NOTE

The Extra-Territorial Scope of *Non-Refoulement*

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Introduction

The core principle at the heart of international law's scheme for the protection of refugees is the principle of *non-refoulement* – that is, the obligation on the part of States not to return those with a well-founded fear of persecution[1] to a territory where their life or freedom is threatened by reason of a protected characteristic. A broad reading of the principle that extends States' obligations extra-territorially is consistent with the aims of the international refugee regime.

However, such an approach has not always met with universal favor, the consensus of experts notwithstanding. After discussing the relevant legal principles, this Note analyzes two case studies to illustrate the way in which this dynamic has played out in practice. The United States' policy of interdicting Haitian asylum seekers and the Tampa affair in Australia may have consequences for the way in which the principle of *non-refoulement* is construed as a matter of international law, and perhaps of equal consequence, implications for the *realpolitik* methods through which it can be enforced.

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1. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

I. The Principle of *Non-Refoulement*

The principle of *non-refoulement* is enshrined in article 33 of the 1951 Convention, which relevantly provides that "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] This obligation may not be the subject of a reservation under the Convention,[3] and should be read broadly[4] consistently with the treaty's protective aims.[5] An obligation tantamount to *non-refoulement* can also be found in many other international instruments,[6] and there is significant evidence to suggest that it forms a part of customary international law.[7]

The obligations imposed by the various treaties are not identical,[8] but in many cases they will overlap.[9] The differences are largely beyond the scope of this Note because it is concerned with *non-refoulement* at the first instance which, as a matter of law, will depend on some form of asylum claim being made,[10] which need not be referable to a specific legal instrument. The practical effect of complementary protection is to afford some asylum seekers who do not meet the definition of "refugee" in the 1951 Convention the protection against *non-refoulement* that they would have been entitled to under that instrument.[11]

Similarly, I do not propose to focus on the national security exceptions to the principle under the 1951 Convention,[12] as they arise only after a specific individual threat has been identified, and do not exist in other instruments such as the Convention Against Torture. Moreover, the consequence for States of *non-refoulement* forming a part of customary international law is that the principle will bind them regardless of whether or not said States are signatories to the 1951 Convention, or indeed any other instrument.[13] Lauterpacht and Bethlehem are of the opinion that this customary obligation exists in similar

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2. *Id.* at art. 33(1).
3. *Id.* at art. 42.
4. Vienna Convention on the Law of Treaties art 31, May 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].
5. 1951 Convention, *supra* note 1, at pmbl.; Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 8 (3d ed. 2007).
6. *E.g.*, International Covenant on Civil and Political Rights art. 6—7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, 8, 13, Nov. 4, 1950, E.T.S. 5; Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.
7. *See* Goodwin-Gill & McAdam, *supra* note 5, 345—54.
8. *Id.* at 207—11.
9. *See* David A. Martin et al., Forced Migration Law and Policy 450 (2d. ed. 2014).
10. Sir Elihu Lauterpacht & Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion*, *in* Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 87, 116 (Erika Feller et al eds. 2003).
11. *See* Seline Trevisanut, *The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea*, 27 Leiden J. Int'l L. 661, 666 (2014).
12. 1951 Convention, *supra* note 1, at art. 1F.
13. Lauterpacht & Bethlehem, *supra* note 10, at 163.

terms to the Convention Against Torture and the 1951 Convention.[14] Thus, the core of the obligation is best viewed in those terms, which do not give rise to any substantive differences in extra-territorial obligation.[15]

Two further observations are worth making at the outset. It is uncontroversial that the obligation will bind, *inter alia*, an organ of another State if it is placed at the effective control of the State whose legal duties are impugned,[16] as well as "a person or group of persons in fact acting on the instructions of, or under the direction or control of, a State."[17] Additionally, *non-refoulement* may be breached not only by returning a person to the country from which they are fleeing persecution, but by transporting them to any territory where his or her "life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."[18] It is therefore obvious that the scope of the principle extends beyond situations where asylum seekers are delivered into the arms of their persecutors.

It is a relatively uncontroversial principle that refusing entry at the border can constitute a breach of a State's *non-refoulement* obligations.[19] It has long been noted that to refuse admission in that way would flout the aims of the 1951 Convention.[20] However, some States have argued that an inability to refuse asylum seekers at the border amounts to a *de facto* right of asylum, something that the 1951 Convention does not contemplate. These arguments usually rely on statements made by the Swiss and Dutch delegates at the 1951 Conference, but these were arguably not clear statements of principle to that effect even at the time, as they were directed to situations of mass migration.[21] There have been reams of academic commentary about the proper interpretation of those dicta. This Note adopts the position of Goodwin-Gill and McAdam that there is "little to be gained today by further analysis of the motives of States or the meaning of words in 1951."[22]

In any event, an argument that applying the *non-refoulement* obligation at the border would amount to a right to asylum is not logically founded, as Lauterpacht and Bethlehem observe. Under such circumstances, the principle of *non-refoulement* would not oblige States to grant asylum, but if they should choose not to, they would be limited as to the actions they could take:[23] "they must adopt a course that does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge."[24] The proposition that refusal at the border is within the scope of '*refouler*' also accords with the ordinary meaning of the word, and its

14. *Id.*
15. Trevisanut, *supra* note 11, at 666.
16. Lauterpacht & Bethlehem, *supra* note 10, at 109.
17. *Id.*
18. 1951 Convention, *supra* note 1, at art. 33.
19. Lauterpacht & Bethlehem, *supra* note 10, at 113-15.
20. Goodwin-Gill & McAdam, *supra* note 5, at 207.
21. *Id.* at 206.
22. *Id.* at 207.
23. *See* Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 Int'l J. Refugee L. 443, 444 (2011); James C. Hathaway, The Rights of Refugees Under International Law 301, 305 (2005).
24. Lauterpacht & Bethlehem, *supra* note 10, at 113.

application in French and Belgian law.[25] It is an interpretation which furthers the humanitarian aims of the treaty.[26]

II. Extra-territorial Application of the *Non-Refoulement* Principle

A more controversial question, at least from the perspective of certain States, is whether the extra-territorial activity of States is captured by the *non-refoulement* principle. The expert view on this question is well-settled on a broad interpretation that does so extend, as this Note will set out. However, as this Note goes on to consider, the failure of States to consistently abide by the principle thus formulated, and in many cases the failure of the international community to condemn in clear terms breaches of the principle,[27] have important consequences.

It is convenient to note the materials which are relevant to determining the 1951 Convention's scope. As set out in the Statute of the International Court of Justice, those materials are international treaties, international custom, the 'general principles of law recognized by civilized nations,' and judicial and expert opinion.[28] A construction of article 33 which extends beyond State boundaries is consistent with accepted methods of treaty interpretation[29] and furthers the aim of providing safe resettlement options for those fleeing persecution. Indeed, as the United Nations High Commisioner for Refugees (UNCHR) has noted in an *amicus* brief, the policy arguments against a construction which only encompasses territorial activities are obvious: in the context of maritime interception, it would punish refugees on the high seas whilst rewarding those who managed to surreptitiously enter territorial waters.[30] In light of that observation, it is unsurprising that the UNHCR favors a broad reading, stating in their Advisory Opinion that the "intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State."[31]

This view is echoed by Lauterpacht and Bethlehem who observe that a State's responsibility will "hinge on whether the relevant conduct can be attributed to that State [understood in a broad sense] and not whether it occurs within the territory of the State or outside it",[32] a view with which Trevisanut,[33]

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25. *Id.* at 113.
26. *Id.*
27. Goodwin-Gill & McAdam, *supra* note 5, at 228.
28. Statute of the International Court of Justice art. 38, Oct. 24, 1945.
29. Vienna Convention, *supra* note 4, at art. 31.
30. UNCHR, Brief as Amicus Curiae, filed Dec 21. 1992 in McNary v. Haitian Centers Council Inc., Case No. 92-344 (US SC).
31. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol 12 (Jan. 26, 2007).
32. Lauterpacht & Bethlehem, *supra* note 10, at 110.
33. Seline Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, 12 Max Planck Y.B. United Nations L. 210, 210 (2008).

Hathaway,[34] Hurwitz,[35] and Goodwin-Gill and McAdam[36] concur. It is also consistent with rulings of the International Court of Justice with respect to other human rights obligations which have emphasized that the important principle is the attribution of the activity to a State irrespective of the territory in which it occurs.[37]

In addition to such considerations, Trevisanut offers an alternative argument that State operations which 'de-territorialize' immigration borders do not legally take place beyond their borders at all. In so doing, she explains the distinction between the delineated 'regular' border and the functional border which 'moves' following the "nature of the considered behaviour, the subject carrying out the behaviour and the maritime zone in which the behaviour took place. Concerning migration control, the border materializes where the competent authorities perform their activities of border control."[38] Such an approach accords with the international law surrounding the scope of 'jurisdiction;'[39] however, if one accepts the view of the lawyers and scholars already mentioned, that *non-refoulement* obligations extend beyond the border, it does not matter much which conception of the border is applied. Considering all this, it is not a stretch to claim that there is unanimity of expert opinion that States' legal responsibility is not restricted to their territory.

However, this expert opinion does not count for a great deal if States do not conceive of themselves as so bound. The approach of States varies considerably, but D'Angelo identifies four distinct camps. What she terms "the absolute state sovereignty approach"[40]— amongst the adherents of which she cites the UK and the U.S.[41]—does not recognize the 1951 Convention as imposing obligations to asylum seekers extra-territorially, and does not see that taking methods to prevent their territorial arrival is contrary to article 33.[42] D'Angelo characterizes other States as adopting a 'collective approach' to *non-refoulement*, whereby complex arrangements between States govern the routes and destinations available to asylum seekers;[43] the 'collective approach with a twist' whereby procedural measures are used to prevent asylum seekers from accessing Refugee Status Determination ('RSD') in certain receiving States;[44] and the 'restrictive definition approach,' whereby certain refugees are deemed, their refugee status notwithstanding, to not be at risk in their home

34. Hathaway, *supra* note 23, at 160.

35. Agnes Hurwitz, The Collective Responsibility of States to Protect Refugees 177 (2009).

36. Goodwin-Gill & McAdam, *supra* note 5, 246.

37. Hurwitz, *supra* note 35, at 177; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005, I.C.J. Rep. 116 ¶ 216 (December 19); Legal Consequences of the Construction of the Wall in the Palestinian Occupied Territory, Advisory Opinion, 2004, I.C.J. Rep. 131 ¶ 109 (July 9).

38. Trevisanut, *supra* note 11, at 672.

39. *Id.*; *see generally* Cedric Ryngaert, Jurisdiction in International Law 5—10 (2008).

40. Ellen F D'Angelo, *Non-Refoulement: The Search for a Consistent Interpretation of Article 33*, 42 Vand. J. Transnational L. 279, 291 (2009).

41. *Id.* at 292.

42. *Id.* at 291.

43. *Id.* at 298.

44. *Id.* at 303.

country under article 33 and therefore not protected by the *non-refoulement* principle.[45]

The consequences of the divergences in State approaches, and the inconsistencies between expert opinion and State practice, are potentially highly significant for the content of the *non-refoulement* principle. This is in part because subsequent State practice is one of the criteria for assessing the meaning of a treaty provision.[46] The UNHCR argues that this is "expressed, *inter alia*, through numerous Executive Committee Conclusions which attest to the overriding importance of the principle of *non-refoulement* irrespective of whether the refugee is in the national territory of the State concerned."[47] However, this inevitably loses weight where State actions and State rhetoric point in different directions. Even if the legal content of the principle remains unaltered, the 1951 Convention has no enforcement mechanisms and thus relies on diplomatic measures to ensure compliance. The ability of the global community to enforce *non-refoulement* obligations is surely lessened when countries, especially countries in the global North with ample means to maintain their international duties like the U.S., the UK and Australia, are allowed to circumvent or ignore their extra-territorial obligations seemingly at will. This Note proceeds to consider two circumstances in which this dynamic played out in practice.

III. The Haitian Interdiction

In October 1981, the Regan administration first began interdicting Haitian vessels with the intention of cutting down the number of migrants, including refugees.[48] President Regan characterized the movement of asylum seekers as a "continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" and a "serious national problem detrimental to the interests of the United States."[49] Although the policy was intended to assess asylum applications on water in order to ensure that the U.S. abided by its *non-refoulement* obligations, between 1981 and 1991, only 28 of the 22,716 Haitians intercepted were allowed to proceed to the United States.[50] In 1991, a military coup in Haiti resulted in a vastly increased number of asylum seekers amidst reports of politically motivated killings and torture.[51] On May 23 1992, President George H.W. Bush authorized the interception and return to Haiti of any asylum seekers, irrespective of their refugee status.[52] It was the policy in this form, continued by the newly-elected President Clinton,[53] that came before the Supreme Court.[54]

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45. *Id.* at 306.
46. Vienna Convention, *supra* note 4, at art. 31.
47. UNHCR, *supra* note 31, at 15.
48. Martin et al., *supra* note 9, at 594.
49. *Id.*
50. *Id.*
51. David E. Ralph, *Haitian Interdiction on the High Seas: The Continuing Saga of the Rights of Aliens Outside United States Territory*, 17 Md. J. Int'l L. 227, 227 (1993).
52. *Id.* at 237.
53. *Id.* at 238.
54. *Id.* at 249.

The primary question in *Sale v. Haitian Centers Council, Inc.* was whether the Executive Order which enacted the policy of interdiction was inconsistent with the Immigration and Nationality Act of 1952.[55] However, an argument was also raised that the practice was contrary to article 33 of the 1951 Convention.[56] This second frame of analysis was relevant because the Immigration and Nationality Act was promulgated in part to give effect to the U.S.' adherence to the 1967 Protocol[57] which relevantly imported the *non-refoulement* obligation from the 1951 Convention.[58] Justice Stevens delivered the opinion of the majority in which he emphasized that "wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration."[59] He dealt first with the respondent's arguments grounded in statutory construction. Section 243(h)(1) of the Immigration and Nationality Act provided:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

The respondents argued that the terms 'deport' and 'return' were not limited in application to aliens within the United States and that the removal of the phrase 'within the United States' from an earlier version of the provision made it clear that Congress intended the section to have extraterritorial effect. They also argued that this amendment was necessary to ensure that the statute was consistent with the effect words of the 1967 Protocol.[60] The Court of Appeals for the Second Circuit had found that, in spite of its language, §243(h)(1) was directed at the executive branch rather than only the Attorney-General.[61] However, Justice Stevens rejected this analysis and found that §243(h)(1) was directed at the Attorney-General alone. Justice Stevens went on to say that this language suggested that the provision was directed towards the Attorney-General's ordinary functions under the Immigration and Nationality Act.[62]

It might be objected that this conclusion (that only the Attorney-General's ordinary functions are implicated) does not strictly follow from the fact that the Attorney-General is individually identified, but such an objection would not go to the core of Justice Stevens's reasoning. If the provision is to be read as not applying to the President, it is difficult to see that the scope of the restriction on the Attorney-General's power could be an independent ground for challenging the validity of the Executive Order. Justice Stevens went on

55. Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc, et al., 509 U.S. 155, 158 (1993).
56. *Id.* at 159.
57. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].
58. *Id.* at art. 1.
59. *Sale*, 509 U.S. at 165.
60. *Id.* at 170–71.
61. Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1360 (2d Cir. 1992).
62. *Sale*, 509 U.S at 173.

to invoke the presumption against extra-territorial application and argue that the respondents' expansive definition of the word 'return' meant that the word 'deport' was rendered otiose.[63] In the Court's view, the use of both 'return' and 'deport' evinced a Congressional intention for the section to have a purely domestic operation and apply both to exclusion proceedings (where the word 'return' was apposite) and deportation proceedings (where the word 'deport' was implicated).[64]

Justice Stevens then considered whether the Immigration and Nationality Act, being a codification of the United States' international legal obligations, was intended to implement its obligations under article 33 including any extra-territorial application thereby entailed.[65] In order to do so, he considered where the 1967 Protocol had extra-territorial application by looking to the history of the Convention. Justice Stevens stated that both the text and negotiating history of the Convention were "completely silent with respect to [article 33's] possible application to actions taken by a country outside its own borders."[66]

He located two textual indicators which he held supported a narrow interpretation of the provision, however. The first textual indicator Justice Stevens relied upon was that the national security exception was framed in terms of a person presenting a risk "to the country in which he is."[67] Stevens reasoned that since a person on the high seas is not in a country at all, States would not be able to avail themselves of the security exception when acting extra-territorially, something he characterized as an "absurd anomaly."[68]

Far from being an absurd anomaly, however, this is entirely consistent with the purpose of the exception, which is to protect public safety.[69] A dangerous person plainly does not present a national security risk at the point that he or she is encountered on the high seas, as in Steven's hypothetical.[70] Nor, as Stevens appears to assume, does the principle of *non-refoulement* require that a dangerous person encountered on the high seas be integrated into the domestic community with no further security screening—it simply requires that such a person not be transported to a place where their life or freedom is threatened. Even that modest restriction on the State's power is removed when a proper assessment of the danger posed by the person is conducted within that State's territory.

The second textual indicator relied upon by Stevens was the use of the words 'expel or return,' in article 33.1, which he said matched the meaning of 'deport' and 'return' in §243(h)(1).[71] That is, he found that the word 'expel' was directed to deportation and the word 'return' meant the exclusion of an alien from the border or "at the threshold of entry."[72] Justice Stevens recognized that

63. *Id.* at 174.
64. *Id.*
65. *Id.* at 178.
66. *Id.*
67. *Id.* at 179.
68. *Id.* at 180.
69. *See* Hathaway, *supra* note 23, at 336.
70. *Sale*, 509 U.S at 180.
71. *Id.* at 180.
72. *Id.*

the effect of this was to give the word 'return' in the context of article 33.1 a narrower construction than it bears in ordinary usage.[73] He defended this by observing that the word 'return' is followed in the text of article 33 by the French word '*refouler*,' which he claimed had a narrower meaning than its English translation.[74]

Even if one accepts this as an accurate assessment of the word '*refouler*,' it might nevertheless be argued that the meaning of that word is a neutral consideration. That is because the drafters of the 1951 Convention chose to include the English word 'return,' in circumstances where, if a narrower connotation had been intended, other words were available. Indeed, Steven's opinion includes examples of such words, including 'repulse,' 'repel,' and 'expel' which might have evinced a clearer intention. A footnote suggests an even clearer formulation that might have been employed: "refuse entry."[75] Of course, article 33.1 does not say "refuse entry" — it says "return."

Justice Stevens went on to say, rather strikingly in light of the weight of contemporary expert opinion canvassed in the earlier part of this Note, that "[f]rom the time of the Convention, commentators have consistently agreed with [the view that article 33 does not operate extra-territorially]."[76] In support of that assertion, he cited three academic works, one of which he conceded "describes the evolution of *non-refoulement* into the international (and possibly extraterritorial) duty of nonreturn relied upon by the respondents),"[77] and what he described as the UNHCR's implicit acknowledgement that "the Convention has no extraterritorial application."[78] This alleged acknowledgement was based on two factors: first, that the basic procedural requirements promulgated by the UNHCR require a State to abide by its *non-refoulement* obligations in respect of any asylum seeker located at the border or within its territory and; secondly, that an asylum seeker is entitled to remain 'in the country' pending a determination of her refugee status.[79]

It might be objected that the fact that the UNHCR Handbook is directed towards domestic obligations does not mean that it sanctions the actions of a State outside that context. In any event, the UNHCR filed an *amicus* brief in which it made clear that its position was that "[a]rticle 33 makes no exceptions for State conduct that occurs outside the territory or territorial waters of the contracting State. Rather, the obligations which it imposes arise wherever a State acts."[80] This rather cuts against the notion that the UNHCR had implicitly acknowledged the Convention only had territorial effect.

Justice Stevens conceded that the framers of the Convention

> may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such

73. *Id.*
74. *Id.* at 180–82.
75. *Id.* at 181.
76. *Id.* at 182.
77. *Id.* at 182–83.
78. *Id.* at 183.
79. *Id.*
80. *The Haitian Interdiction Case 1993 Brief Amicus Curiae*, 6 Int'l J. Refugee L. 85, 86 (1994).

> actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.[81]

Justice Stevens held that his conclusion that *non-refoulement* did not extend extra-territorially was strengthened by comments made by Swiss[82] and Dutch[83] delegates at the Conference to this effect and the apparent adherence by silence on the part of other States.[84]

Justice Blackmun dissented. He characterized the decision of the majority as positing that "the word 'return' does not mean return . . . the opposite of 'within the United States' is not outside the United States . . . [and] the official charged with controlling immigration has no role in enforcing an order to control immigration."[85] Justice Blackmun held that the meaning of both the statute and article 33 was 'clear.'[86] He was highly critical of the approach the majority took to the construction of the word 'return,' arguing that they had erroneously applied a distinction from American law to an international instrument.[87] Commenting on the translation of *refouler* into English, he commented, "I am at a loss to find the narrow notion of 'exclusion at a border' in broad terms like 'repulse,' 'repel,' and 'drive back.'"[88] Furthermore, the inference drawn by the majority from the territorial specificity of the exclusion in article 33(2) was misguided. In Blackmun's view, such an exclusion was so framed because a refugee can only be a national security threat when they are in the nation in question.[89]

Justice Blackmun additionally argued that the majority's reliance on the Convention debates was misplaced. That was in the first place because the subjective intention of the framers cannot displace the clear meaning of the treaty,[90] and secondly because, when placed in their proper context, the remarks relied upon did not support the majority's position,[91] but were rather indicative of an apprehension about a duty to admit asylum seekers in the case of a mass influx.[92] However, Blackmun emphasized that no one seriously contended that protection under the 1951 Convention depended on the number of claimants and hence the views of the Swiss and Dutch delegates had not been accepted.[93] On that point, Blackmun concluded, "fragments of negotiating history upon which the majority relies are not entitled to deference, were never voted on or adopted, probably represent a minority view, and in any event do not address the issue in this case."[94] He further stated,

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81. *Sale*, 509 U.S at 183.
82. *Id.* at 184.
83. *Id.* at 185.
84. *Id.*
85. *Id.* at 189.
86. *Id.*
87. *Id.* at 191.
88. *Id.* at 192.
89. *Id.* at 193.
90. *Id.* at 194.
91. *Id.*
92. *Id.* at 195.
93. *Id.* at 196.
94. *Id.* at 198.

> refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the treaty and the statute. We should not close our ears to it.[95]

Much of the commentary on *Sale* heavily criticized the majority decision.[96] Hathaway wrote that the majority's "arguments have little substance. Perhaps most spurious is the construction of Art 33(1) based on the need for consistency with Art 33(2) . . . it is difficult to conceive of a situation in which a refugee not yet at or within a state's territory could be subject to such an exclusion."[97] He further argued that the Convention's failure to consider actions taken beyond the border was reflective of the reality that extra-territorial border control had never been attempted in 1951,[98] and concluded that returning asylum seekers to their persecutors "is in fact the plainest and most obvious breach of the duty conceived by the drafters, namely to prohibit measures which would cause refugees to be 'pushed back into the arms of their persecutors.'"[99]

Goodwin-Gill similarly criticized the majority's reliance on negotiating history as "both superficial and selective."[100] He accused the Supreme Court of being adrift in its citations, taking passages out of context, misrepresenting academic and other commentators including the UNCHR Handbook, and simply ignoring evidence that did not support its conclusion.[101] In Goodwin-Gill's view, the result of the majority judgment was that 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 [of the Convention]."[102]

Goodwin-Gill's conclusion was vindicated as a matter of international law when the decision of the U.S. Supreme Court was held to be legally wrong by the Inter-American Commission on Human Rights,[103] and was disavowed by the UNCHR.[104] Calling the decision a "setback to modern international refugee law," the UNHCR's statement went on to say that the effect of *Sale* was to make their work more difficult and to set a "very unfortunate example."[105] In their 2007 Advisory Opinion, the UNHCR again expressly disavowed the majority's

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95. *Id*. at 208.
96. *E.g.* Harold Hongju Koh, *The 'Haiti Paradigm' in United States Human Rights Policy*, 103 Yale L.J. 2391, 2416—23 (1994); Hathway, *supra* note 23, at 336—38; Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 Int'l J. Refugee L. (1994).
97. Hathaway, *supra* note 23, at 336.
98. *Id*. at 337.
99. *Id*. at 338.
100. Goodwin-Gill, *supra* note 96, at 104.
101. *Id*. at 104—5.
102. *Id*. at 109.
103. Harold Hongju Koh, *The Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y.L. Sch. L. Rev. 31, 43 (2016).
104. *See generally* United Nations High Comm'r for Refugees, *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers' Council*, 32 Int'l Legal Materials 1215 (1993).
105. *Id*. at 1215.

line of reasoning, writing that the "portions of the negotiating history [relied upon by the majority] do not warrant the conclusion that the drafters of the 1951 Convention reached consensus about an implicit restriction of the territorial scope of the principle of *non-refoulement* as provided for in Article 33(1)."[106] Koh argues that the international community has gradually moved away from the position of the Supreme Court, but notes that some domestic courts have sided with *Sale*.[107]

These criticisms notwithstanding, the majority judgment in *Sale* irrevocably represents the position in domestic U.S. law. According to Goodwin-Gill and McAdam, the "strategic departure from the accepted meaning of *non-refoulement* [as upheld by the Supreme Court in *Sale*] came too late to alter the obligations of the United States under international law."[108] That point may be accepted, although its acceptance is not unanimous. D'Angelo, for example, is of the opinion that *opinio juris* is best reflected in judicial decisions.[109] In any event, the fact remains that the international legal position lacks a separate enforcement mechanism. The Haitian asylum seekers interdicted under the U.S. policy were not helped by the scope of the *non-refoulement* principle as understood in international law.

IV. The Tampa Affair

On Sunday 26 August 2001, Captain Arne Rinnan was commanding the MV Tampa, a 39,000-ton Norwegian shipping vessel en route to Singapore from Fremantle, when he received a call from the Australian coastguard to assist a sinking ship.[110] Before rescuing those on board the vessel in distress, the Tampa was carrying a crew of 27; it was licensed to carry 50.[111] On board the sinking fishing ship, Captain Rinnan found 433 people and took them all aboard.[112] After Captain Rinnan chartered a course for Indonesia, several of the asylum seekers on board threatened to commit suicide if he did not change course to Christmas Island, leading Rinnan to change course.[113] When close to Christmas Island but still outside Australian territorial waters, the Immigration Department requested the Tampa change course again for Indonesia.[114] Rinnan nevertheless entered Australian territorial waters, and in response 45 SAS troops left Christmas Island and boarded the Tampa.[115]

While the ship was still at sea, the Howard government hurriedly attempted to pass legislation that would have authorized the navy to remove the ship

106. UNCHR, *supra* note 31, at 13.
107. Koh, *supra* note 103, at 44.
108. Goodwin-Gill & McAdam, *supra* note 5, at 226.
109. D'Angelo, *supra* note 40, at 288.
110. Victorian Council for Civil Liberties Incorporated v. Minister for Immigration & Multicultural Affairs [2001] F.C.A. 1297, ¶ 14—17 (Austl.).
111. *Id.* ¶ 15.
112. *Id.* ¶ 17.
113. *Id.*
114. *Id.* ¶ 18.
115. *Id.* ¶ 26.

from Australian waters.[116] The Opposition refused to support the Bill and the Bill lapsed in the Senate.[117] The UNHCR claimed that the Bill was incompatible with Australia's international obligations because it could have led to "rejection of asylum seekers at the frontier by the forcible removal of ships from Australia's territorial waters."[118] Notwithstanding this criticism, throughout the entire saga the Australian government professed to take very seriously its *non-refoulement* obligations, as Marr and Wilkinson observe.[119]

Legal proceedings were commenced in Australia, despite the lawyers acting on behalf of the asylum seekers having been unable to contact any of the 433 people rescued.[120] In the *Tampa Case*, it was submitted by the applicants that those on board the Tampa should be released into Australia both on the proper construction of the Migration Act[121] and because their detention was not lawfully authorized.[122] Because they were not representing those on board directly, Justice North held that the applicants did not have standing to bring any remedies under the Migration Act.[123] However, there is no standing requirement to bring an action in *habeas corpus*,[124] and this part of the case succeeded.[125] North ordered that the 'rescuees' be released onto mainland Australia.[126]

The circumstances of the case were not conducive to the successful invocation of a *non-refoulement* argument. International obligations entered into by the Australian executive do not become domestically binding until they are incorporated into domestic law by legislation.[127] Although it is an interpretative principle that legislation be read so as to give effect to Australia's international duties,[128] the fact that the Migration Act was not in issue meant that the case turned on the legitimacy of executive actions, for which no such argument can be made. In the context of proposed offshore processing on Nauru, North commented that because Nauru was not a signatory to the 1951 Convention, asylum seekers sent there would "not have the protection of the *non-refoulement* obligation contained in the Convention."[129] In fact, as a matter of international law, the better view is that Nauru would likely have been bound by the principle under customary international law, as explained earlier in this Note; however, the comment was nevertheless well-justified if it was

116. David Marr & Marian Wilkinson, Dark Victory 116 (2004).
117. *Id.* at 118.
118. *Id.* at 140.
119. *Id.* at 149.
120. *Id.* at 156—157.
121. Migration Act, No. 62 of 1958 (Austl.).
122. Victorian Council for Civil Liberties Incorporated v. Minister for Immigration & Multicultural Affairs [2001] F.C.A. 1297, ¶ 45—48 (Austl.).
123. *Id.* ¶ 137.
124. *Id.* ¶ 56.
125. *Id.* ¶ 107.
126. *Id.* ¶ 169.
127. Koowarta v. Bjelke-Petersen (1982) 153 C.L.R. 168 (Austl.).
128. *E.g.* Plaintiff M61/2010E v. The Commonwealth (2010) 243 C.L.R. 319, at 33 (Austl.).
129. Victorian Council for Civil Liberties Incorporated v. Minister for Immigration & Multicultural Affairs [2001] F.C.A. 1297 at ¶ 79 (Austl.).

directed towards a concern about Australia becoming involved in constructive or chain *refoulement*.[130]

Justice North's decision was successfully appealed in *Vadarlis*.[131] Justice French, with whom Justice Beaumont agreed, held that the *Migration Act* had not displaced the prerogative power of the executive to expel aliens,[132] which meant that the actions of the executive were authorized.[133] Chief Justice Black dissented, upholding the orders made by Justice North.[134] Again, the issue of *non-refoulement* was only mentioned in passing. Justice French considered the possibility that Australia's international obligations bound the executive even without the passage of legislation, but said that the question was moot "because nothing done by the Executive on the face of it amounts to a breach of Australia's obligations in respect of *non-refoulement* under the Refugee Convention."[135] Whilst it is true that Australia did not send anyone back to a country in which they were to face persecution, it seems that unlike North, French either failed to consider or was not concerned by the potential of Australia becoming involved in constructive *refoulement* through its agreement with Nauru.

Contemporaneously with these cases, the Australian government was engaged in imaginative restructuring of its migration law. It had been extremely important for the government initially to ensure that the Tampa did not enter Australian territorial waters. As soon as it did, rights under the Migration Act would be triggered that demanded that the vessel be brought ashore.[136] After it failed in this endeavor, the government proposed to excise Ashmore and Christmas Island from the migration zone entirely.[137] The effect of this intended to create a Guantanamo Bay style camp with the twist that Christmas Island would be within Australia's borders. A spokeswoman for the UNCHR commented, "we don't consider the fact that the Australian Migration Act may or may not apply to Christmas Island or Ashmore Reef is relevant from an international law perspective."[138] If successful as a matter of international law, this scheme would have had the bizarre consequence that a person standing onshore at Christmas Island would have been standing in Australia but outside its migration zone. The government was clutching at legal fictions to prevent the arrival of refugees and asylum seekers.

It is important to emphasize that none of the actions Australia undertook during the Tampa affair were clear breaches of the *non-refoulement* principle, because it did not itself transport any asylum seekers to a place where their life or freedom would be threatened. Australia was, however, potentially cavalier about becoming involved in chain *refoulement*. In the wake of Tampa, Australian governments have taken even tougher stances. As Mathew noted at the time,

130. *See* Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 Am. J. Int'l L. 661, 666 (2002).
131. *See generally* Ruddock v. Vadarlis [2001] F.C.A. 1329 (Austl.).
132. *Id.* ¶ 204.
133. *Id.* ¶ 215.
134. *Id.* ¶ 92.
135. *Id.* ¶ 203.
136. Marr & Wilkinson, *supra* note 116, at 55.
137. *Id.* at 140.
138. *Id.* at 141.

legislative changes made in the wake of the saga allowing immigration officials to tow boats back to the high seas had at least the prospect of falling foul of Australia's *non-refoulement* obligations.[139] She argued that Australia was following the U.S. Supreme Court's incorrect narrow reading of the 1951 Convention, and providing insufficient protection against chain *refoulement*.[140] The view of the Australian government on this point can be ascertained through a submission made in the High Court proceedings in *CPCF v. Minister for Immigration and Border Protection*,[141] stating that the 1951 Convention does not operate extra-territorially.[142] The argument was tentatively rejected by Justice French;[143] however, the other judges did not find it necessary to answer the question.

As was the case with *Sale*, Goodwin-Gill and McAdam argue that Australia's response to the Tampa crisis "attracted no support from other States, and consequently had no effect on the established scope of the principle of *non-refoulement* under international law."[144] Similarly, Australia's attempts to excise territory from its Migration Zone, though it technically avoids *refoulement*, "may constitute a breach of Australia's duty to apply its 1951 Convention obligations in good faith . . . and not to frustrate or defeat that treaty's object and purpose."[145] The lack of support from other States was supplemented by UN bodies formulating more precise guidelines about the responsibilities of States in sea rescues.[146] Goodwin-Gill and McAdam conclude that the Tampa incident "ironically inspired a reaffirmation of the rescue-at-sea principles developed during the Indo-China exodus, and a buttressing of soft law on the issue by the international community."[147]

However, the reaffirmation of these principles has not altered Australia's domestic practice. It continues to push the bounds of international legality, including by utilizing boat turn-backs,[148] which would directly breach the principle of *non-refoulement* if the turn-backs involved returning legitimate refugees back to the country from which they were fleeing, and allegedly by making payments to people smugglers to return to their port of departure.[149]

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139. Mathew, *supra* note 130.

140. *Id.* at 666–67.

141. CPCF v. Minister for Immigration and Border Protection 255 C.L.R. 514 (2015) (Austl.).

142. Minister for Immigration and Border Protection, *Submissions of the Defendants in CPCF v. Minister for Immigration and Border Protection*, S169/2014, September 30, 2014, at 3—4. *See also* Patrick Emerton & Maria O'Sullivan, *Rethinking Asylum Seeker Detention at Sea: The Power to Detain Asylum Seekers at Sea under the Maritime Powers Act 2013 (Cth)*, 38 Univ. N.S.W. L.J. 695, 715—17 (2015).

143. CPCF v. Minister for Immigration and Border Protection (2015) 255 C.L.R. 514, at 528 (Austl.).

144. Goodwin-Gill & McAdam, *supra* note 5, at 226.

145. *Id.* at 257.

146. *Id.* at 284.

147. *Id.*

148. Christopher Knaus, *Details of Australia's asylum seeker boat turnbacks released in FoI battle*, Guardian Austl. (Apr. 3, 2017), https://www.theguardian.com/australia-news/2017/apr/03/details-of-australias-asylum-seeker-turnback-operations-released-in-foi-battle [https://perma.cc/JT3L-8X4A].

149. Claire Phipps, *Did Australia pay people-smugglers to turn back asylum seekers?*, Guardian Austl. (June 17, 2015), https://www.theguardian.com/world/2015/jun/17/did-australia-pay-people-smugglers-to-turn-back-boats [https://perma.cc/CZY9-56QN].

In October 2017, UN special rapporteur Agnes Callamard handed down a report accusing Australia of continuing to breach its international obligations, including its duty not to engage in *refoulement*.[150]

The act of turning boats back to their port of origin in international waters is not the only activity Australian authorities engaged in which potentially implicates its *non-refoulement* obligations. Australia has long adopted a policy of 'offshore processing' of asylum seekers under which prospective refugees are held in detention centers in Nauru and Papua New Guinea.[151] Whilst the 1951 Convention does not prohibit States from processing asylum seekers in other countries,[152] it does impose the core obligation that States do not remove refugees to territories where their life or freedom is threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. Akal makes the case that the conditions in which asylum seekers are held—apparently indefinitely—constitutes a breach of this obligation.[153]

The Australian government's cavalier attitude to its *non-refoulement* obligations is perhaps most explicitly illustrated by section 197C(1) of the *Migration Act*, enacted in 2014, which provides "[f]or the purposes of section 198 [which deals with the removal of 'unlawful non-citizens' from Australia], it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen."[154] It is an extraordinary provision. Not only has Australia failed to enshrine its international obligations in domestic law, it has enacted their negation.

It should be noted that section 197C was amended in 2021. The amendments leave the text of section 197C(1) intact but provide that, notwithstanding that text, section 198 does not require or authorize the removal of non-citizens if "the non-citizen has made a valid application for a protection visa that has been finally determined"[155] or "in the course of considering the application, a protection finding . . . was made for the non-citizen with respect to the country (whether or not the visa was refused or was granted and has since been cancelled)."[156]

According to the revised explanatory memorandum for the bill which enacted this amendment, one of the purposes of the bill was to "clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach non-refoulement obligations, as identified in a protection visa assessment process, including Australia's obligations under the [1951 Convention] and its 1967 Protocol."[157] There are real questions as to whether

150. Ben Doherty, *Australia's boat turnbacks are illegal and risk lives, UN told*, Guardian Austl. (Oct. 30, 2017), https://www.theguardian.com/australia-news/2017/oct/30/australias-asylum-boat-turnbacks-are-illegal-and-risk-lives-un-told [https://perma.cc/GH35-4QQ2].

151. A.B. Akal, *Third Country Processing Regimes and the Violation of the Principle of Non-Refoulement: A Case Study of Australia's Pacific Solution*, J. Int'l. Migration & Integration (2022.

152. *Id.*

153. *Id.*

154. Migration Act, 1968 at §197C(1) (Austl.).

155. *Id.* § 197C(3)(a).

156. *Id.* § 197C(3)(b).

157. *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 Revised Explanatory Memorandum*, Parliament of the Commonwealth of Austl. (2021),

the bill achieves those objects, however. For one, it appears that the exceptions to 197C(1) would not be engaged if a boat was returned on the high seas because a person returned in such circumstances would not have made a finally determined application for a protection visa, nor would the Minister have made a protection finding in respect of such a person. Further, the fact that protection findings are made by the Minister gives rise to questions about their adequacy. In my view, it is clear from the text of the 1951 Convention that the *non-refoulement* obligation calls for an objective assessment of whether an asylum seeker has been removed to a place where his or her life or freedom would be threatened. An assessment made by a person involved in the decision to remove an asylum seeker would appear to lack the requisite objectivity. Even if there was no possibility of a conflict of interest, a determination by the Minister cannot affect the scope of the international legal obligation but only the degree to which it is incorporated in Australia's domestic law.

V. Reflections

Along with the preponderance of experts, this Note argues that the better reading of article 33 is as follows: article 33 binds States irrespective of where their actions take place. It is a position which accords with the ordinary meaning of *refouler*, the aims of the 1951 Convention, and is consistent with accepted methods of treaty interpretation.[158] The inevitable difficulty with the interpretation is ensuring that States cooperate with a broad approach, given that the Convention does not contain any enforcement mechanisms and that compliance may conflict with State self-interest.[159] An additional issue is that because State practice is one of the sources of international law, continued refusal by States to consider themselves bound by the principle of *non-refoulement* extra-territorially may affect the substantive content of the law. There is likely little prospect of that; however, because as this Note has argued, the international legal position is well-settled, and it is clearly contrary to the aims of the international legal regime for States to be constrained in deporting asylum seekers at the border but completely at liberty to do so outside their territories. This view is reflected by Goodwin-Gill who writes that the *Sale* decision "came too late to excuse the United States from responsibility for the violation of international law."[160]

Even if the legal position is solid, the *realpolitik* reality is that relying on pressure from other States to enforce compliance can only be effective when States can do so without appearing hypocritical. This appears to be the concern underlying the UNHCR's response to the *Sale* decision,[161] and Assistant Commissioner for Refugees Søren Jessen-Petersen's more explicit comment in the context of the Tampa crisis that "other countries might say 'if Australia can

https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6696_aspassed/toc_pdf/21040b01.pdf;fileType=application%2Fpdf [https://perma.cc/9NA2-WKAA].

158. Vienna Convention, *supra* note 4, at art. 31.

159. Goodwin-Gill & McAdam, *supra* note 5, at 284.

160. Goodwin-Gill, *supra* note 96, at 106.

161. United Nations High Comm'r for Refugees, *supra* note 104.

do it, we can do it,' and there goes the whole international protection principle down the drain."[162]

Some measure of comfort may be taken in the fact that no such dramatic scenario has eventuated. States continue to affirm their abidance by the principle of *non-refoulement*,[163] and the European Court of Human Rights has held that Italy acted unlawfully in returning a vessel to Libya, extending Italy's obligations to extra-territorial waters in so doing.[164] The UK's domestic courts have also explicitly disavowed the approach in *Sale*.[165] The European Court of Human Rights found that the UK nevertheless did not breach its duties in preventing would-be Roma asylum seekers from leaving the Czech Republic; however, this does not diminish the courts' theoretical acceptance of a wider scope of the *non-refoulement* principle.[166] Contrary to D'Angelo's criticism that the UK essentially applied *Sale*, despite purporting to criticize the precedent, because the UK policy had the same effect as that of the U.S.,[167] there is a relevant legal (which is not to say normative) difference between a persecuted person who has left their home country and can then claim protection under the 1951 Convention, and one who has not and therefore cannot.[168]

It is nonetheless troubling that subsequent UK policy appears to have treated Australian precedent as a blueprint. The UK's plan to process asylum seekers offshore in Rwanda is clearly indebted to the Australian practice of offshore detention and processing in Papua New Guinea and Nauru. In June 2022, the European Court of Human Rights stayed the removal of applicant 'K.N' to Rwanda pending final adjudication of his legal challenge in that court.[169]

Whilst it is true that the Rwanda plan does not return refugees to the place from which they seek asylum, the question of whether it breaches the UK's *non-refoulement* obligation requires consideration of at least two further issues. As a general matter, there may be a risk that the UK is engaged in chain or constructive *refoulement* if an asylum seeker is subsequently deported from Rwanda. Secondly, an assessment would need to be made on an individualized basis for each asylum seeker as to whether Rwanda is a territory in which her life or freedom is threatened on account of her race, religion, nationality, membership of a particular social group or political opinion.[170] As Akal has argued in the context of the Australian scheme,[171] this obligation is not avoided by removing asylum seekers offshore.

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162. Marr & Wilkinson, *supra* note 116, at 107.

163. Goodwin-Gill & McAdam, *supra* note 5, at 284.

164. Hirsi Jamaa and Others v. Italy [2012] Eur. Ct. H.R., Application no. 27765/09 (2012).

165. R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport [2003] EWCA Civ 666, at ¶34-35; R (European Roma Rights Centre) v. Immigration Officer at Prague Airport [2005] 2 AC 1.

166. R (European Roma Rights Centre) v. Immigration Officer at Prague Airport [2005] 2 AC 1, at ¶12.

167. D'Angelo, *supra* note 40, at 294.

168. Goodwin-Gill & McAdam, *supra* note 5, at 354.

169. *Recent Case: K.N. v. the United Kingdom*, Harv. L.R. Blog (June 29, 2022), https://blog.harvardlawreview.org/recent-case-kn-united-kingdom/ [https://perma.cc/LV7D-9ZU5].

170. 1951 Convention, *supra* note 1, at art. 33.

171. Akal, *supra* note 151.

Within the European Union, other schemes apparently designed to circumvent the operation of *non-refoulement* obligations have been implemented. For example, Italy has entered an agreement with Libya whereby prospective asylum seekers are detained in Libya before they are able to depart for Italy.[172] Such an agreement may be a more effective legal mechanism of evading *non-refoulement* obligations because, unlike in the case of Australia and the UK, the state itself does not actively become involved in the removal of a person to any other territory. As Lamicchane and Angotti observe, "efforts by powerful States to prevent refugees from ever reaching their jurisdiction, where the latter would become entitled to the benefit of the duty of non-refoulement and other core rights set by the Refugee Convention . . . has long been a feature of the refugee protection landscape."[173] The legal distinction drawn here, of course, does not mean that programs like Italy's are any less destructive to the aims of the international refugee regime.

The picture that emerges of State practice is not a wholly encouraging one. Whilst it is certainly true that countries are happy to commit themselves to the principle of *non-refoulement*,[174] their enthusiasm in upholding, and even in criticizing the breaches of other States,[175] is less consistent. In the case studies referred to above, the U.S. and Australia both claimed to be acting entirely consistently with their international obligations, despite their actions clearly being motivated by domestic political concerns rather any view towards promoting international comity.

The better view of these prevarications is that they have not altered any international obligations on the part of the U.S. and Australia. Rather, those states merely shirked them. Nevertheless, the moral force of any request for another country to abide by its international commitments made by the U.S. or Australia is surely lessened by their conduct in those cases and, particularly in the case of Australia, by their ongoing refugee programs. This is a highly regrettable outcome in the context of an international refugee regime which confronts an era of global uncertainty. The war in Ukraine is a sobering reminder that refugees do not come exclusively from the global South, and it appears all but inevitable that climate change will result in ever growing numbers of refugees, a challenge which the international community will need to manage through instruments like the 1951 Convention.[176] The imperative for countries to maintain the commitments in good faith and consistently with

172. Shishir Lamicchane & Antonio Angotti, *Extra-Territorial Control Measures: Implications for the Principle of Non-Refoulement*, 15 NJA L.J. 107, 108 (2021).

173. *Id.* at 112.

174. Goodwin-Gill & McAdam, *supra* note 5, at 226–27.

175. *Id.* at 228. Though, as Goodwin-Gill and McAdam observe, the role of UNHCR in administering the 1951 Convention complicates any conclusion that could be drawn in this regard.

176. There is a live question about whether the 1951 Convention and 1967 Protocol are fit for purpose in dealing with displacement due to climate change. It is not immediately obvious that someone forced to flee her country because of global warming faces a threat in her home territory that is due to her 'race, religion, nationality, membership of a particular social group or political opinion'. That is an issue beyond the scope of this Note, and it is possible that the practical impossibility of returning a 'climate refugee' to a home territory that has been rendered uninhabitable will render such legal distinctions irrelevant.

their establishhed scope, thereby encouraging other nations to do likewise, is therefore only strengthening.

Conclusion

Having assessed the weight of expert opinion and the aims of the 1951 Convention, this Note has argued that the principle of *non-refoulement* extends beyond national boundaries to bind State actors extra-territorially. The case studies of the Haitian interdiction in the U.S. and the Tampa affair in Australia provide sobering examples of the ways in which States may choose to ignore the spirit and, as this Note argued, the effect of the Convention with relatively minor immediate consequences.

Depending on the view that one takes of the way in which international law develops, it is possible to argue that such actions have the potential to alter the legal meaning of the 1951 Convention if they become widespread enough, and even if they cannot, they have serious impacts on its *realpolitik* enforcement. In that context, the developments in the migration policy of the UK are particularly discouraging. In an uncertain international environment, States would do well to consider their long-term as well as short-term political interests.