention.\(^3\) It is clearly linked to the

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\(^1\) 'Each State Party...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant...'.

\(^2\) 'The...Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'

\(^3\) 'The...Parties undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction (their) free and full exercise ...'. Art. 1 of the 1981 African (Banjul) Charter adopts a slightly different approach: '...parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'
matching duty to provide a remedy to those whose rights are infringed, or threatened with violation.\textsuperscript{138}

3.2 Time and Place

The recognition of refugee status under international law is essentially declaratory in nature. Paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979) emphasizes that:

\begin{itemize}
  \item A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.
\end{itemize}

94. The duty to protect refugees arises as soon as the individuals or group concerned satisfy the criteria for refugee status set out in the definition (flight from the State territory for relevant reasons) and come within

\textsuperscript{138} Art. 14(1), 1966 Covenant on Civil and Political Rights; art. 13, 1950 European Convention on Human Rights; art. 25, 1969 American Convention on Human Rights. Again, art. 7(1) of the 1981 African (Banjul) Charter uses a slightly different formulation: '1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. Note also rights to equality before the law and to equal protection of the law.
the territory or jurisdiction of another State, regardless of whether refugee status has been formally determined. Under general principles of international law, State responsibility may arise directly from the acts and omissions of its government officials and agents, or indirectly where the domestic legal and administrative systems fail to enforce or guarantee the observance of international standards. The fact that the harm caused by State action may be inflicted outside the territory of the actor, or in an area identified by municipal law as an international zone, in no way diminishes the responsibility of the State.

3.2.1 Extraterritorial Application

95. A State’s obligations under international law extend beyond its physical territory. The United Nations Human Rights Committee has ruled that a State Party may be accountable under article 2(1) of the 1966 Covenant on Civil and Political Rights for violation of protected rights committed by its agents in the territory of another State, whether or not that State acquiesced. In the view of the Committee, the phrase ‘subject to its
jurisdiction' referred not to the place where the violation occurred, but to the relationship between the individual and the State concerned.\textsuperscript{141} Similarly, the European Commission on Human Rights has taken the position that the obligations of States under the European Convention on Human Rights extend to 'all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.'\textsuperscript{142}

96. Unlike other provisions in the Convention, which condition rights and benefits on degrees of presence and lawful residence, article 33.1 contains no such restriction. On the contrary, article 33.1 prohibits the return of refugees 'in any manner whatsoever.'

3.2.1.1 The United States and the Unlawful Interdiction of Haitians

97. In domestic litigation arising out of the Haitian interdiction programme, the U.S. Government argued that the prohibition against non-refoulement applies only to refugees present within the territory. Beginning with a September 1981 Presidential Proclamation and Executive Order, the U.S. Coast Guard has been


\textsuperscript{142} Cyprus v. Turkey (6780/74; 6950/75), Report: 10 July 1976.
regularly 'interdicting' Haitians and returning them to their country of origin, initially at least with a form of screening and guarantees for the non-return of those found to be refugees. In the first days of interdiction the U.S. Government informed the Haitian Government that it would not return any individual whom it determined to qualify for refugee status. President Reagan’s Executive Order likewise confirmed, 'that no person who is a refugee will be returned without his consent.' U.S. officials also made similar statements on several other occasions in other fora.

98. Following the September 1991 military coup against the democratically elected Government of Haiti and President Jean Bertrand Aristide, repatriations were first suspended but then resumed after some six weeks. In May 1992, President Bush decided to continue interdiction and repatriation, but without offering the possibility of screening in for those who might qualify as refugees. President Clinton elected to maintain the practice. In its 21 June 1993 decision in Sale, Acting Commissioner, INS v. Haitian Centers Council, however, the U.S. Supreme Court ruled that neither domestic law nor article 33 of the 1951 Convention limited the power of the President to

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order the Coast Guard to repatriate undocumented aliens, including refugees, on the high seas.

99. The Supreme Court decision, by an 8-1 majority, held first that domestic law provisions applied only in immigration proceedings for exclusion or deportation. As such proceedings do not operate outside the U.S., neither the President nor the Coast Guard were under any statutory limitation in dealing with those, such as Haitians, found on the high seas while in flight from persecution. Moreover, the words ‘deport or return’ in U.S. law were to be interpreted exclusively in light of the ‘traditional’ distinction in the U.S. between exclusion and deportation proceedings, that is, in an ‘exclusively territorial application’.

144 Using the language of ‘Congressional intent’ at the time of enactment, the Court only thinly disguises its policy decision to deny a remedy to individuals beyond territorial jurisdiction.

100. The Supreme Court accepted that, despite the categorical language of article 33.1, the article as a whole, considered together with its negotiating history, indicated that it was not intended to have extraterritorial effect. Unfortunately, the Court’s knowledge of the negotiating history was both
superficial and selective. With respect to the text, the Court was impressed by the reference in article 33.2 to the denial of *non-refoulement* to a refugee ‘whom there are reasonable grounds for regarding as a danger to the security of *the country in which he is...*’ In the view of the Court,

If the first paragraph did apply on the high seas, no nation could invoke the second paragraph’s exception with respect to an alien there: an alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not.

101. Not only did Court fail to consider the extent to which article 1 F of the Convention protects State interests, but it also overlooked the fact that this second paragraph to an initial, absolute and unqualified draft,145 was not the result of ‘a deliberate bargain’,

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145 The Ad hoc Committee had proposed no exceptions to the principle of *non-refoulement*, given its fundamental character: see UN doc. E/1850, para. 35.
but reflected Cold War security concerns. As one who was there put it: ¹⁴⁶

...the climate of opinion had altered since [article 33] had been drafted, and ... each government had become more keenly aware of the current dangers to its national security.

102. On the meaning of words, the U.S. Supreme Court claimed, with little regard to chronology or logic, that article 33, 'uses the words expel or return ('refouler') as an obvious parallel to the words deport or return in United States law. The Court also approached the meaning of the word refouler, not by looking at usage in French, or even as a term of art among those States familiar with the term. Rather, it searched desperately for a sense of 'return' that somehow would allow it to rule that 'returning' Haitians to Haiti is not really 'returning' them at all; but perhaps something else, like repulsing them, repelling them, or driving them back. The inherent inconsistencies are neatly underlined by Blackmun, J., who cites Le Monde, for an article actually showing refouler used in its ordinary sense: '[L]es Etats Unis ont décidé de refouler directement les réfugiés recueillis par la garde cotière.'

103. But the Court is not at ease with foreign words, and moves quickly to quote with approval from Judge Edwards' conclusion in a 1987 decision, that expulsion referred to a refugee already admitted to a country and return to one within the territory by not yet resident there. 147 Not surprisingly, the Supreme Court fails to mention that Edwards' opinion contains no analysis of international law issues, and merely reiterates the Government's Brief, complete with the misquotation of sources and incorrect attribution of one representative's concerns to the Conference of Plenipotentiaries as a whole. UNHCR's *amicus curiae* brief in the present case corrected many of those errors, but the Supreme Court's citations are equally wayward; it takes passages out of context, misquotes academic and other commentators, misrepresents the sense of the UNHCR *Handbook*, and ignores whatever might obstruct its policy decision to uphold executive authority to return refugees to persecution.

104. Finally the Supreme Court turns to the Government's argument from the *travaux préparatoires*, and various remarks by the Swiss and

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147 *Haitian Refugee Center v. Gracey*, 809 F.2d at 840.
Dutch delegates to the 1951 Conference. Blackmun, J. notes succinctly in his dissenting opinion.\textsuperscript{148}

This reliance, for two reasons, is misplaced. First, the isolated statement of a delegate to the Convention cannot alter the plain meaning of the Treaty itself. Second, placed in its proper context, [the Dutch delegate's] comment does not support the majority position...the fragments of negotiating history upon which the majority relies are not entitled to deference, were never voted on or adopted, probably represented a minority view, and in any event do not address the issue in this case.

105. The judgment of the Supreme Court attempts to confer domestic 'legality' on the practice of returning refugees to persecution. It is a decision of \textit{domestic}, not international law, however, and the Court is not competent to determine the international obligations of the United States, which remain unchanged. From an international law perspective, which is finally what counts, the Supreme Court's position suffers from significant omissions, most of which were covered in briefs by \textit{amici curiae}, but all of which were conveniently 'missed' in the reasoning of

\textsuperscript{148} Diss. Op., pp. 7, 14.
the majority. In particular, as shown above, the principle of non-refoulement has crystallized into a rule of customary international law, the core element of which is the prohibition of return in any manner whatsoever of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action wherever it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction. This development is amply confirmed in instruments subsequent to the 1951 Convention, including declarations in different fora and treaties such as the 1984 UN Convention against Torture, by the will of States expressed in successive resolutions in the UN General Assembly or the Executive Committee of the UNHCR Programme, in the laws and practice of States, and in unilateral declarations by the United States Government.

3.2.1.2 Unilateral Declarations and International Obligations

106. During the first ten years of the Haitian interdiction programme, senior United States officials publicly and repeatedly affirmed the principle of non-
refoulement, not only in the broad general sense,\textsuperscript{149} but also in the specific context of Haitian operations. Although formulated in the language of admission (and consequently not very clear at all on exactly what non-refoulement is really about), the statement by the United States delegate to the Executive Committee in 1989, so far as it implicitly refers to policy and practice with respect to Haitian interdiction, thus departs substantially from the historical record.

107. Specifically, it overlooks the clear statement of executive intent explicit in section 3 of Executive Order 12324, 29 Sept. 1981: 'The Attorney General shall...take whatever steps are necessary to ensure...the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.' It ignores the unqualified recognition of international obligations by U.S. Attorney General William French Smith's in his letter of 16 February 1982 to the UNHCR Chief of Mission in Washington, D.C.,\textsuperscript{150}

Let me assure you that the Administration is firmly committed to the full observance of our international obligations and traditions

\textsuperscript{149} Note in particular the statement of Ambassador Jonathan Moore at the Executive Committee in 1987; see above, note 59 and text.

\textsuperscript{150} See also INS Acting Commissioner Doris M. Meissner's letter of 29 December 1981 to the UNHCR Chief of Mission: 'These procedures fully comply with our responsibilities under the U.N. Convention and Protocol'. (Emphasis supplied)
regarding refugees, including, most critically, the principle of non-refoulement...For this reason we have taken careful steps to deal with possible asylum claims by those met at sea...If there were an indication of a colorable claim of asylum, the individual would be brought to the United States where a formal application for asylum would be filed. I am confident that these procedures will insure that nobody with a well-founded fear of persecution is mistakenly returned to Haiti.

108. In addition, a Memorandum to all INS employees assigned to duties related to interdiction at sea, revised 26 August 1982 under signature of the INS Associate Commissioner Examinations, indicated that,¹⁵¹

The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions towards refugees, including the necessity to be keenly attuned ... to any evidence which may reflect an individual’s well-founded fear of persecution.

¹⁵¹ The list of authorities for this memorandum included not only the Presidential Proclamation and Executive Order of 29 September 1981, but also 4. Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.
109. It can even be said to have missed the firm statement of intention, rather than of discretion or option, implicit in U.S. Ambassador Ernest H. Preeg's letter of 23 September 1981 to H.E. Edouard Francisque, Secretary of State for Foreign Affairs, Port-au-Prince, Haiti: 'It is understood that ... the United States Government does not intend to return to Haiti any Haitian migrants who the United States authorities determine to qualify for refugee status.'

110. The 1989 'statement' to the Executive Committee not only ignores a substantial series of undertakings by U.S. government officials, but also the fact that these undertakings had already been applied in practice for at least eight years. That practice continued for at least two years thereafter until the U.S. President decided to return even Haitians who might have a 'colorable claim' to be refugees. The combination of declarations in the sense of an international obligation with practice confirming that obligation is conclusive evidence of the applicability of the principle of non-refoulement to the extraterritorial activities of United States agents. This conclusion is further strengthened by the fact that even though the United States authorities considered that the vast majority of Haitians were leaving for economic reasons,

152 Other similar statements are cited by Blackmun, J., dissenting in Sale v. Haitian Centers Council, Inc. (Diss. Op., p. 3, note 3).
they were still prepared, against interest, to take steps to ensure that no refugees among them were returned contrary to international obligations.

111. In its judgment in the *Nuclear Tests* Cases, the International Court of Justice observed:¹⁵³

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations... An undertaking of this kind, if given publicly, and with an intent to be bound...is binding. In these circumstances, nothing in the nature of a *quid quo pro* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement of the State was made...

46. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-

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operation ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created by respected.

UNHCR has been entrusted by the United Nations General Assembly with the international protection of refugees, and States in turn have formally undertaken to co-operate with UNHCR, ‘in the exercise of its functions, and shall in particular facilitate its duty to supervising the application of the provisions’ of the 1951 Convention/1967 Protocol. In the present case, UNHCR’s legal interests are equivalent to those of States in the circumstances described by the International Court of Justice; it was entitled to take notice of and place confidence in the declarations of the United States.

112. In fact, UNHCR did precisely this. At no time did the Office challenge the exercise of jurisdiction on the high seas. Rather, it focused its interventions on the *adequacy* of the on-board procedures, to sift out

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114. In failing to uphold the principle of non-refoulement and in conferring domestic ‘authority’ on the decision to violate international law, the Court has merely compounded the illegality, itself becoming a party to the breach. In the absence of any domestic remedy, the responsibility of the United States is beyond dispute. The legal situation is succinctly described by McNair:  

...A State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of treaty.

115. In the present case, of course, it is not the U.S. Supreme Court which alone is responsible for the violation of international law. Rather, it is the system of administration as a whole, beginning with the executive acts of the President, that has produced the result contrary to the principle of non-refoulement.

116. The guarantee of non-refoulement for refugees is a specific and fundamental protection, independent from the question of admission or the grant of asylum.

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effectively those Haitians who might have a 'colorable claim' to asylum. A principal section of UNHCR's amicus curiae brief in Haitian Refugee Center, Inc. v. Gracey was concerned precisely with such issues:

Given the applicability of the principle of non-refoulement to the broad field of state action or omission, the secondary principle of effectiveness of obligations itself obliges a state to establish procedures adequate and sufficient to ensure fulfilment of the primary duty... [W]here... a state of its own volition, elects to intercept asylum-seekers on the high seas and outside their own or any state's territory, particularly high standards must apply and be scrupulously implemented.

113. The declaration of intent to abide by article 33, substantiated by ten years of practice in which all Haitians interdicted were screened for a 'colorable claim' to asylum, is thus amply sufficient to confirm the 'extraterritorial' obligations of the United States, which are implicit in the clear words of the Convention.

3.2.1.3 A Judgment on the Judgment

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The law was reviewed and the position clearly stated by UNHCR in its *amicus curiae* briefs both in the present case and in *Haitian Refugee Center, Inc. v. Gracey*. In the latter, UNHCR concluded:\(^{157}\)

It is beyond doubt then that the responsibility of the state may arise when a refugee is returned to persecution, whether as a result of the failure or inadequacy of domestic procedures, or by reason of the extraterritorial action of its organs. *In fine*, the central question depends neither on whether the individual is physically present within state territory nor on the extent of local constitutional rights or principles of justice. *Non-refoulement*...does not by itself require admission, residence, asylum or other durable solution to the plight of the refugee; it does, however, enjoin such action on the part of states as results in the return of refugees where their lives or freedom may be endangered.

3.2.2 ‘*International Zones*’

117. The basic argument for the non-application of international obligations in State territory (whether in

\(^{157}\) UNHCR, Brief *Amicus Curiae*, p. 23f.
the matter of refugees, asylum-seekers, stowaways or any other subject) is on shaky ground. It is a fundamental principle of international law that every State enjoys *prima facie* exclusive authority over its territory and persons within its territory, and with that authority or jurisdiction goes responsibility. A State could hardly argue, for example, that it may elect not to be bound by its international duties of protection with respect to diplomatic personnel, merely by reason of the fact that they might be within an ‘international’ or transit area of an airport.

118. Many States, of course, choose to accord lesser rights in their municipal law to those awaiting formal admission, than to those who secure entry. The United States is a typical example, where physical presence is not necessarily synonymous with legal presence for the purpose of determining constitutional guarantees. Other States seek to make similar distinctions, for example, in the case of stowaways and other categories, who may be deemed not to have entered the country; the purpose of such municipal law provisions is usually to facilitate their treatment at will on the basis of international agreements and practices, but the point remains, that these are *municipal law* provisions, and therefore not controlling from the perspective of international law.
119. From that perspective, what counts is not the status or non-status conferred by municipal law, but the treatment in fact accorded. For international law purposes, presence within State territory is the juridically relevant fact which will in most cases be sufficient to establish the necessary link with the authorities whose actions may be imputable to the State in circumstances giving rise to State responsibility. General principles of State responsibility (flowing from the fact of control over territory) will govern most cases; with respect to human rights, these principles have been confirmed in various instruments, which have recognized the obligation of the State to ensure and to protect the human rights of everyone within its territory and/or subject to its jurisdiction.\textsuperscript{158} Municipal courts, too, have rarely doubted their authority to extend their jurisdiction and protection into airport areas; the \textit{Schipol Refugee Centre Case} is a recent example,\textsuperscript{159} and many earlier precedents are available.\textsuperscript{160}


\textsuperscript{159} Hamerslag, R.J., 'The Schipol Refugee Centre Case,' 1 \textit{IJRL} 395 (1989).

\textsuperscript{160} In the past, such cases have dealt, for example, with habeas corpus and false imprisonment. See Küchenmeister v. Home Office [1958] 1 Q.B. 496, in which a non-citizen in transit at London Airport succeeded in an action for false imprisonment, when immigration officers prevented him from joining his connecting flight after he had been refused permission to enter. See also views on art. 1, European Convention on Human Rights, expressed in Kirkwood v. United Kingdom (European Commission on Human Rights); and in the Steering case (European Court of Human Rights).
120. In examining the legality and implications of ‘international zones’, such as might be established at an airport or other port of entry, the point of departure is the State’s sovereign and *prima facie* exclusive authority or jurisdiction over all its territory, and the concomitant international legal responsibilities which flow from the fact of control and from the activities of its agents. This authority or jurisdiction derives from customary international law, and is amply confirmed by international treaties, such as the 1944 Chicago Convention and the 1982 Convention on the Law of the Sea. No State, by treaty or practice, appears to have abandoned the territory comprised by its ports of entry; the extent of national control exercised therein sufficiently contradicts any assertion of their *international* character.

121. Given that States continue to have international responsibility in such zones, certain legal obligations also follow, such as *non-refoulement* and protection of human rights; States have a general obligation to ensure that their laws and practices conform with their international obligations. From an international law perspective, it is the juridically relevant fact of presence within State territory and being subject to State jurisdiction which counts; whether responsibility for breach of international obligations results will in turn depend upon whether the
actions taken with respect to an individual, such as removal, are imputable in the State (more than likely in the case of 'immigration action'), and whether they result in harm to an internationally protected interest.

3.2.3 Non-refoulement and Extradition

122. In 1951 some States formally expressed the view that article 33 did not prejudice extradition. One suspected of a serious non-political crime would in any event be excluded from the benefits of refugee status; but one suspected or guilty of a non-serious non-political crime might remain liable to extradition, even to the State in which he or she had a well-founded fear of persecution. Any conflict of treaty obligations could be further dependent upon which obligation was contracted first.

123. With respect to exclusion from refugee status, one State was concerned not to prejudice those guilty of minor crimes; another wanted to retain discretion to grant asylum to minor criminals, but without being obliged to recognize refugee status; still others sought to avoid a clash of obligations between the Convention and extradition treaties.\textsuperscript{161} One representative also suggested that it would be necessary to balance the

\textsuperscript{161} See UN doc. A/CONF.2/SR.24, pp. 4, 5, 9-16.
seriousness of the crime against the degree of inconvenience or persecution feared.\textsuperscript{162}  

124. \textit{Non-refoulement} is not synonymous with asylum. Similarly, non-extradition for a ‘political’ offence is not synonymous with residence in the State refusing surrender, and neither does it entail any necessary immunity from prosecution. In both cases, a limited but fundamental protection is involved; in the case of \textit{non-refoulement}, that protection must be accorded to the refugee having a well-founded fear of persecution, or to one whom there are serious reasons to believe may be tortured in the State to which he or she is surrendered.\textsuperscript{163} Recent resolutions of the UN General Assembly equally confirm the principle of non-extradition with respect to those who may become victims of ‘extra-legal, arbitrary or summary execution’, or be in danger of enforced disappearance.\textsuperscript{164}  

125. If States had reservations about the relationship between extradition and article 33 in 1951, these have been displaced by subsequent regional, bilateral and multilateral State practice. The 1957 European Convention on Extradition, for example, prohibits extradition, ‘if the requested Party has

\textsuperscript{162} Denmark: ibid., p. 13.  

\textsuperscript{163} Besides being mandated by the 1984 United Nations Convention on Torture, this protection is implicitly guaranteed in human rights covenants, such as art. 7, 1966 Covenant on Civil and Political Rights.  

\textsuperscript{164} See above section 2.4.
substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of those reasons.¹⁶⁵ This article was expanded expressly to include the basic elements of the refugee definition, and to close the gap between the political offender and the refugee. Moreover, the transit of those extradited is also excluded through any territory where the life or freedom of the person claimed could be threatened for any of the stated reasons.

126. Article 3 of the European Convention is widely employed as a model for bilateral treaties and municipal laws.¹⁶⁶ It clearly influenced the Scheme for the Rendition of Fugitive Offenders adopted in 1966 by the Meeting of Commonwealth Law Ministers, and implemented in many Commonwealth countries since then.¹⁶⁷ This approach has extended to multilateral

¹⁶⁵ Art. 3(2), emphasis supplied: European Treaty Series, No. 24,


¹⁶⁷ In the form adopted in section 4(1)(c) of the United Kingdom’s Fugitive Offenders Act 1967, non-return is called for where the person requested 'may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions'. Article 4 of the 1967 Extradition Treaty between Canada and Israel also provides that a person 'shall not be extradited' if that person's position 'may be prejudiced' for the like reasons. See also art. 7, Finland-United Kingdom Extradition Treaty, 1976 (which refers to the possibility that the person claimed might 'be prejudiced at his trial, or be punished, detained, restricted in his personal liberty or otherwise exposed to persecution of a serious nature by reason of his descent, his
agreements. Article 4 of the 1981 Inter-American Convention on Extradition, signed in Caracas under the auspices of the Organization of American States, calls for non-extradition, 'when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is invoked, or that the position of the person sought may be prejudiced for any of these reasons.' Article 6, moreover, declares, 'No provision of this Convention may be interpreted as a limitation on the right of asylum, when its exercise is appropriate.'

127. The extradition of refugees was examined in 1980 by the Executive Committee, which reaffirmed the fundamental character of the principle of non-refoulement, and recognized that 'refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1(A)(2) of the 1951 Convention.'

Anxious to ensure not only the

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\(\text{167} (\ldots\text{continued})\)
association with a specific group of the population, his religion, nationality, political opinions or otherwise on account of political conditions'); art. 3(2), Belgium-Morocco Extradition Treaty 1959; art. 6, Austria-Czechoslovakia Extradition Treaty 1985 (extradition not to be granted where inconsistent with obligations in a multilateral agreement of the requested State); ibid., art. 12 (extradition not to be granted 'when the person ... is granted asylum on the territory of the State requested').

\(\text{168}\) See also art. 5, 1977 European Convention on the Suppression of Terrorism, in which non-extradition is optional ('Nothing in this Convention shall be interpreted as imposing an obligation to extradite if ...'); also, art. 9, 1979 International Convention against the Taking of Hostages: UNGA res. 34/146, 17 Dec. 1979, which employs the 'extradition shall not be granted' formula, and also includes ethnic origin within the list of relevant grounds.

protection of refugees, but also the prosecution and punishment of serious offences, the Executive Committee stressed 'that protection in regard to extradition applies to persons who fulfil the criteria of the refugee definition and who are not excluded by virtue of Article 1(F)(b)' of the Convention. As the Argentine delegate reiterated at the Executive Committee in 1989, 'While extradition was a legitimate practice in combating crime, it was inadmissible in international law in the case of a refugee.'

Recent cases support this approach. In the United Kingdom, a serious risk of prejudice has been considered a sufficient standard of proof in extradition and refugee cases, certainly since the decision of the House of Lords in Fernandez v. Government of Singapore. Courts in other States have also consolidated the basic principle of protection against extradition in favour of the refugee. In Bereciartua-Echarri, for example, a decision of the French Conseil d'État in 1988, the court ruled that the appellant could not be extradited so long as he retained the status of

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170 Mr. Strassera (Argentina): UN doc. A/AC.96/SR.442, para. 46. Later in the same session, the United States delegate, Mr. Kelley, appeared to qualify his country's position: 'Concerning the extradition of refugees, the United States Government reserved its position on the application of the 1951 Convention and the 1967 Protocol to persons against whom extradition proceedings had been initiated until the courts hearing their cases had taken a formal position on them': UN doc. A/AC.96/SR.442, para. 84. Given the ambiguity and general lack of clarity, one cannot be certain whether, in the context of extradition proceedings (which involve both a judicial process and an executive decision), the U.S. will or will not take refugee status into account. If it chooses to ignore status in the case of one who is not excluded or otherwise with the exceptions to non-refoulement, then violation of international obligations will result.

refugee, save in the serious cases contemplated by article 33(2) of the Convention. This protection was considered part of the general principles of refugee law; to permit extradition would render the concept of protection ineffective. In a decision handed down on 18 December 1990, the Schweizerisches Bundesgericht (Swiss Federal Court) also ruled that a refugee could not be returned to his country of origin. Most States, said the Court, consider that article 33 is a legal bar against the extradition of refugees; the article’s purpose is to guarantee refugees against the loss of protection in the asylum State, and it would be unjust if a refugee who could not lawfully be expelled to the country of origin, could nevertheless be extradited. In both the French and the Swiss cases it was implicitly accepted that extradition might proceed, once or if asylum or refugee status were revoked in accordance with the Convention.

A review of State practice, including national jurisprudence, confirms that the principle of non-refoulement applies wherever a State would seek to

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173 Schweizerisches Bundesgericht, Ref. 1A.127/1990/tg, 18 Dec. 1990. In its 1980 paper on extradition submitted to the Sub-Committee of the Whole on International Protection (UN doc. EC/SCP/14, 27 Aug. 1980), UNHCR had stressed that the principle of speciality offered no defence against excessive punishment or prejudicial treatment. The Court agreed, and remarked that it was no alternative to protection by non-extradition. The Court further took into account art. 3 of the European Convention on Extradition, which it characterised as the concrete expression of non-refoulement in extradition law, additionally capable of protecting persons who had committed serious non-political crimes, and so might be denied protection under the 1951 Convention.
return a refugee 'in any manner whatsoever.' The protection standards developed for the refugee have had a direct impact on the evolution of international extradition practice in the last forty years. To this extent, even the fugitive from justice is recognized as entitled to protection from persecution, discrimination or prejudice; this attention to the human rights of the fugitive is nevertheless balanced by extension of State competence, and occasionally the obligation, to prosecute for certain types of offences.

3.3 Non-refoulement or Refuge beyond the 1951 Convention/1967 Protocol

130. While the formal requirements of non-refoulement may be limited to Convention refugees, the principle of refuge is located within the body of general international law, rather than within the confines of treaty. It encompasses not only those with a well-founded fear of being persecuted, but also those who do face a substantial risk of torture, or who would face relevant harm if returned there.\textsuperscript{174} The limited protection due springs from objective conditions, wherever the facts are such as to indicate the possibility, if returned, of some harm befalling those

\textsuperscript{174} The phrase 'relevant harm' is used in this context to signify the validity of the reasons lying behind the claim for protection. Note also the provisions with respect to extra-legal, arbitrary and summary executions, and to enforced disappearance: above, section 2.4.
compelled to flee for valid reasons including war, violence, conflict, violations of human right or other serious disturbance of public order.\textsuperscript{175}

131. The juridically relevant situation of need flows from the evidence confirming the causes for flight, and the circumstance of danger facing specific groups or individuals. This essential factual base makes individualised inquiries into persecution or harm redundant. At the same time, host community interests can nevertheless be ensured, within the principle of refuge, by allowing the exclusion of, for example, those who have persecuted others, who are serious criminals or threats to \textit{ordre public}, or who, on their own admission, are motivated by reasons of purely personal convenience.\textsuperscript{176}

132. A combination of legal and humanitarian principle imposes significant limitations on the return of individuals to countries in which they may face inhumane or degrading treatment, or where their readmission is uncertain and their security precarious. Notwithstanding some of the rhetoric and recent exceptions, particularly in Europe with regard to

\textsuperscript{175} This characterization does not exclude, but neither does it determine, the solution that may be ultimately due.

\textsuperscript{176} Unlike other responses which generally call for once only determinations and once for all solutions, the principle of refuge permits the reasons for flight and the conditions producing distress to be regularly re-examined. It also allows complementary policies aimed at remedying the situation at source or otherwise promoting solutions to be pursued, through bilateral and multilateral means, and through the United Nations system. The conditions of refuge will require to be moderated and improved over time, however, as other human rights interests begin to predominate, for example, through lapse of time or the establishment of links.
asylum-seekers from countries beyond the region, such as Iran and Sri Lanka, practice reveals a significant level of general agreement not to return to danger those fleeing severe internal upheavals or armed conflict in their own countries. As has already been mentioned, what is disputed is the extent to which, if at all, any international legal obligation is involved.\textsuperscript{177} At the UNHCR Executive Committee in 1985, several States expressed concern about abuse of asylum procedures, but still agreed that those fleeing armed conflict or internal disturbances deserved protection.\textsuperscript{178} The Netherlands suggested that protection in such cases was based not so much on the principle of \textit{non-refoulement}, as on national asylum policies. The universally accepted definition of a refugee should not be applied, lest this diminish the readiness of governments to grant asylum.\textsuperscript{179}

\begin{itemize}
  \item 133. In recent years, States at the UNHCR Executive Committee have regularly complained about the abuse to which their asylum procedures are
\end{itemize}

\begin{footnotesize}
\textsuperscript{177} See above, notes 68-72 and accompanying text.

\textsuperscript{178} See Summary Records, 36th Session: UN doc. A/AC.96/SR.391, (1985), paras. 50-1 (Switzerland); also para. 42 (Australia), confirming UNHCR’s protecting role for the broader class, but considering it ‘undesirable to define those groups of persons as “refugees” and to grant them the full range of protection available to victims of individual persecution’.

\textsuperscript{179} Ibid., para. 72. See also ibid., paras. 77-8 (Federal Republic of Germany, recognizing that even if UNHCR’s competence were extended, no legal obligations could be implied on the basis of the 1951 Convention with regard to the acceptance of asylum-seekers); and para. 82 (Italy, suggesting an additional type of legal status to deal with new categories).
\end{footnotesize}
subject, and the numbers of applications. Little seems to have been done, however, to improve processing, sources of information, skill in decision-making, or sensitivity to situations of danger. Their principal concern was to highlight the limits of existing international arrangements, and to stress the legitimacy of national counter-measures. The Federal Republic of Germany, for example, said in 1986 that States’ adherence to existing texts offered an ‘unprecedented degree of security to genuine refugees,’ while the numbers of arrivals left it with little leeway for additional obligations. The Netherlands stressed the importance of the distinction between refugees and asylum-seekers from persons leaving for socio-economic or personal reasons, and insisted the following year that its restrictive measures were a bona fide effort to balance control and respect for the principle of asylum.

134. Bearing in mind the reservations of States and various exceptions in recent years, nearly four decades

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180 At the 37th Session of the Executive Committee (1986), see UN doc. A/AC.96/SR.401, para. 70 (United Kingdom); SR.403, para. 19 (Belgium) and para. 22 (Norway). At the 38th Session (1987), see UN doc. A/AC.96/SR.414, para. 39 (Sweden); para. 49 (Switzerland); SR.417, para. 83 (United Kingdom); paras. 84-5 (Sweden). At the 39th Session (1988), see UN doc. A/AC.96/SR.426, para. 81 (Norway); para. 88 (Belgium); SR.430, para. 41 (Switzerland); para. 51 (United Kingdom).

181 UN doc. A/AC.96/SR.406, para. 22; also SR.402, para. 32.

182 UN doc. A/AC.96/SR.406, paras. 36 et seq. The Netherlands did not address the question of those falling between the two extremes, but did argue that asylum in Europe should be considered on an individual basis. With a masterful combination of understatement and question-begging, Switzerland urged a clear distinction between Convention refugees and ‘persons attempting to escape from an insecure or distressing situation created by political, social, ecological or economic circumstances’: UN doc. A/AC.96/SR.406, para. 87.
of practice contains ample recognition of a humanitarian response to refugees falling outside the 1951 Convention. Recommendation E inspired or endorsed refuge for those otherwise excluded by temporal or geographic limitations, or who risked prejudicial treatment falling short of persecution. Whether practice has been sufficiently consistent over time, and accompanied by the *opinio juris* essential to the emergence of a customary rule of refuge, may be thought less certain, even at the regional level.

135. In part, this very approach is misconceived, for international legal obligations flowing from human rights treaties, in particular, have clearly influenced the practice, and constrained States’ freedom of action. In that process, the obligations themselves have developed, even if what emerges at the present time is an incomplete relation of rights and duties. The primary responsibility for the protection of human rights rests on the territorial State, and other States are not themselves immediately implicated as primary violators of the human rights of those faced with removal to their own country. So far as a State’s actions may forcibly return an individual to the risk of violation, however, its responsibility is duty-driven, rather than strictly correlative to any individual ‘right’. What exactly this entails in terms of policies, practices, State
conduct and international responsibility still needs to be worked out.

3.4 Non-refoulement and Asylum

136. In the years since 1951, many States have adopted the refugee definition as the criterion for the grant of asylum, and as the sole criterion for the grant of the specific, limited, but fundamental protection of non-refoulement. In the practice of many States party to the 1951 Convention/1967 Protocol, the recognized refugee, the person with a well-founded fear of persecution, is not only presumptively entitled to asylum in the sense of residence, but also guaranteed against return to the country as against which he or she had a well-founded fear of persecution. So far as States have resisted any formal obligation to grant asylum, they have nevertheless accepted the peremptory character of the principle of non-refoulement, applicable to those at initial point of entry, or who have already entered State territory, or who may be liable to extradition proceedings.

137. There is nevertheless a certain discontinuity in the protection regime established by the 1951 Convention/1967 Protocol and general international law, and between the status of refugee and a solution to the problem of the refugee. Refugees benefit from
non-refoulement and refugee status is often, but not necessarily, the sufficient condition for the grant of permanent or durable asylum. But, as shown above, there is no necessary connection between non-refoulement and admission or asylum. Refugees may benefit from non-refoulement through time, but this may still have an interim character, such as temporary refuge pending resettlement or return. Refugees may also be subject to measures falling short of refoulement, which nevertheless prevent them from effectively making a claim to status or asylum, or in securing admission to a particular country. In international law as well as in national practice, the discretion to grant asylum and the obligation to abide by non-refoulement remain divided, even as they are linked by the common definitional standards of well-founded fear or risk of torture or other relevant harm.

4. Non-refoulement and UNHCR

4.1 Protection and non-refoulement

138. UNHCR’s mandate responsibilities for refugees and displaced persons have been progressively extended by the United Nations and in practice. The class of beneficiaries has expanded from those defined
in the Statute, to those assisted on a 'good offices basis', to those defined in relevant resolutions of the UN General Assembly and directives of the UNHCR Executive Committee, and today covers the generic class of refugees and displaced persons of concern to the international community. UNHCR's duty towards refugees and others within its mandate engages the Office directly in monitoring observance of the principle of non-refoulement, and in ensuring that rule and practice develop in accordance with the humanitarian objectives of the international system of protection.

139. The principle of non-refoulement, both as a treaty and as a custom-based norm, extends to every individual having a well-founded fear of persecution in the country to which surrender is contemplated, so long as he or she has not ceased to be a refugee, is not excluded from refugee status, and does not fall within the recognized exceptions. The principle also prohibits the return of persons who risk torture, and possibly also those who risk other serious

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184 In 1984, the Cartagena Declaration included a reference to the actual or imminent jus cogens status of the principle of non-refoulement; see above, note 44 and text. In 1985, the High Commissioner observed in his report to the General Assembly that the principle of non-return had crystallized to the status of a peremptory norm of international law, unrestricted by geographical or territorial limitations: 1985 Report of the United Nations High Commissioner for Refugees: UN E/1985/62 (1985), paras. 22-3. A peremptory norm is one 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character': art. 53, 1969 Vienna Convention on the Law of Treaties. Although a sound case can be made for the customary international law status of the principle of non-refoulement, its claim to be part of jus cogens is far less certain, and little is likely to be achieved by insisting on its status as such.
violations of human rights. Secondly, *non-refoulement* extends to all State measures which result in the surrender or return of an individual, including refusal of admission at the frontier, deportation, expulsion, forcible return no matter the place of interception, and extradition.

140. The principle of *non-refoulement* applies to all States, whether or not they have ratified the 1951 Convention or the 1967 Protocol. However, the practice of States indicates that a significant element of *contingency* attaches to the obligation, particularly in cases of mass influx that may constitute a threat to the security of the receiving State. The practical necessity for UNHCR to involve other States in the provision of material and political support for countries of first asylum has clear implications for the manner in which UNHCR can seek to uphold the basic principle.

4.2 Refuge and Protection

141. The formal requirements of *non-refoulement* may be limited to Convention refugees, but the *principle of refuge* is located within the body of general international law. In light of the extended mandate of UNHCR with respect to a broad range of displaced persons outside the original mandate, the *principle of refuge* can be viewed as a essential tool in the Office's
promotion of protection, assistance and solutions not only for those with a well-founded fear of being persecuted, but also for those who do not enjoy the protection of the government of their country of origin and who would face some ‘relevant harm’ if returned there. ‘Relevant harm’ in this context serves to identify and distinguish the validity of the reasons lying behind the claim for protection, such as war, violence, conflict, torture, arbitrary execution, enforced disappearance, or serious violations of human rights. This characterization does not oblige or pre-determine the solution that may be ultimately due, and even while it may be the trigger for intervention by UNHCR, it does not commit a State to accord asylum or, if alternative protection is available, to keep those in flight upon its territory.

4.3 Protecting the principle of *non-refoulement*

142. In 1989, one State began to develop an attack on the basic principle of *non-refoulement*, that went far beyond mere restrictive interpretation. What is surprising and not otherwise explained is the apparent failure of UNHCR to express any opposition to what
were manifestly incorrect propositions of law.\textsuperscript{185} The following year’s Note on International Protection referred to the fact that ‘Both international conventions and customary international law reaffirm the prohibition against return or \textit{refoulement} of a refugee to situations endangering life or freedom as one of the most fundamental principles of refugee protection.’ Examples of such return or \textit{refoulement}, by land and sea, were given.\textsuperscript{186} The next year’s Note on International Protection gave further examples and again observed,\textsuperscript{187}

The summary rejection of asylum-seekers at land or sea borders and their return to situations threatening their physical security have required the intervention of UNHCR on a number of occasions in many countries over the preceding year.

\textbf{143.} But a statement from UNHCR on the \textit{legal} position was conspicuous by its absence. The present review shows that while there is considerable consensus on the core of meaning of the principle of \textit{non-refoulement}, grey areas remain. It is therefore essential that UNHCR, as the body responsible for the international protection of refugees, ensure that

\begin{itemize}
\item[\textsuperscript{185}] Other States also failed to object, although not necessarily because they agreed.
\item[\textsuperscript{186}] UN doc. A/AC.96/758 (2 Oct. 1990), paras. 13-14.
\item[\textsuperscript{187}] UN doc. A/AC.96/777 (9 Sept. 1991), para. 27.
\end{itemize}
differences of opinion or interpretation are resolved in a manner most attuned to the needs of refugees, and that attempts to exploit the areas of uncertainty, or to rewrite basic obligations, are openly confronted. In this regard, the important linkages now established between *non-refoulement* in its traditional sense, and the comprehensive protection required by international human rights law, remain to be fully developed. Although States may be the bearers of obligations, UNHCR has both legal standing and a duty continually to promote and defend the principle of *non-refoulement*. 
1. Multilateral Treaties and other Instruments

1951 Convention relating to the Status of Refugees

Article 33

Prohibition of expulsion or return ("refoulement")

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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

1957 Agreement relating to Refugee Seamen

Article 10

No refugee seaman shall be forced, as far as it is in the power of the Contracting Parties, to stay on board a ship which is bound for a port, or is due to sail through
waters, where he has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

1957 Convention on Stowaways

Article 5

(2) As regards the application of the provisions of this Convention, the Master and the appropriate authorities of the port of disembarkation will take into account the reasons which may be put forward by the stowaway for not being disembarked at or returned to those ports or States mentioned in this Convention.

(3) The provisions of this Convention shall not in any way affect the power or obligation of a Contracting State to grant political asylum.

1967 UN Declaration on Territorial Asylum

The General Assembly,

... Recommends that, without prejudice to existing instruments dealing with asylum and the status of refugees and stateless persons, States should base themselves in their practices relating to territorial asylum on the following principles:
Article 1

1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

... 

Article 3

1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.
1968 Tehran Conference on Human Rights

The International Conference on Human Rights, ...

(3) Affirms the importance of the observance of the principle of non-refoulement embodied in the above-mentioned instruments and in the Declaration on Territorial Asylum adopted unanimously by the General Assembly in December 1967.

1984 UN Convention against Torture

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

1989 UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions

5. No one shall be involuntarily returned or extradited to a country where there are substantial grounds for
believing that he or she may become a victim of extra-
legal, arbitrary or summary execution in that country.

1992 UN Declaration on the Protection of All
Persons from Enforced Disappearances

Article 8

1. No State shall expel, return *(refouler)* or extradite
a person to another State where there are substantial
grounds to believe that he would be in danger of
enforced disappearance.

2. For the purpose of determining whether there are
such grounds, the competent authorities shall take into
account all relevant considerations including, where
applicable, the existence in the State concerned of a
consistent pattern of gross, flagrant or mass violations
of human rights.

2. Regional Instruments

2.1 Africa

1969 OAU Convention governing the Specific Aspects
of Refugee Problems in Africa

Article II

Asylum

1. Member States of the OAU shall use their best
endeavours consistent with their respective legislations
to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.

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 to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph...

1981 Banjul Charter of Human and Peoples’ Rights
Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

2.3 Africa/Asia

1966 Bangkok Principles concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee

Article 3
Asylum to a Refugee

1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.

2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.

3. No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

4. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

2.3 Americas

1889 Montevideo Treaty on International Penal Law

Article 16

Political refugees shall be afforded an inviolable asylum...
Article 23

Political offenses, offenses subversive of the internal or external safety of a State, or common offenses connected with these, shall not warrant extradition...

1940 Montevideo Treaty on International Penal Law (Revising the 1889 Treaty)

Article 20

Extradition shall not be granted:

... (d) For political crimes;

(e) For common crimes committed with a political purpose, except when, in the opinion of the judge or tribunal receiving the request, the common character manifestly predominates.

1954 Caracas Convention on Diplomatic Asylum

Article 2

Every State has the right to grant asylum; but it is not obligated to do so or to state its reasons for refusing it.

Article 3

It is not lawful to grant asylum to persons who, at the time of requesting it, are under indictment or on trial
for common offenses or have been convicted by competent regular courts and have not served the respective sentence, nor to deserters from land, sea, and air forces, save when the acts giving rise to the request for asylum, whatever the case may be, are clearly of a political nature.

... 

Article 5

Asylum may not be granted except in urgent cases ...

Article 6

Urgent cases are understood to be those, among others, in which the individual is being sought by persons or mobs over whom the authorities have lost control, or by the authorities themselves, and is in danger of being deprived of his life or liberty, because of political persecution and cannot, without risk, ensure his safety in any other way.

Article 17

Once the departure of the asylee has been carried out, the State granting asylum is not bound to settle him in its territory; but it may not return him to his country of origin, unless this is the express wish of the asylee.

... 

1954 Caracas Convention on Territorial Asylum
Article 1

Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State.

Article 2

The respect which, according to international law, is due to the jurisdictional right of each State over the inhabitants in its territory, is equally due, without any restriction whatsoever, to that which it has over persons who enter it proceeding from a State in which they are persecuted for their beliefs, opinions, or political affiliations, or for acts which may be considered as political offenses.

... 

Article 3

No State is under the obligation to surrender to another State, or to expel from its own territory, persons persecuted for political reasons or offenses.

Article 4

The right of extradition is not applicable in connection with persons who, in accordance with the qualifications of the solicited State, are sought for political offenses, or for common offenses committed for political ends, or when extradition is solicited for predominantly political purposes.
Article 5

The fact that a person has entered into the territorial jurisdiction of a State surreptitiously or irregularly does not affect the provisions of this Convention.

1969 American Convention on Human Rights

Article 22

Freedom of Movement and Residence

1. Every person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law.

2. Every person has the right to leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.

1981 Inter-American Convention on Extradition

Article 4

Grounds for denying extradition

Extradition shall not be granted:

... 

4. When, as determined by the requested State, the offense for which the person is sought is a political offense, an offense related thereto, or an ordinary
criminal offense prosecuted for political reasons. The
requested State may decide that the fact that the
victim of the punishable act in question performed
political functions does not in itself justify the
designation of the offense as political.

5. When, from the circumstances of the case, it can
be inferred that persecution for reasons of race, religion
or nationality is involved, or that the position of the
person sought may be prejudiced for any of these
reasons.

... 

Article 6

Right of asylum

No provision of this Convention may be interpreted as
a limitation on the right of asylum when its exercise is
appropriate.

1985 Inter-American Convention to Prevent and
Punish Torture

Article 15

No provision of this Convention may be interpreted as
limiting the right of asylum, when appropriate, nor as
altering the obligations of the States Parties in the
matter of extradition.
2.4 Europe

1950 European Convention on Human Rights

Article 3

No one shall be subject to torture or to inhuman or degrading treatment or punishment.

1957 European Convention on Extradition

Article 3

Political Offences

1. Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.

2. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons.

3. The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offence for the purposes of this Convention.
4. This Article shall not affect any obligations which the Contracting Party may have undertaken or may undertake under any other international convention of a multilateral character.

Council of Europe: Resolution (67) 14

Committee of Ministers Resolution on Asylum to Persons in Danger of Persecution

The Committee of Ministers,

... Considering Recommendation 293 (1961) of the Assembly on the right of asylum and Recommendation 434 (1965) of the Assembly on the granting of the right of asylum to European Refugees;

Aware of the liberal practice based on humanitarian considerations already followed in regard to asylum by the Governments of member States;

Considering, moreover, that Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that no one shall be subjected to inhuman treatment;

Desirous that member Governments should, in a humanitarian spirit, do all that is possible, individually and collectively, to assure to persons in danger of persecution the security and protection of which they stand in need;
Recognizing the need for member Governments to take account both of their obligations under existing international treaties and of the necessity of safeguarding national security and of protecting the community from serious danger,

Recommends that member Governments should be guided by the following principles:

1. They should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory;

2. They should, in the same spirit, ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory were he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;

3. If, in order to safeguard national security or protect the community from serious danger, a member Government contemplates taking measures which might entail such consequences, it should, as far as possible and under such conditions as it may consider appropriate, accord to the individual concerned the opportunity of going to a country other than that where he would be in danger of persecution;

4. Where difficulties arise for a member State in consequence of its action in accordance with the above
applied for refugee status or for other reasons are not formally recognised as refugees;

Recalling the liberal and humanitarian attitude of Council of Europe member states to persons requesting asylum and, in particular, their commitment to the principle of non-refoulement as reflected in Resolution (67) 14 on asylum to persons in danger of persecution and the 1977 Declaration on territorial asylum;

Considering that the principle of non-refoulement has been recognised as a general principle applicable to all persons;

Bearing in mind the European Convention on Human Rights, and particularly Article 3;

Considering Consultative Assembly Recommendation 773 (1976) on the situation of de facto refugees,

Recommends that governments of member States, without prejudice to the exceptions provided for in Article 33, paragraph 2, of the Geneva Convention, ensure that the principle according to which no person should be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, shall be applied regardless of whether this person has been recognised as a refugee under the Convention relating to the Status of
recommendations, Governments of other member States should, in a spirit of European solidarity and of common responsibility in this field, consider individually, or in co-operation, particularly in the framework of the Council of Europe, appropriate measures in order to overcome such difficulties.

Council of Europe: Recommendation No. R (84) 1

Committee of Ministers Recommendation on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognized as Refugees

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Having regard to the Convention relating to the Status of Refugees of 28 July 1951 amended by the Protocol relating to the Status of Refugees of 31 January 1967, and particularly to Article 33 of the Convention;

Considering that in the member states of the Council of Europe there are persons who satisfy the criteria given for definition of the term 'refugee' within the meaning of Article 1 of the Convention of 28 July 1951 relating to the Status of Refugees amended by the Protocol of 31 January 1967 but who because they have not