

# TAKING NON-REFOULEMENT SERIOUSLY: WHY THE EXTRATERRITORIALITY OF ARTICLE 33(1) OF THE REFUGEE CONVENTION NEEDS TO BE ADDRESSED

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## ABSTRACT

This article critically analyses the uncertainty surrounding the extraterritorial application of the non-refoulement obligation as incorporated in Article 33(1) of the Refugee Convention 1951. In doing so, it engages in a comparative critique between the restrictive interpretation afforded to the provision by the United States Supreme Court and the liberal reading of the text by the European Court of Human Rights. The polarised interpretations adopted by these adjudicative bodies highlight the ambiguity in the text of Article 33(1) and consequently, its susceptibility to arbitrariness and abuse. Therefore, this article proposes an incremental reform in two phases, beginning with reforming the text of Article 33(1) itself to bring it into line with the liberal reading of the text as it stands. In the second phase, the establishment of an independent international Judicial Commission is concerned, tasked with ensuring convergence in the interpretation of the revised text of Article 33(1).

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## INTRODUCTION

Refugees have co-existed with history; from the expulsion of legendary tribes of Israel by Assyrian rulers in 740 BC, to one of the first recognised displacements of people across nation states via the Edict of Fontainebleau issued by Louis XIV of France in 1685<sup>186</sup> and the mass exodus of Jews post the assassination of Tsar Alexander II in 1881,<sup>187</sup> history has been witness to a somewhat perpetual forced movement of people across states.

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<sup>186</sup> This banned Protestant worship and led to the emigration of Protestants eventually.

<sup>187</sup> Kushner, T., & Knox, K. (1999). Refugees in an age of genocide: global, national, and local perspectives during the twentieth century. England, F. Cass.

However, the 1951 Refugee Convention<sup>188</sup> was the first instance of the international community's largely universal acceptance of the status of refugees as a human rights issue and was the foremost reflection of an awareness that this issue called for a unified and consolidated protection regime. Historically, this Convention was a response to the massive displacement of people that had transpired after the events of the Second World War.<sup>189</sup> Rooted in Article 14<sup>190</sup> of the Universal Declaration of Human Rights,<sup>191</sup> the application of this international legal edifice for refugee protection was further solidified by its 1967 Protocol<sup>192</sup> which removed geographical limitations of the Convention (confined to "events occurring in Europe before 1 January 1951"<sup>193</sup> with the aim to ensure refugee protection worldwide, regardless of state of origin.

Termed a "status and rights-based instrument", the Refugee Convention's underlying principles are non-refoulement, non-discrimination and penalization.<sup>194</sup> The focus of this article is non-refoulement in Article 33(1), the essence of which is to prohibit states parties from returning asylum-seekers to places from where they have escaped and would be liable to persecution.

It was through this very concept that the signatories to the Convention expressed their commitment to ensure that refugees would never be returned to their states of origin to face persecution or death.<sup>195</sup>

Today, however, the horrors of the Second World War have been replaced by new horrors characterized by the massive forced displacement of peoples in numerous regions around

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<sup>188</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; hereinafter referred to as the Refugee Convention

<sup>189</sup> Grant Dawson, S. F., 2012. *Forcible Displacement throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement*: Martinus Nijhoff Publishers.

<sup>190</sup> "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

<sup>191</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

<sup>192</sup> UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

<sup>193</sup> Article 1, Refugee Convention

<sup>194</sup> Office of United Nations High Commissioner for Refugees, Introductory Note to Convention Relating to the Status of Refugees. Geneva: UNHCR Communications and Public Information Service.

<sup>195</sup> Keller, K. M., 2014. A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement. *Yale Human Rights and Development Journal*, 2(1), pp. 183-206

the world suffering from fundamentalist terror regimes, civil war, persecution or human rights violations. This changed setting has shed new light on the nature and extent non-refoulement as encapsulated in Article 33. Among the most relevant modern-day perceived legal lacunas in Article 33 is whether it has extraterritorial application or not, which is a key issue as it determines the decisive moment which triggers a state's responsibility for refugees.

As an example, let us consider that an asylum seeker, "A", escapes from Country B where there is ongoing persecution at the hands of state authorities of a certain class of citizens to which A also belongs. A then reaches, after a cumbersome journey, the border of Country C. At the moment he reaches this border, the non-refoulement provision needs to determine whether he can be sent back to the horrors of Country B just because he has not yet entered Country C's territory or if doing so would be an act in contravention of Country C's non-refoulement obligation to A.

In light of the importance of this provision for the stability of the entire refugee protection regime, it is highly problematic that its exact nature and scope remains ambiguous to date. It is acknowledged from the outset that this international legal edifice runs into the same problems of uniform, practical enforcement that other human rights do. However, the basic clarity in the very language and scope of the obligation, albeit theoretically, is what this article shall establish the need for. Only when the obligation itself is clear can steps be taken towards consolidated and meaningful enforcement. Therefore, the central objective of this article is to analyse how and why the reformation of Article 33(1) is vital to any holistic uplifting of the actual refugee crises plaguing our world today. Moreover, identifying the contours of Article 33(1) may help appreciating the implications that stem from the fundamental humanitarian legal principles which form the basis for Article 33.<sup>196</sup>

## 1. THE PROBLEM SURROUNDING ARTICLE 33(1)

### 1.1. The Importance of Article 33(1)

The text of Article 33(1) is as follows:

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<sup>196</sup> Molnár, T., 2016. The principle of non-refoulement under international law: its inception and evolution in a nutshell. *Cojourn*, 1(1), pp. 51-61

“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”.

## 1.2. Non-Refoulement of Refugees as Customary International Law

Article 33 is part and parcel of customary international law, therefore binding even on non-states parties to the Refugee Convention.<sup>197</sup> This section will illustrate how this obligation forms a customary norm, having both the requisite *opinio juris* and state practice in its favour.<sup>198</sup> Laying out Article 33’s status as part of custom at the outset is vital because it emphasises the importance of the obligation to the entire refugee regime, making the need for its clarity paramount and pressing.

The UNHCR has concluded<sup>199</sup> that the principle of non-refoulement is now custom due to its incorporation in regional and international treaties.<sup>200</sup> States parties have also issued a Declaration whereby they recognised the customary status of Article 33.<sup>201</sup> Not only that, it has been systematically recognised and affirmed in the 1967 United Nations Declaration on Territorial Asylum,<sup>202</sup> conclusions of the UNHCR Executive Committee and resolutions of the United Nations General Assembly.<sup>203</sup> Moreover, as far as state practice is concerned, to date, there has been no case of total disregard for the principle.<sup>204</sup>

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<sup>197</sup> Article 38, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969

<sup>198</sup> These elements of the formation of customary international law have been confirmed, inter alia, in North Sea Continental Shelf Cases 1969 ICJ Rep 3, the Lotus Case (1927) PCIJ Ser. A No.10, Anglo-Norwegian Fisheries Case 1951 ICJ Rep 116 and Nicaragua v USA 1986 ICJ Rep 14.

<sup>199</sup> UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany*, 31 January 1994

<sup>200</sup> Among others, the principle has been incorporated in the OAU Convention 1969 governing the specific aspects of refugee problems in Africa which has 42 state parties and the American Convention on Human Rights 1969 to which 24 States are now parties.

<sup>201</sup> Declaration of States parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, 16 January 2002.

<sup>202</sup> UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII)

<sup>203</sup> UNGA/RES/37/195, paragraph 2; UNGA/RES/48/116, paragraph 3; UNGA/ RES/2312(XXII), Article 3

<sup>204</sup> Hyde, L., 2016. *The Principle of Non-Refoulement in International Law*. [Online] Available at: [http://www.rescriptum.org/wordpress/wp-content/uploads/2016/07/2016\\_1\\_029\\_Hyde.pdf](http://www.rescriptum.org/wordpress/wp-content/uploads/2016/07/2016_1_029_Hyde.pdf) [Accessed 30 December 2017]

Thus, the status of Article 33(1) has been elevated to that of custom. This is significant because it means that this is one responsibility which states cannot escape vis-à-vis asylum seekers since a breach of it would be tantamount to destroying any other rights a refugee may have. All other rights enjoyed by refugees under the Refugee Convention are contingent upon a State being obliged not to refouler asylum-seekers. For example, Article 16 of the Refugee Convention accords the right of access to courts in the host state's territory.<sup>205</sup> However, that right for a refugee can only be crystallised once the host state has an international responsibility not to send him/her back; otherwise, that right is rendered redundant. This obligation is thus the starting point of nation-State's international obligations towards refugees.

### 1.3. Non-Refoulement of Refugees as *Jus Cogens*?

*Jus cogens* has been defined by Articles 53<sup>206</sup> and 64<sup>207</sup> of the Vienna Convention on the Law of Treaties as a peremptory norm accepted by the community, without any derogations. According to Article 42(1)<sup>208</sup> of the Refugee Convention and Article VII (1)<sup>209</sup> of its Protocol, derogations from Article 33 are proscribed. Notwithstanding that, unlike the largely settled status of the obligation as a customary norm, its status as *jus cogens* is far from certain.

Non-refoulement has been explicitly granted "peremptory norm" status by the UN High Commissioner on Refugee's Executive Committee in 1982.<sup>210</sup> The 1984 Cartagena Declaration went a step further and declared non-refoulement with regard to refugees to be

<sup>205</sup> Article 16(1) reads as: "A refugee shall have free access to the courts of law on the territory of all Contracting States."

<sup>206</sup> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm 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."

<sup>207</sup> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

<sup>208</sup> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive."

<sup>209</sup> "At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof..."

<sup>210</sup> UNHCR EXCOM Conclusion No. 25 (XXXIII), 20 October 1982: "the principle of non-refoulement [is] progressively acquiring the character of a peremptory rule of international law"

*jus cogens*.<sup>211</sup> Proponents of the view that the obligation is a norm of *jus cogens* argue that such norms do not have any allowance for deviation, thus no violations of them are permitted “in any way whatsoever”.<sup>212</sup>

Notwithstanding the above acknowledgments, there are serious doubts as to its *jus cogens* status of non-refoulement for two reasons. Firstly, had it been a principle of *jus cogens* to which no derogations were permitted, then the exception in Article 33(2) would not have been there and neither would states have adopted restrictive readings to the obligation itself. It is primarily because the obligation is not a peremptory norm that it itself spells out situations where it can be foregone and the next section illustrates in more detail how the obligation has been prone to inhibitory readings. Secondly, while the UNHCR’s views as to the customary status of the principle have been reiterated by other international bodies, its views as to its supposed status as *jus cogens* has not.

Thus, non-refoulement has not, as of yet, reached the status of *jus cogens* and in view of the importance given by international law to the sovereignty of states, it is unlikely that it will ever reach the status of an obligation to which no exception will be allowed. It would run afoul of practicality if the obligation was in fact non-derogable because that would render States extremely unlikely to accept it and in any case, there are certain situations where derogations are justified,<sup>213</sup> for example in cases of threat to security and necessity.<sup>214</sup> This is in light of not only increasing global security concerns but also in view of the burden such a status would impose on the economic status of countries.

#### 1.4. The Linguistic Ambiguity in Article 33(1)

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<sup>211</sup> Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in South America, 1984, paragraph 5.

<sup>212</sup> Jean Allain “The Jus Cogens Nature of Non-Refoulement,” *International Journal of Refugee Law* 13, no. 4 (2001): 533-558

<sup>213</sup> Rodgers, J., 2001. *Defining the Parameters of the Non-Refoulement Obligation*. [Online] Available at: <http://www.refugee.org.nz/JessicaR.htm> [Accessed 30 December 2017]

<sup>214</sup> Article 33, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001

Given the importance of Article 33(1), augmented by its status as customary international law, it is all the more problematic that there is linguistic ambiguity surrounding its extraterritorial application. This, in turn, renders it susceptible to a myriad of interpretations. The focus is on the uncertainty surrounding the exact scope and application of the phrase “...*expel or return a refugee in any manner whatsoever to the frontiers of territories...*”

It is uncontroversial that Article 33(1) and even the Refugee Convention on the whole do not place obligations on states to admit refugees within their sovereign territories.<sup>215</sup> However, the controversial question is whether Article 33(1) leaves it up to the discretion of states to reject refugees at its borders.

### 1.5. Literal Interpretations

Read “restrictively”,<sup>216</sup> Article 33(1) seems to propound the obligation of non-refoulement as restricted to those within the boundaries of the host state. Various delegates, including the Swiss and Dutch, took this reading, as evident from the records of the Conference of the Plenipotentiaries in 1951.<sup>217</sup>

Here, it is important to examine the converse “literal” meaning of the phrase. Read liberally, the words “in any manner whatsoever” were clearly meant to proscribe all and any acts of “removal or rejection that would place the person concerned at risk”.<sup>218</sup> Thus, the aforementioned all-encompassing phrase did not distinguish between expulsion once within a state’s territory or rejection even before entering a state. Moreover, Bethlehem, literally interpreting the words “return” and “refouler” reaches a different conclusion than proponents of the restrictive reading. The existence of two alternative “literal” readings of Article 33(1) lends weight to the assertion that the obligation is ill-defined in the Convention.

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<sup>215</sup> D’Angelo, E. F., 2009. Non-Refoulement: The Search for a Consistent Interpretation of Article 33. *Vanderbilt Journal of Transnational Law*, 42(279), pp. 279-315.

<sup>216</sup> *Ibid*

<sup>217</sup> U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 16th mtg., UN Doc. A/CONF.2/SR.16 (Nov. 23, 1951)

<sup>218</sup> Bethlehem, S. E. L. a. D., 2003. *The scope and content of the principle of non-refoulement: Opinion*, s.l.: Cambridge University Press

A provision which goes to the heart of the entire refugee regime is thus vulnerable to two starkly contradictory “literal” readings.

The liberal literal reading of the text also seems to echo the concern that a refugee really has no choice when he decides to access one state’s territory over the other. Thus, the onus cannot be on potential asylum seekers to make reasoned judgments before purporting to enter territories of countries depending on whether that state interprets Article 33(1) narrowly or widely making the activity of seeking asylum equivalent to a “dangerous lottery”.<sup>219</sup> The refugee only seeks refuge; and an assessment of his/her right to that refuge cannot be practically done without allowing him/her a chance to have his legal status determined.

#### 1.6. Contextual Interpretations

If a contextual approach is taken to Article 33(1), interpreting it in view of Article 32, the meaning of “expel or return” clarifies itself.<sup>220</sup> Article 32(1) reads:

*“The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order and in pursuance of a decision reached in accordance with the process of law.”*

Thus, because Article 32 specifically refers to refugees lawfully “in” the receiving state’s territory, proponents of the restrictive reading take this to mean that Article 33(1) also then assumes the same premise: the non-refoulement obligation could only logically apply to asylum seekers “in” a state’s territory.

States which adopt this restrictive reading, then, take measures in pursuant of it claiming them to be in line with their obligation of non-refoulement. The range of such measures is non-exhaustive and extensive but may include visa controls, pre-entry clearance procedures,

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<sup>219</sup> European Council on Refugees and Exiles, ‘*Europe Must End Asylum Lottery: Refugee NGOs*’ PR6/11/2004/EXT/RW (Press Release, 4 November 2004)

<sup>220</sup> Guy S. Goodwin-Gill, *The Refugee in International Law* 206 (2<sup>nd</sup> edition 1996): 206 (“*The words ‘expel or return’ have no precise meaning in general international law. . . . [A]lthough article 32 possibly implies that measures of expulsion are reserved for lawfully resident aliens.*”).

measures to inhibit access to a state's borders and rejecting refugees at the state's borders themselves.

However, opponents to this restrictive reading argue that the only restriction placed by Article 33(1) is that the duty of non-refoulement crystallises only when there has been an affirmative classification of an individual(s) as refugee(s).<sup>221</sup> If looked at in a historical context, this argument in fact carries weight in light of Article 3 of the 1933 Refugee Convention<sup>222</sup> which explicitly referred to "non-admittance at the frontier" as an element of the non-refoulement obligation of states.

Therefore, proponents of the liberal interpretation reason that because Article 3 explicitly contained rejection at frontiers as amounting to refoulement, thus, by necessary historical corollary, Article 33 also encapsulates the same notion. However, this is not the strongest argument that has been, made in favour of a wider interpretation of Article 33. The very fact that the new provision omits the extension provided for by its preceding provision is conclusive in itself that the drafters' intentions behind both were starkly different.

Therefore, the above discussion makes it clear that Article 33(1) is in fact laden with obscurity. It is too ambiguously worded for an obligation cardinal to the entire refugee protection regime.

### 1.7. The Practical Implications of an Ambiguous Non-Refoulement Obligation

Given the unfettered freedom of interpretation the text of Article 33(1) enables, states are likely to pursue their own national interests at the expense of diluting the Article 33(1) obligation to the extent that it no longer retains any effective force in protecting refugees. Of greater concern is the fact, as pointed out by D'Angelo,<sup>223</sup> that denial of access to a state's territory does not make potential refugees disappear. Instead, what happens is that heavier burdens are imposed on other states who give wider interpretation to Article 33(1). This is

<sup>221</sup> James C. Hathaway, *The Rights of Refugees in International Law* 315 (2005)

<sup>222</sup> League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663

<sup>223</sup> D'Angelo, "Non-Refoulement" at 311

not only unfair but is also inequitable as it essentially means that geographically larger states with much more developed economies, infrastructure and housing facilities can refuse access to their territories for refugees merely by interpreting their non-refoulement obligations restrictively. On the other hand, smaller, underdeveloped or developing nation-states, may be left to bear the brunt of refugees seeking access to their territory by virtue of the fact that they take their Article 33(1) responsibility in its essence and give it a wider meaning. Equally, smaller states, too, could deliberately adopt a restrictive interpretation, given their lack of capacity for hosting refugees and either way, it would be a raw deal for refugees. Thus, this leaves the following question: what is the purpose of laying down an obligation which is so central to the entire legal edifice for refugee protection but is so ambiguous in its language that its practical implementation is essentially rendered arbitrary?

As Chia<sup>224</sup> stated, “*diversity of opinion*” in the process of interpretation is a “*necessary and healthy element*”. However, when interpreting a humanitarian treaty like the Refugee Convention, it is crucial to not overlook its foundational principles of justice. Thus, Chia correctly points out that while the subjects of the Convention are States, its objects are refugees who are its “*substantive beneficiaries*”.<sup>225</sup>

Thus, varying interpretations are inevitably an essential part of human rights instruments such as the Refugee Convention. However, if these interpretations begin to vary to such an extent that they taint and compromise the aims and objectives of the Convention itself and distort the rights of its beneficiaries, then there is a problem with the provision itself

## 2. THE RESTRICTIVE INTERPRETATION OF ARTICLE 33(1)

### 2.1 Sale v Haitian Centers Council

This case pertained to the 1981 proclamation issued by President Reagan whereby he termed the “*continuing illegal migration*” of “*undocumented aliens*” as a serious national security threat to

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<sup>224</sup> Chia, A. M. N. a. J., 2006. Towards convergence in the interpretation of the Refugee Convention. In: *Australian Year Book of International Law* pp. 214-256

<sup>225</sup> *Ibid*, at 218.

the US.<sup>226</sup> Following this, the Coast Guard was authorized through the President's executive order to "*intercept and return vessels*" carrying fleeing Haitians.<sup>227</sup> According to the respondents, the military coup in Haiti in 1991 witnessed as its aftermath a "*reign of terror in Haiti*" with over thousands of Haitians killed or subjected to extreme violence on account of their political beliefs. Owing to this, persecuted Haitians set out in overloaded boats and undertook the dangerous journey through sea to the US in order to escape persecution.<sup>228</sup> However, these Haitians were continuously interdicted by the US Coast Guard and their boats were returned to Haiti. Subsequently, various organisations and Haitian aliens brought action challenging the interdiction programmes. The respondents based their action on domestic as well as international law. For the purposes of the present article, the author shall only be focusing on the international law aspect of the claims.

The Supreme Court decided by a majority of 8 to 1 that the actions of the Coast Guard in interdicting Haitians before they reached the borders of the US were not in violation of the non-refoulement obligation in Article 33(1).<sup>229</sup> An important aspect of this understanding of the Supreme Court is reflective in its unambiguous acceptance of the non-refoulement obligation itself; the majority did not think the US was not bound by that obligation. However, despite this acknowledgment, the majority decided that Article 33(1) did not have extraterritorial application and therefore, the US was in line with its international law obligation not to refouler refugees to territories where they faced the risk of ill-treatment.

Justice Stevens, delivering the opinion of the Court, reasoned that it was evident from not only the text but also the negotiating history behind Article 33(1) that there was no intention to grant it extraterritorial applicability. However, the Court's reasoning was problematic. The Court took the negotiating history of Article 33(1) out of its proper context and deliberately strained its reading of the literal text of the article. While the former is independent of the linguistic ambiguity of Article 33(1), the latter problem sources directly from the language of the text which enabled the Supreme Court's reading.

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<sup>226</sup> Presidential Proclamation No. 4865, 3 CFR 50-51

<sup>227</sup> Executive Order No. 12324, 3CFR, p. 181

<sup>228</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993)

<sup>229</sup> *Ibid*, at 155

The first rationale provided by the Court for its decision was based on a contextual reading with Article 33(2). Article 33(2) allows states to forego their non-refoulement obligations if the concerned individual is a danger to the country that he is in. This was misfounded as the comparison between Article 33(1) and Article 33(2) could not properly be made in the context of extraterritoriality; Article 33(2) is quite explicit in its geographical application. The Court was of the view that if Article 33(1) applied extraterritorially, the exception in Article 33(2) would be reduced to an “*absurd anomaly*”. Drawing from this, the Court concluded that “*dangerous aliens in extraterritorial waters would be entitled to*” Article 33(1) because they would not literally be in any “country” to satisfy the threshold for the exception in Article 33(2). On the other hand, aliens residing within the receiving state would not be so entitled. Therefore, the Court found it “*more reasonable to assume*” that Article 33(2) applied to those within the country because of the very understanding that the obligation in Article 33(1) was limited to aliens within a state’s territory.<sup>230</sup>

However, Blackmun J (dissenting) opined that unlike Article 33(2), Article 33(1) does not contain any geographical limitation; it only limits the place where a refugee can be sent to and does not talk about the place where he may be sent from. Blackmun J was correct and the first argument of the majority’s reasoning that was based on a contextual analysis with Article 33(2) is flawed. Such an inference would lead to the oddity of Article 33(1) only applying, for example, to refugees with families if Article 33(2) created an exception for refugees who “constitute a danger to their families”.<sup>231</sup>

The second limb of the Court’s reasoning was based on an interpretation of the French word “refouler” to be indicative of Article 33(1)’s limited territorial application. This was misconceived as such an interpretation rendered the justification for a non-refoulement obligation completely unachievable. The Court referred to its previous decision in *Leng May Ma v Barber*,<sup>232</sup> which relied on *Shaughnessy v United States ex rel. Mezei*,<sup>233</sup> to suggest that “*refouler*” refers only to exclusion of aliens who are merely “*on the threshold of initial entry*”.

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<sup>230</sup> *Supra* note 228, at 180

<sup>231</sup> *Supra* note 228, at 194

<sup>232</sup> 357 U.S. 185 (1958), at 187

<sup>233</sup> 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953)

Moreover, the Court stated that “refouler” is not an exact synonym for “return” in English. On the other hand, the Court observed that translation dictionaries did use words like “repulse,” “repel,” “drive back,” and even “expel” as containing the same meaning as “refouler”. Therefore, the Court concluded by implication that “return” means a “defensive act of resistance or exclusion at a border”, and not the conduct of transporting to a destination.<sup>234</sup>

According to Hathaway, this is the most “*disingenuous*” of all the arguments made by the Court.<sup>235</sup> The executive order in question itself expressly authorised the Coast Guard “to return” Haitian boats to Haiti, which was precisely the act that Article 33(1) prohibited.<sup>236</sup> Moreover, it is not clear why the plain meaning of “*refouler*” was not applied to the situation at hand, especially when French newspapers themselves were reporting the incident as one where the US had decided to “*return*” the refugees.<sup>237</sup>

Moreover, by interpreting “refouler” as “expel”, Article 33 was transformed into a circular and redundant obligation as this translation would then mean that no contracting state “shall expel or refouler (expel) a refugee”.<sup>238</sup> Clearly, the word *refouler* cannot be translated to mean expel as that would reduce Article 33 to repetition of itself.

According to Blackmun J, the text of Article 33(1) was clearly prohibitive of the government’s actions, whether reliance was placed on the word “return” or “refouler”. While the majority thought it appropriate to rely on contextual meanings and the negotiating history in order to aid their interpretation of the text, the minority view was that the text was clear. This divergence in views as to the clarity of the text is indicative of the ambiguity in the text. Had the text really been clear, the majority would not have relied on secondary instruments of statutory interpretation.

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<sup>234</sup> Supra note 228

<sup>235</sup> Supra note 219, at 337

<sup>236</sup> Wishnie, H. H. K. & M. J. The Story of Sale v Haitian Centers Council: Guantanamo and Refoulement. In: Human Rights Advocacy Stories. pp. 386-432

<sup>237</sup> Le *bourbier* haitien, LE MONDE, May 31- June 1, 1992

<sup>238</sup> Supra note 228

Lastly, the Court relied on the negotiating history of the Convention to support its restrictive reading of Article 33(1).<sup>239</sup> However, it did so in a rather peculiar fashion. It relied on the statement of the Swiss delegate present during one of the negotiating conferences where he explained that he understood the words “expel” and “return” to pertain only to refugees in the host country. The Court relied upon this observation and the fact that no one at that Conference expressed discord with the Swiss delegate’s understanding.<sup>240</sup>

However, the Court’s reliance on this specific aspect of the negotiating history is misplaced. This article submits that reliance on this history itself is not incorrect because the Vienna Convention on the Law of Treaties directs that reliance on this history should be an alternative of last resort.<sup>241</sup> As far as Article 33 is concerned, the text is ambiguous and unclear, thus making the use of this history itself appropriate. Therefore, the criticism levelled at the use of the negotiating history by the Court is directed at the inaccurate understanding of the history and its misapplication by the Court.

The Court relied on statements of a foreign delegate that were not discussed or voted upon by the US itself, which were not considered by the US Senate when it ratified the 1967 Protocol and that were actually refuted by the US government official who negotiated the Convention itself.<sup>242</sup> Moreover, if the negotiating history of the Convention is looked at in a more holistic manner, it becomes clear that despite the ambiguous text, the intent of the drafters was unambiguous in that they wanted to secure the widest possible protection for refugees.<sup>243</sup> The Court’s decision is the most basic and apparent breach of Article 33(1) which was envisioned to render impermissible all methods which would result in refugees being “*pushed back into the arms of their persecutors*”.<sup>244</sup>

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<sup>239</sup> Supra note 228, at 184

<sup>240</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty fifth Meeting, U.N.Doc. A/ CONF.2/SR.35, pp. 21-22 (July 25, 1951)

<sup>241</sup> Article 32

<sup>242</sup> Supra note 228

<sup>243</sup> Refugee Convention, at Preamble, ¶2

<sup>244</sup> Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7.

There was no basis for the Court to have reasoned that the drafters envisaged interdiction and return such as that carried out by the US against Haitians.<sup>245</sup> Moreover, the Court seems to have been oblivious to another aspect of the negotiating history. The drafters of Article 33 decided to amend it and include the phrase “in any manner whatsoever”, which was explained to encompass methods inclusive of refusal of admission in addition to expulsion and return.<sup>246</sup> Therefore, the inclusion of the all-encompassing “*in any manner whatsoever*” was made with the intent to make the obligation apply extraterritorially as well. This was a key snippet of the negotiating history which was conveniently overlooked by the Court.

Moreover, the majority reasoning failed to take account of the observations of the UNHCR as *amicus curiae* in the case. The High Commissioner had explicitly expressed his assent of the extraterritorial application of Article 33(1). He was of the view that the US government’s interpretation extinguished “*the most basic right enshrined in the treaty*” for a whole class of refugees and rendered the most fundamental protection of the refugee regime meaningless.<sup>247</sup>

Therefore, it can be gauged from the above analysis that the decision of the Supreme Court was based on an inaccurate interpretation of Article 33(1), which was enabled and triggered by its ambiguous text and its ability to be interpreted in the manner that it was. This decision exhibits how Article 33(1) is vulnerable to abuse via such strained readings of its text.

## 2.2 The Haitian Centre for Human Rights et al. v. United States<sup>248</sup>

The Inter-American Court of Human Rights agreed with the UNHCR that Article 33(1) did have extraterritorial application and explicitly criticized the majority’s interpretation in the US Supreme Court.<sup>249</sup> Here, the petitioners highlighted the various hardships and forms of persecution that the repatriated interdictees had to face once the Coast Guard returned them

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<sup>245</sup> Supra note 228

<sup>246</sup> Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

<sup>248</sup> Case 10.675, Report No. 51/96 (1997) (Decision of the Inter-American Court of Human Rights)

<sup>249</sup> Ibid, paragraph 157

to Haiti. Many were arrested in Haiti, several of those were found shot to death, beaten in public, forced to identify other repatriated Haitians and tortured.<sup>250</sup>

This explicit disagreement with the Supreme Court's interpretation of Article 33(1) is further proof of its dubious nature as the correct reading of the obligation. This disagreement was premised on the arguments advanced by the UNHCR as *amicus curiae* and Blackmun J's dissent in *Sale*.

As exhibited by this complaint, the effects of construing the obligation as not applying extraterritorially are extreme. The effects, in fact, completely defeat the obligation. Non-refoulement is aimed at preventing return of refugees to places where it is likely they would face persecution. That is precisely what the fate of the repatriated Haitian refugees was. This practical reality that these Haitians had to face when they were returned is reflective of the problem with the Supreme Court's approach. Via a strained interpretation of an unclear text, the Supreme Court nullified the core obligation of non-refoulement.

However, while this case does highlight the practical lacunas the Supreme Court's reasoning is capable of creating, the Inter-American Court did not offer a reading which permitted extraterritoriality on the text of Article 33(1) itself. The judgment of this court was premised largely on claims of the interdicted Haitians arising out of the American Convention on Human Rights,<sup>251</sup> American Declaration of the Rights and Duties of Man<sup>252</sup> and customary international law binding upon the US. Article 33(1) was only addressed briefly, that also in mere endorsement of the UNHCR's views as *amicus curiae*.

### 2.3 R (European Roma Rights Centre) v Immigration Officer at Prague Airport<sup>253</sup>

The importance of this judgment of the United Kingdom House of Lords is the simple fact that it follows the problematic interpretation in *Sale*. This decision reiterates how the

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<sup>250</sup> *Ibid*, paragraph 10

<sup>251</sup> Articles 22(2)(7)(8), 24 and 25, Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969

<sup>252</sup> Articles I, II, XVII, XVIII, XXIV, XXVII, Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man, 2 May 1948

<sup>253</sup> [2004] UKHL 55

absence of a clear prohibition on extraterritorial non-refoulement in the provision makes it vulnerable to continuous abuse by states.

This case concerned the lawfulness of procedures adopted and applied to the appellants at Prague Airport by the British Immigration Officer. These appellants belonged to Romani ethnicity and were Czech nationals. They were all refused entry into Britain at the Prague Airport itself, before boarding the plane.<sup>254</sup> These Czech Roma had escaped from discrimination, persecution, harassment and poor living standards in the Czech society.<sup>255</sup>

Lord Bingham expressed in unequivocal terms his approval of the restrictive reading of Article 33(1) and justified it by reference to the literal text itself. According to him, the court's task was confined to interpreting the written document to which they had assented and not to decide on what an "ideal world" should look like.<sup>256</sup> He additionally observed that the obligation of interpreting a treaty in good faith<sup>257</sup> does not apply if a state interprets a provision as it is and refuses to do more than what the provision requires. Moreover, he distinguished the situation of the Haitians in the US from that of the Czech Roma because he believed the plight of the former and their treatment by US authorities was of much greater magnitude.<sup>258</sup> The facts, according to him, also differed because the Haitians, unlike the Roma, were outside the country of their nationality when they were repatriated.

However, what Lord Bingham failed to acknowledge was the fact that the effect of measures taken in both jurisdictions was similar in its application to the fate of the asylum seekers. Both measures ensured refugees did not gain access to the border. The only difference was that the UK intercepted the asylum seekers before they even left, saving themselves the inconvenience of returning them from their own territory. Otherwise, both states had taken preemptive action to stop the inflow of asylum-seekers by ensuring, albeit in different ways, that access to the territory was rendered impossible in the first place. Thus, what is

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<sup>254</sup> Ibid, paragraph 1

<sup>255</sup> Ibid, paragraph 3

<sup>256</sup> Ibid, paragraph 18

<sup>257</sup> Article 26 Vienna Convention on the Law of Treaties

<sup>258</sup> Supra note 253, at paragraph 21

important is that the implications of both measures is the same for the principle of non-refoulement notwithstanding their distinguishable nature.<sup>259</sup>

Lord Hope expressly approved the decision in the US Supreme Court,<sup>260</sup> acknowledging as correct both the textual and contextual arguments relied on by the majority in *Sale*.<sup>261</sup> The interpretation adopted in *Sale* was destructive towards the entire regime of refugee protection, and the House of Lords is susceptible to the same charge for having followed that restrictive interpretation. It shows how dangerous the ambiguity in the text of Article 33(1) really is.

The House of Lords relied on the supposedly clear meaning emanated by the provision but the question remains: did this “clear” meaning of the literal text uphold the rights of refugees in the widest possible sense? In fact, this “clear” meaning essentially made the obligation redundant and devoid of any practical value.

### 3 THE LIBERAL INTERPRETATION OF ARTICLE 33(1)

#### 3.1 The European Court of Human Rights

The ECtHR in *Hirsi Jamaa* took a reading of Article 33(1) contrary to that adopted by the highest courts of the UK and US. It was the first case in which this judicial body delivered a judgment on interceptions at sea wherein it unanimously decided that the obligation of non-refoulement does have extraterritorial applicability.

This case concerned Somali and Eritrean migrants who fled Libya in 2009 on vessels, aiming to reach the Italian coast. However, they were intercepted by Italian authorities before they could access the border or the refugee determination procedures of the receiving state. They were transported back to Libya.

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<sup>259</sup> D'Angelo (2009) at 294

<sup>260</sup> *Ibid* at 70

<sup>261</sup> *Ibid* at 68

The ECtHR did not rely solely on Article 33(1) in finding Italy in breach of its obligations. Its conclusion was based equally on Article 3 of the European Convention of Human Rights,<sup>262</sup> Article 4 of the Italian Navigation Code (2002),<sup>263</sup> bilateral accords between Libya and Italy, the United Nations Convention on the Law of the Sea (1982),<sup>264</sup> the Palermo Protocol (2002),<sup>265</sup> Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe and other European Union law.<sup>266</sup> For the purposes of the present article, however, only the court's reasoning vis-à-vis its interpretation of Article 33(1) will be considered.

The ECtHR adopted a four-pronged line of analysis when interpreting Article 33(1) liberally. Firstly, the court emphasised the significance of refugee-status determination and its proximity to the non-refoulement obligation. Since the determination of this status is “declaratory”,<sup>267</sup> Article 33(1) applies to not only those awaiting status determination but also those who have not yet applied at all. This reasoning of the court carries immense practical weight. Until and unless asylum-seekers are allowed access to refugee protection procedures of host states, the propriety of their claim to be refugees can never be ascertained. In order to afford them this opportunity, which the court points out is “*instrumental in protecting primary human rights*”,<sup>268</sup> it is imperative that the obligation of non-refoulement apply extraterritorially. This argument has also been endorsed by Vandvik by his emphasis on the practical realities concerning the non-refoulement obligation; Article 33(1) requires a substantive determination of refugee status which is logically impossible until an asylum-seeker is allowed access to the procedures as a starting point.<sup>269</sup>

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<sup>262</sup> This reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>263</sup> As amended in 2002, this provided as follows: “Italian vessels on the high seas and aircraft in airspace not subject to the sovereignty of a State are considered to be Italian territory.”

<sup>264</sup> The Court relied on Articles 92, 94 and 98 of this Convention.

<sup>265</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime

<sup>266</sup> This included Article 19 of the Charter of Fundamental Rights of the European Union (2000), Article 17 of the 1985 Schengen Agreement, Regulation (EC) No. 2007/2004, Regulation (EC) No. 562/2006, Council Decision (2010/252/EU).

<sup>267</sup> *Supra* note 81, at 63.

<sup>268</sup> *Ibid*

<sup>269</sup> Vandvik, B., 2008. *Extraterritorial Border Controls and Responsibility to Protect: A View from ECRE*, Amsterdam: ECRE

Secondly, the court explicitly disapproved of the United States Supreme Court's interpretation of Article 33(1) in *Sale* as it ran counter to the "*literal and ordinary meaning*"<sup>270</sup> of Article 33(1). The court reasoned that treaties must be given their ordinary interpretation according to the Vienna Convention on the Law of Treaties. The court was convinced of the view that since Article 33(1) was clear, no reliance should have been placed by the United States Supreme Court on aids to treaty interpretation, like *travaux préparatoires*. However, the rationale of the ECtHR in this regard is deeply flawed and the Supreme Court's reliance on the negotiating history was not misplaced, rather it was their narrow account of that history, bordering on cherry-picking, that was problematic. The downside of the ECtHR's reasoning is that it is oblivious to the textual ambiguity in Article 33(1): it is not plain from its ordinary meaning whether it applies extraterritorially or not. The court emphasised on the all-encompassing nature of the phrase "*in any manner whatsoever*" and took it to apply to situations where interceptions of asylum-seekers occur before they reach the receiving state's territory. However, this is the very phrase that is the root of the problem; this phrase, as it stands, cannot impose a negative obligation on states not to return asylum-seekers to places from where they have escaped before they reached the host country. That, being the essence of the obligation, should have been unequivocal in the text of Article 33(1).

Thirdly, it is appreciated that the ECtHR's decision is in line with Blackmun J's dissenting opinion in the *Sale* judgment who also endorsed the liberal interpretation of Article 33(1). In agreement with Blackmun J's observations, the ECtHR rationalized that if there is any limitation as to territory in Article 33(1), then it is just on the country to which return is prohibited, not the country from where such return is not allowed.<sup>271</sup> Therefore, from this argument, the ECtHR rationalized, adopting a flexible line of reasoning that the provision had no bar for it to apply extraterritorially, in the absence of a clear restriction on such application.

Fourthly, the court in this case also relied on the "*deliberate insertion of the French word refouler*" which it believed was done to accentuate the "*linguistic equivalence*" between "*return*" in English and "*refouler*" in French. While this line of reasoning is logical, it does run in sharp contrast to

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<sup>270</sup> *Ibid*, at 67

<sup>271</sup> *Ibid*, at 68.

the court's second line of reasoning wherein the ECtHR criticised the use of supplementary sources by the United States Supreme Court because it felt Article 33(1) was clear enough. However, the ECtHR ended up relying on fragments of the negotiating history and the rationale behind "*refouler*".

The ECtHR therefore found Article 33(1) to have extraterritorial applicability, their conclusion being in consonance with the stance of this article. However, this article does not adhere to the rationales employed by the ECtHR which construe the extraterritorial effect of Article 33(1) as indisputable in its promulgation of the non-refoulement obligation.

### 3.2 UNHCR Advisory Opinion<sup>272</sup>

This Opinion affirms the liberal and human-rights friendly interpretation of Article 33(1). The analysis of this Advisory Opinion is pertinent because this Opinion affirms the extraterritorial effect of Article 33(1), and criticises the reasoning employed by the majority in *Sale*. This rejection by the world's largest refugee protection and assistance organization is proof of the blatant disregard the restrictive interpretation of Article 33(1) has for the indispensable right of a refugee who leaves his state of persecution to not be sent back. While the overall stance taken by the Advisory Opinion is correct, the approaches adopted in reaching its conclusion are ill-reasoned. The two major arguments presented by the UNHCR in favour of the extraterritorial applicability of Article 33(1) shall be presented and it shall be shown how the methodology in forming them is flawed.

Firstly, the UNHCR opined that the non-refoulement prohibition applied to all forms of forcible removal. This would include expulsion, extradition, renditions, informal transfers and non-admission at frontiers. The UNHCR supported this finding by basing it on the wording of Article 33(1), more specifically, its reference to "in any manner whatsoever".<sup>273</sup> However, it is submitted that this phrase, while being quite open-ended, is not decisive as to Article 33(1)'s extraterritorial application. The list of forms of forcible removals given by the

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<sup>272</sup> United Nations High Commissioner for Refugees, 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

<sup>273</sup> *Ibid*, at paragraph 7

UNHCR needs to be evident on the face of Article 33(1) itself, especially the category of non-admission at frontiers.

Secondly, the UNHCR does reiterate the general stance promulgated by the liberal interpretivists of Article 33(1) that the only geographic restriction it is subject to is with regard to the country where a refugee may be sent to.<sup>274</sup> However, the UNHCR finds this conclusion, again, on the basis of the “clear” text of Article 33(1). While it is clear that refugees may not be “sent to” their countries of origin, Article 33(1) fails to mention the status of the potential host country at all. Its failure to do so cannot be extrapolated to such an extent as to imply an extraterritorial non-refoulement obligation. Thus, this reasoning is stretched on part of the UNHCR, just like it was by the ECtHR.

A unique facet of this Opinion is how it justifies extraterritoriality by reference to the general application of other human rights extraterritorially,<sup>275</sup> as decided by the Human Rights Committee, the International Court of Justice<sup>276</sup> and the European Court of Human Rights.<sup>277</sup> However, these observations have to be treated with caution and this general trend is not the basis for this article’s support for the extraterritorial application of Article 33(1). The factors for each human right to be applied extraterritorially are varied, must be looked at separately, without an overarching principle of extraterritoriality applying to all and any human rights obligations of a state.

In conclusion, this section depicted the virtues of the liberal interpretation of Article 33(1) as being in conformity with the overall aim of the Refugee Convention in general and the non-refoulement obligation in particular. Nevertheless, it is submitted that both the ECtHR and the UNHCR erred, to some extents, in their justifications for the conclusions reached. The preferred liberal interpretation adopted was not as evident on the text of the provision as they claimed it was. This precisely is what needs to be made evident.

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<sup>274</sup> Ibid, at paragraph 26

<sup>275</sup> North, J. A, Extraterritorial Effect of Non-Refoulement. Bled, International Association of Refugee Law Judges World Conference, at 4

<sup>276</sup> International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, General List No 131, 9 July 2004, at 111

<sup>277</sup> Bankovic & Ors v Belgium & Ors, application no 52207/99, [2001] ECHR 890 (12 December 2001), at 59; Issa and Others v Turkey, application no 31821/96, [2004] ECHR 629 (16 November 2004)

4 INCREMENTAL REFORM OF ARTICLE 33(1)

4.1 Textual Reform of Article 33(1)

As a starting point, it is proposed that the textual ambiguity within Article 33(1) should be resolved in favour of explicit reference to the extraterritoriality of the non-refoulement obligation. The liberal interpretation of Article 33(1) should be the basis of this textual reform.

This textual reform should be done drawing influence from Article 2(3) of the OAU Convention in the following manner:

<u>Article 2(3) of the OAU Convention</u>	<u>Article 33(1) of the Refugee Convention</u>	<u>Proposed amendment to Article 33(1) of the Refugee Convention</u>
<p><i>“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.”</i></p>	<p><i>“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.”</i></p>	<p><i>“No Contracting State shall <b>take any measures to reject at or before asylum seekers reach frontiers,</b> 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.”</i></p>

The text of Article 2(3) is evidently wider than Article 33(1) and more importantly makes explicit reference to “*rejection at the frontier*” unlike Article 33(1)’s silence on the exact scope of such measures in relation to non-refoulement. Moreover, Article 2(3) has comparatively open-ended language where it proscribes measures “*such as...*” indicating that there are measures other than rejection at frontier, return and expulsion that will be caught by the provision. While Article 33(1) may, *prima facie*, also seem equally broad with its inculcation

of “*any manner whatsoever*”, it is submitted that this broadness is deficient in encompassing the notion of extraterritorial non-refoulement. In comparison, Article 2(3) is not just broader, but also provides a much clearer rule on the matter.

Article 2(3) reflects the overall theme of the OAU Convention, which originated premised as a reaction to the refugee problems subsisting in Africa.<sup>278</sup> Accordingly, its provisions for the protection of refugees are broad-based and liberal, reflecting the “*ideal of solidarity and cooperation among African States.*”<sup>279</sup> It is appreciated that the aims and objectives of the OAU and Refugee Convention are different. The former was meant to serve as an addition to and for the furtherance of the aims of the latter,<sup>280</sup> and not as a replacement of or alternative to it. While the Refugee Convention’s geographical application extended to its 145 signatories and the 146 states parties to its Protocol, the obligations enshrined in the OAU Convention only extend to the 46 African states who have consented to it. Thus, the obligations of states and rights of refugees in the OAU Convention reflect the particular conditions prevailing within African states during the time of the drafting of the instrument. The main group of asylum-seekers during that time were those fleeing conflict zones created during the struggles against colonial powers.<sup>281</sup> It was “specifically intended to meet the security concerns” of African states and to “prevent the refugee problem from becoming a source of subversive, inter-state dispute”.<sup>282</sup>

Set against this background, the wider promulgation of the non-refoulement obligation in the OAU Convention seems well-rationalized and raises the corresponding question: can this liberal meaning be duly extrapolated to the Refugee Convention? It can, despite the differences in backgrounds and contexts of the two instruments. This is because Article 2(3)’s express reference to “measures such as rejection at the frontier” clearly addresses the

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<sup>278</sup> The Preamble states that, “1. Noting with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future .... ”

<sup>279</sup> Jennifer L. Turner, *Liberian Refugees: A Test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, Georgetown Immigration Law Journal (1994)

<sup>280</sup> Preamble, OAU Convention

<sup>281</sup> Okello, J. O. M., 2014. The 1969 OAU Convention and the continuing challenge for the African Union. *Forced Migration Review*, Volume 48, pp. 70-73.

<sup>282</sup> Rutinwa, B., 1999. *The end of asylum? The changing nature of refugee policies in Africa*, Oxford: UNHCR.

bone of contention raised by Article 33(1) of the Refugee Convention.<sup>283</sup> Therefore, the incorporation of the aforementioned phrase into Article 33(1) will have the effect of making the extraterritoriality of the obligation crystal-clear. It may be legitimately argued that provisions such as those defining who a refugee is under the OAU Convention cannot be projected on to how the Refugee Convention defines him/her because such definitions are directly the outcome of the historic backdrop against which the two instruments were set, both catering to different needs and aspirations of the international community. However, the issue of the extraterritoriality of the obligation of non-refoulement is not a provision which has any bearing on or is sourced from a specific setting. It is a matter of principle which must extend to all uses of the phrase universally. If non-refoulement is to include rejection at frontiers, then that is the understanding that should be obvious on a literal reading of any text containing that obligation.

Apart from importing the phrase “rejection at the frontier” from the OAU Convention into Article 33(1), it is also proposed that Article 33(1) cover the type of situation that arose in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*. In that case, the issue was not rejection at UK’s frontier per se, but interception before asylum-seekers even reached that frontier. Because both measures have the same effect of returning asylum-seekers without even giving them a chance to access to a state’s refugee determination procedures, both should be the basis of the non-refoulement provision. Therefore, as mentioned in the table above, Article 33(1) should also extend to refoulement before reaching a state’s frontier.

#### 4.2 Independent International Judicial Commission

Once the textual ambiguity in Article 33(1) is resolved, the next step towards ensuring optimum effect of an extraterritorial non-refoulement obligation is the creation of an independent International Judicial Commission. The proposal for this Commission has is

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<sup>283</sup> Weissbrodt, D., 1999. The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties. *Buffalo Human Rights Law Review*, Volume 5, pp. 1-73.

based on North and Chia's paper on the matter,<sup>284</sup> the specifics of which shall be explored henceforth.

This would be an international platform for the analysis of different interpretations of Article 33(1), with the eventual aim of ensuring a convergence in interpretation. While the International Commission proposed by the aforementioned paper is tasked with ensuring an overall consensus on the interpretation of all contentious provisions of the Refugee Convention, for the purposes of the present article, the focus remains on the task of ensuring uniformity in the interpretation of the non-refoulement obligation only.

The Commission should be established under the auspices of the UNHCR,<sup>285</sup> comprising of highly qualified jurists, experts and lawyers of refugee law. The composition of the adjudication panel for this Commission is important. Some of the most groundbreaking and decisive interpretations regarding the extraterritoriality of the non-refoulement obligation have been made by adjudicatory bodies. Therefore, the most effective manner of change in interpretations is through such a body itself, "best equipped to persuade judges"<sup>286</sup> of national jurisdictions. The presence of experts in this judicial body is significant because of the peculiar nature of the non-refoulement obligation, and refugee law in general. It cuts across traditional confines of humanitarian and international law. This requires "sophisticated analysis"<sup>287</sup> and deeper understanding better suited to the mandates of experts of refugee law than to sole confines of judges.

In conformity with the original proposal, the involvement of states in the process of the creation and running of this Commission is also supported.<sup>288</sup> Without the inclusion of states, who are the subjects of international law, there can be no potential for enforcement or recognition of the decisions or declarations of such a commission. Moreover, states eventually make domestic refugee policies so their participation in such a commission is indisputably necessary. However, caution needs to be taken and a balance will need to be

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<sup>284</sup> Supra note 224

<sup>285</sup> Namely, the supervisory mandate of the UNHCR enshrined in Article 8 of its Statute.

<sup>286</sup> Supra note 224

<sup>287</sup> Ibid, at 245

<sup>288</sup> Ibid

struck between participation of states and any excessive, detrimental interference or for that matter, monopoly of power for any state or group of states. The Commission would be charged with providing opinions and deciding on the correctness of varying interpretations of Article 33(1). In consonance with the underlying tenet of international law being consensual in nature, it is clear that this body's declarations would be neither binding nor enforceable. They will, however, be highly persuasive in so far as their "institutional mandate and intellectual and practical quality" is concerned.<sup>289</sup> There exists precedent for the establishment of such bodies for various human rights instruments. For example, the Human Rights Committee is a group of independent experts which oversees the enforcement of the International Covenant on Civil and Political Rights<sup>290</sup> by its State parties. It has done so, for instance, in relation to Article 19 of the Covenant.<sup>291</sup>

The ultimate aim of this Commission would be to ensure the maximum possible convergence in interpretation of the non-refoulement obligation among states parties to the Refugee Convention. This is crucial because without a certain standard of uniformity in the way states perceive their non-refoulement obligations, some states will continue to suffer from unfair burdens while others enjoy undue latitude. Uniformity of interpretation is all the more important when the subject matter is an "international treaty designed to offer universal protection" where it is critical to not overlook the fundamental "principle of justice".<sup>292</sup> Because the object or the beneficiaries of the non-refoulement obligation are refugees themselves, a certain level of equality between the interpretations states give to their non-refoulement obligations in relation to these beneficiaries is important.<sup>293</sup> Refugee law, generally, is an area where the balance between consistency and divergence in interpretation needs to be struck overwhelmingly in favour of the former, because of the important consequences it has for the plight of refugees.<sup>294</sup>

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<sup>289</sup> Ibid, at 215.

<sup>290</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

<sup>291</sup> UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011

<sup>292</sup> Supra note 224, at 217

<sup>293</sup> Supra note 224, at 218

<sup>294</sup> Supra note 224, at 225

It is appreciated that a consensus in interpretation of Article 33(1) will not solve practical divergences in refugee determination laws of different states parties, which does affect the “principle of justice” underlying the Refugee Convention. However, as with the first phase of reform, this judicial body of experts will help strengthen and promote the extraterritoriality of the non-refoulement obligation for all states-parties alike, and that will serve as the foundation for justice in refugee determination laws of these states as well.

### CONCLUSION

It is appreciated that the debate surrounding the extraterritoriality of non-refoulement cannot be divorced from its political aspects. Rejection at frontiers is an inherently political exercise of a state’s sovereignty, especially if mass influx situations are concerned where threats to state security tend to tilt the balance in favour of preservation of state sovereignty. It is recognised that practical realities of the way non-refoulement plays out are much more complex than what is shown on paper or pronounced in judicial decisions.

This article has not deflected those realistic concerns. It has, in fact, highlighted one of the textual loopholes which can (and has) led to the abuse of the notion of state sovereignty and a manifestation of those concerns. There is a considerable amount of uncertainty and ambiguity regarding the geographic limitations of Article 33(1) of the Refugee Convention: does it apply extraterritorially to cover measures such as rejection at frontiers or not? This question has been answered both in the positive and negative by the ECtHR and the US Supreme Court respectively. However, this article has proposed that the answer by judicial bodies ought to be positive (given the fact that the non-refoulement obligation is in one sense the core of the refugee protection regime), and that the way of ensuring this is by reforming Article 33(1) and introducing a regime that brings about uniformity of interpretation.

Unless and until such clarity is achieved, the modern refugee protection regime will run a full circle and go back to where it started from – states across Europe using all measures to disable the entry of Jewish refugees within their territories. Thus, in the words of Carl Levy,

whatever happens, it is absolutely essential to “fight for the principle of non-refoulement”.<sup>295</sup> If fundamental principles of the refugee protection regime, such as non-refoulement, are foregone with impunity by states, then this in turn also affects the pace and substance of policy initiatives at the international level.<sup>296</sup> Finally, as Wesley Hohfeld’s characterisation of “jural correlatives” goes, a “right” cannot be operationalized without a corresponding “duty” on the state.<sup>297</sup> Thus, the right of refugees not to be refouled to their states of origin is rendered hollow and meaningless if there is no concrete, clear duty preventing states from doing so.

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<sup>295</sup> Selm, J.V., 2003. *The Refugee Convention at Fifty – A View From Forced Migration Studies*: Lexington Books, at 141

<sup>296</sup> Kneebone, S., 2009. *Refugees, Asylum-Seekers and the Rule of Law: Comparative Perspectives*: Cambridge, at 30

<sup>297</sup> Lazarev, N., 2005. Hohfeld’s Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights. *Murdoch University Electronic Journal of Law*