IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

GENE McNARY, COMMISSIONER, IMMIGRATION

AND NATURALIZATION SERVICE, *et aL,*

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,

Respondents

BRIEF *AMICUS CURIAE* OF THE

OFFICE OF THE UNITED NATIONS

HIGH COMMISSIONER FOR REFUGEES

IN SUPPORT OF RESPONDENTS

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No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Office of the United Nations High Commissioner for Refugees ("UNHCR" or "High Commissioner") is charged by the United Nations General Assembly with the responsibilities of providing international protection to refugees and of seeking permanent solutions to the problems of refugees.[1]

The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[2] The supervisory responsibility of UNHCR is formally recognized in the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 ("1967 Protocol" or "Protocol"), which provides that:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner on Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.[3]

The views of UNHCR are informed by over 40 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees throughout the world and has representatives in over 80 countries. It has twice received the Nobel Peace Prize, in 1954 and 1981, for its work on behalf of refugees.

The present case involves the interpretation of the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6259 ("1951 Convention" or "Convention"), and the 1967 Protocol, multilateral treaties whose application the High Commissioner is expressly mandated to supervise. Article 33 of the 1951 Convention expresses the fundamental minimum protection owed to refugees, namely that they shall not be sent back, in any way whatsoever, to a place where their lives or freedom would be threatened; it is the cornerstone of international efforts to protect refugees. This Court's interpretation of this fundamental safeguard may well influence, for years to come, the behavior of other countries and thus the fates of untold numbers of refugees throughout the world. Ac-

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[1] *Statute of the Office of the United Nations [illegible]h Commissioner for Refugees*, G.A. Res. 428(V), U.N. GAOR, Supp. No. 20, Annex,

[2] *Id.* ¶ 8(a).

[3] 1967 Pro[illegible]l, art. II, ¶ 1.

cordingly, this case implicates the vital interests of the High Commissioner.

SUMMARY OF ARGUMENT

Amicus curiae respectfully urges the Court to affirm the decision of the United States Court of Appeals for the Second Circuit striking down the Executive Branch's policy of blocking the flight of Haitian refugees and returning them against their will to the country from which they fled. This policy of summarily repatriating Haitian refugees whose lives or freedom would be threatened in Haiti is contrary to the terms of the 1951 Convention and the internationally recognized principle of *non-refoulement* set forth in Article 33.

By its plain terms, Article 33 prohibits the involuntary return of refugees "in any manner whatsoever" to the frontiers of territories where their lives or freedom would be threatened, whether or not those refugees are eligible for asylum. The protection of Article 33 is available as soon as an individual satisfies the criteria provided in the definition of "refugee," regardless of whether the refugee has been formally recognized as such by a State or international organization. Article 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.

This plain meaning is confirmed by the structure of the treaty, which sets forth territorial limitations in other articles but includes no such limitation in paragraph 1 of Article 33, and by the treaty's broad and overriding humanitarian purpose, which is to protect an especially vulnerable group from persecution. Article 33's plain meaning is further confirmed by the United States' own prior practice under the Convention and Protocol, and by other international agreements, practices and norms, all of which reflect an international understanding that this fundamental protection afforded refugees is not

limited by State borders. Finally, the negotiating history of the treaty upon which petitioners rely does not support their conclusion that intercepting refugees on the high seas and forcibly repatriating them is permissible under the Convention, Protocol, and international law. To the contrary, the treaty's *travaux preparatoires* indicate that the drafters understood the term *"non-refoulement"* to proscribe State conduct both within and outside of a State's territories.

ARGUMENT

I. THE INVOLUNTARY RETURN OF HAITIAN REFUGEES WHOSE LIVES OR LIBERTY WOULD BE THREATENED IN THEIR COUNTRY IS PLAINLY PROSCRIBED BY ARTICLE 33 OF THE 1951 CONVENTION.

Article 33 of the 1951 Convention lies at the heart of this dispute and is central to its resolution. In 1968, the United States acceded without reservation to the 1967 Protocol, which incorporated by reference the substantive provisions of the 1951 Convention. Article 33 of the Convention states:

> 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.

1951 Convention, art. 33(1). The Convention, in turn, defines a "refugee" as any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is unable or unwilling to return to his or her country of origin or former habitual residence. 1951 Convention, art. 1(A)(2).[4] Thus, under Article 33, refugees whose lives or freedom would be

[4] The 1967 Protocol incorporates this definition, but eliminates certain temporal and geographic restrictions included in the 1951

threatened in their country of origin may not be returned against their will.

The treaty's language is broad and unequivocal. It prohibits both the expulsion of a refugee *from* a contracting State and, of critical importance here, the return of a refugee *to* a territory where his or her life or freedom would be endangered. As the Second Circuit explained below, the term "return" necessarily looks to the place "to" which a refugee is returned.[5] The word "expel," by contrast, refers to the treatment of refugees present in a State's territory, since, by definition, refugees cannot be expelled from a country in which they are not present.[6] Thus, as the court below correctly recognized, by its plain terms Article 33 announces two broad proscriptions. The second, known as *non-refoulement* or non-return, bars "in any manner whatsoever" the involuntary repatriation of refugees to a place where their lives or freedom would be threatened.[7]

The plain meaning of Article 33 is controlling here. As this Court has consistently recognized, when treaty "interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). See also

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Convention. 1967 Protocol, art. I(2)-(3). The 1967 Protocol's definition was the basis for the definition of "refugee" in the 1980 Refugee Act. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987).

[5] See *Webster's Third New International Dictionary* 1941 (1971) (return means "to bring, send, or put (a person or thing) back to or in a former position").

[6] See *Webster's*, *supra*, at 799 (expel means "to drive away from a place or country: compel to leave").

[7] The term "*non-refoulement*" is also frequently used in its broadest sense to refer to both proscriptions collectively: that refugees must not be sent back to a place where their lives or freedom would be threatened regardless of whether the State first encounters the refugee inside or outside its own territory.

United States v. *Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties'"); *id.* at 370 (Kennedy, J., concurring) (same).[8] Here, Article 33's flat prohibition against returning refugees plainly proscribes the government's current policy of intercepting Haitian refugees on the high seas and forcibly returning them to Haiti.

This principle is at the very heart of international refugee law and amounts to a minimal form of protection for those who flee persecution. The United States formally accepted that principle when it acceded to the Protocol in 1968; indeed both the Protocol and the Convention by their express terms prohibited any reservation to Article 33,[9] and the United States did not purport to lodge any.[10]

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[8] This recognition is fully consistent with well-settled principles of international law. Article 31 of the Vienna Convention on the Law of Treaties provides that "the ordinary meaning" of treaty terms in their context, and in light of the object and purpose of the treaty, control its interpretation. 1155 U.N.T.S. 331, U.N. Doc. A/Conf. 39/27 (1969) ("Vienna Convention"). Although the United States has signed but not ratified the Vienna Convention, the Department of State, in submitting this treaty for ratification for the Senate, stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971).

See also *Restatement (Third) of Foreign Relations Law of the United States* § 325(1) (1987) ("*Restatement*") ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose").

[9] Article 42(1) of the Convention states that "[a]t 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." Article VII(1) of the Protocol provides that States may make reservations to articles of the Convention "other than those contained in Articles 1, 3, 4, 16(1) and 33."

[10] Altogether, one hundred and fifteen nations have adopted either

Article 33 guarantees refugees a specific, fundamental protection, irrespective of the grant of asylum. The benefit of this protection extends to refugees the moment they satisfy the criteria for refugee status. As the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 28 (1992) explains:

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

Id. (emphasis added).[11] See also *Vigile* v. *Sava*, 535 F. Supp. 1002, 1019 (S.D.N.Y.) (the term "'[r]efugee' is a self-imposed label, not one requiring the imprimatur of the INS"), *rev'd on other grounds*, 684 F.2d 204 (2d Cir. 1982). Thus, elimination of a formal screening process by Executive Order 12,807 [12] does not absolve

reservations registered by the parties to these agreements, none has purported to weaken the protection of Article 33.

[11] The UNHCR Handbook was prepared at the request of the Executive Committee of the High Commissioner's Programme, a body comprised of government representatives from 46 nations including the United States, to provide guidance in applying the terms of the Convention and Protocol. The learning in the Handbook is based on UNHCR's experience, the practice of States in determining refugee status, and the literature devoted to the subject over the years. The Handbook has been widely cited in judicial decisions. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("[T]he Handbook provides significant guidance in construing the Protocol . . . [and] in giving content to the obligations that the Protocol establishes"). Its recommendations have been viewed by several governments as "obligatory." A. King, *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. Rev. 773, 798-800 (1988) (examining practice of countries which follow Handbook's recommendations).

[12] 57 Fed. Reg. 23,133 (1992).

the United States of its obligation not to return Haitian refugees.

II. ARTICLE 33 OF THE 1951 CONVENTION IS NOT AMBIGUOUS.

A. The Text, Structure And Purpose Of Article 33 Demonstrate That The Treaty Unambiguously Prohibits The Return Of Refugees To A Territory In Which Their Safety Or Freedom Is Threatened.

In order to escape the plain meaning of Article 33, petitioners attempt to create ambiguity where none exists. According to petitioners, the parenthetical inclusion of the French term "*refouler*" immediately following the English term "return" clouds the plain meaning of the latter and limits its otherwise broad reach. This is so, petitioners claim, because *one* French dictionary includes "expel (aliens)" as one of several definitions of "*refouler*." Brief for the Petitioners ("U.S. Br.") at 38-39. Seizing on this relatively limited usage and its "connot[ation]s" (*id.* at 39), petitioners contend that Article 33 is best read as "express[ing] an essentially unitary prohibition against removal of a refugee from the 'Contracting State' to a foreign territory." *Id.* at 38 (emphasis deleted).

Although this Court frequently relies on dictionary definitions to confirm the plain meaning of statutory and other legal terms, no sensible principle of treaty or statutory construction supports the use of uncommon definitions to create ambiguity in otherwise clear treaty language. French dictionaries, including the one on which the government relies, define "*refouler*" as "to drive back" or "to repulse." [13] By contrast, some French dictionaries do not even include the definition petitioner cites.[14] Petitioners' preferred construction of the treaty

[13] See *Collins Robert French Dictionary* 558 (1978); *Cassell's French Dictionary* 627 (1978); M. Dubois, *Dictionaire Larousse* 631 (1981).

[14] See, *e.g.*, *Collins Robert French Dictionary*, *supra*, at 558.

simply ignores the fundamental principle that treaty terms are to be interpreted in light of their *ordinary* meaning. See *Sumitomo*, 457 U.S. at 180; Vienna Convention, art. 31.[15]

Perhaps more significantly, petitioners' construction ignores the fact that, at the time Article 33 was written, the term "*refoulement*" encompassed not only "ejection," but also interception and rejection from *outside* the territory.[16] The French delegate to the Convention's drafting committee, the Ad Hoc Committee on Statelessness, explained that "[i]n France and Belgium . . . *refoulement* meant either deportation as a police measure or *non-admittance at the frontier.*" Ad Hoc Committee on Statelessness and Related Problems, *Summary Record of the Twenty-First Meeting* 4-5, U.N. Doc. E/AC.32/SR.21 (1950) (emphasis added). The Belgian delegate "agreed with that explanation," leading the British delegate to "conclude[] from the discussion that the notion of 'refoulement' could apply to . . . refugees seeking admission." *Id.* at 5.[17]

[15] Petitioners contend that the definition upon which they rely supplies the most appropriate meaning because it is the only definition that "specifically relate[s] to the subject of this case." U.S. Br. at 40 n.25. This contention is incorrect. The *Collins Robert French Dictionary*, for example, specifically defines "*refouler*" in connection with immigrants and foreigners ("*immigrant, etranger*") as "to drive back." *Id.* at 558. More fundamentally, petitioners' reliance on a definition pertaining to "aliens" simply begs the question at issue here. Unlike other articles of the 1951 Convention, which specifically refer to a refugee's status as an alien where that status is relevant (see, *e.g.*, 1951 Convention, art. 18), Article 33 refers only to "refugees," not "aliens." Thus, the specialized and relatively obscure definition upon which the government relies does not speak most directly to the circumstances of the case.

[16] Cf. *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1495 (1991) (relying on a contemporaneous understanding in France of a French term used in 1929 Warsaw Convention).

[17] Nehemiah Robinson, the commentator petitioners cite extensively in their brief, likewise recognized that "there was agreement in the Ad Hoc Committee that *refoulement*, existing in Belgium and France and unknown elsewhere, means either deportation as a police measure or *non-admission at the frontier.*" N. Robinson, *Convention Relating to the Status of Refugees: The History, Contents and Interpretation* 162 (1953) (emphasis added) ("Robinson"). Robinson makes no attempt to reconcile this recognition with his subsequent conclusion that Article 33 applies only to refugees who have been admitted to a State. This failure completely undermines the government's reliance on his conclusions.

Moreover, the definition of "*refouler*" upon which the government relies to render the term "return" ambiguous simultaneously renders it redundant. Under petitioner's reading, the phrase "expel or return" is transformed into "expel or expel." The government's attempt to explain away this incongruity fails on its own terms. Even if "*refouler*" "connotes . . . physical relocation" (U.S. Br. at 39), it would necessarily encompass *all* forms of physical relocation, whether effectuated through the formal process of expulsion or directly from the high seas with no procedure whatsoever.[18] Thus, the redundancy in petitioners' interpretation of the treaty is inescapable.[19]

Nor can petitioners' restrictive reading of "return" be reconciled with the language that follows it. Article 33

[18] Indeed, while petitioners rely on Goodwin-Gill for their assertedly narrow definition of "*refoulement*," Goodwin-Gill explains in the very passage petitioners cite that "*refoulement*" covers "summary reconduction to the frontier of those discovered to have entered illegally *and summary refusal of admission.*" G. Goodwin-Gill, *The Refugee in International Law* 69 (1983) (emphasis added).

[19] By contrast, construing the term "return" according to its plain meaning does not render the term "expel" redundant. In certain circumstances, expulsion might not lead immediately to the repatriation of a refugee, but repatriation might nevertheless be both foreseeable and inevitable because the country to which the refugee was expelled would in turn repatriate the refugee. Without the prohibition against expulsion, a contracting State could claim that, because it had not returned the refugee directly to his or her country of origin, it had not violated the treaty. The term "expel" closes this potential lo ole.

prohibits the return of refugees "in any manner whatsoever" to a place where their lives or freedom would be endangered. Yet, as petitioners read the treaty, a contracting State may return refugees in any number of ways—by, for example, intercepting them on the high seas, or even in the territory or territorial waters of another State. Thus, under petitioners' reading, while the treaty purports to prohibit the return of refugees "in any manner whatsoever," it actually excepts from this sweeping language all forms of return that do not entail removal of the refugee from the territory of the contracting State.

That the treaty does not create any such exception is made plain by comparing Article 33 with other articles of the Convention that do limit territorially the application of the protections they provide. Where the contracting parties intended the safeguards of the Convention to be dependent on a refugee's presence or residence, they stated so explicitly in the language of the Convention. See 1951 Convention, arts. 2, 4, 27 (simple presence); 18, 26, 32 (lawful presence); 15, 17(1), 19, 21, 23, 24, 28 (lawful residence). In contrast, Article 33 expresses its mandate in clear terms without any geographical limitation. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (the Convention "imposed a mandatory duty on contracting States not to *return* an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons") (citation omitted) (emphasis added).

As is true of statutes, the specification of an exception in a treaty precludes judicial implication of any additional exceptions. As the Court explained in its analysis of another treaty:

> [T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms.

Rocca v. *Thompson*, 223 U.S. 317, 332 (1912). Because the drafters of the 1951 Convention were clearly able and willing to limit the geographical applicability of other protections, there is no basis for reading such a limitation into Article 33.[20] This is particularly true in view of the fact that, as previously noted, the 1951 Convention and the 1967 Protocol expressly prohibit States from adopting *any* reservation to Article 33 when signing or acceding to these treaties. See note 9, *supra*.

Finally, petitioners' restrictive reading is plainly at odds with the broad remedial and humanitarian goals of the treaty. As this Court has long recognized, "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura* v. *City of Seattle*, 265 U.S. 332, 342 (1924). This tenet of treaty interpretation applies with particular force to the 1951 Convention, the overriding purpose of which was to safeguard the rights of a special, vulnerable group in need of protection. Indeed, the preamble to the Convention notes that it was adopted in order "to assure refugees the *widest possible* exercise of these *fundamental* rights and freedoms." 1951 Convention, preamble (emphasis added).

Petitioners' interpretation of Articles 33 is not only "restrictive of rights," it extinguishes the most basic

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[20] Contrary to petitioners' assertion (U.S. Br. at 40-41), paragraph 2 of Article 33 does not provide a basis for such a limitation. Indeed, the very fact that paragraph 2 contains a territorial limitation, while paragraph 1 does not, demonstrates that the drafters did not intend to limit the scope of paragraph 1.

right enshrined in the treaty—the right of non-return—for an entire class of refugees, those who have fled their own countries but have not yet entered the territory of another State. Under petitioners' reading, the availability of the most fundamental protection afforded refuges turns not on the refugee's need for protection, but on his or her own ability to enter clandestinely the territory of another country. The government's interpretation, moreover, is a complete aberration in—and indeed, if upheld, could result in a significant setback to—over 40 years of development in international refugee protection. No State other than the United States has, to UNHCR's knowledge, resorted to the implementation of a formal policy of intercepting refugees on the high seas and repatriating them against their will. This fact itself confirms the international understanding that Article 33 prohibits such conduct.

B. The Past Practice Of The United States Is Consistent With, And Confirms The Plain Meaning Of, Article 33's Proscription Of Non-Return.

The United States' past practice under the treaty is inconsistent with its current interpretation of Article 33 and belies its claim that the treaty is ambiguous.[21] Indeed, the government's current policy represents a recent and marked reversal of the Executive's prior determination that the 1967 Protocol governs conduct beyond a contracting State's territory. Thus, the 1981 bilateral

[21] See *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed"); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 260 (1984) ("The conduct of the contracting parties in implementing [a treaty] in the first 50 years of its operation cannot be ignored"); see also Vienna Convention, art. 31(3)(b) (in treaty interpretation, courts can consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

executive agreement between the United States and Haiti expressly acknowledged that, "with respect to vessels on the high seas," the United States was bound by "international obligations mandated in the Protocol Relating to the Status of Refugees." [22] For more than ten years, the Executive Order implementing this bilateral agreement explicitly provided that "no person who is a refugee will be returned without his consent." [23] See Office of U.S. Department of State Legal Advisor, Letter from Edwin D. Williamson to Timothy E. Flanigan (Dec. 11, 1991) (discussing shift from earlier legal opinions of the Office of Legal Counsel to current practice).[24]

This recognition was fully consistent with the United States' traditionally staunch defense of international refugee protection in general, and the universal application of the principle of non-return in particular. In a 1974 statement to the Third Committee of the United Nations General Assembly, U.S. Ambassador Clyde Ferguson stated:

> It is difficult to overemphasize the significance to refugees of ensuring liberal asylum policies and practices, and above all in making certain that no refugee is required *to return to any country where he would face persecution.*
>
> . . . . .
>
> The [UN] High Commissioner . . . has deplored the fact that during the past year certain countries have repatriated refugees involuntarily, directly contrary . . . to Article 33 of the Refugee Convention.

[22] Agreement Effected by Exchange of Notes, Sept. 23, 1981, T.I.A.S. No. 10,241.

[23] Executive Order No. 12,324, 46 Fed. Reg. 48,109.

[24] Petitioners' strenuous efforts to disparage this earlier interpretation of the treaty (U.S. Br. at 50 n.40) do not alter the fact that the prior interpretation likewise represented the views of that branch of the government charged with the conduct of United States' foreign po[l]

> *My government joins with the High Commissioner in condemning the inhumane practice of refoulement.* The principle that refugees must not be repatriated against their will, and the right of a refugee to seek and secure asylum, have become even more firmly embedded in international law.[25]

More recently, then Deputy Secretary of State Lawrence S. Eagleburger stated in his address to the International Conference of Indochinese Refugees on June 13, 1989: "[T]he United States will remain unalterably opposed to the forced repatriation of Vietnamese *asylum-seekers*. We will not consider forced repatriation as falling within the rubric of 'acceptable under international practices.' " [26]

The United States' respect for Article 33's prohibition against the return of refugees also can be discerned from the 1980 amendments to the Immigration and Nationality Act ("INA"), which were passed in order to conform United States law to the 1951 Convention and the 1967 Protocol.[27] The 1980 Refugee Act amended the INA

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[25] *Reprinted in* A. Rovine, *Digest of United States Practice in International Law 1974* 111 (Office of the Legal Advisor, Department of State, 1975) (emphasis added).

[26] "For the Record," *Washington Post*, July 6, 1989, at A16 (emphasis added).

In the context of the long-standing exodus of boat people in Southeast Asia, the United States government proposed a response even more generous than the minimum protection of non-return. See M. Nash, *Digest of United States Practice in International Law 1979* 403 (Office of the Legal Advisor, Department of State, 1983) (remarks of U.S. Ambassador Richard Clark) (urging Southeast Asian states to offer asylum, and, in any event, "not to refuse admission to 'boat refugees' ").

[27] See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("if one thing is clear from the legislative history of . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees."); see also

to prohibit the "*return* [of] any alien . . . *to* a country" when certain conditions are satisfied.[28] This change is strong evidence that Congress and the President understood the 1951 Convention to prohibit the return of refugees to a place where their safety or freedom would be threatened. It provides no support for petitioners' contention that Congress understood Article 33 to proscribe only the "removal" or "summary reconduction" of refugees—terms that appear in neither the treaty nor the statute.

C. The Customary Obligation Of Non-Return Confirms The Plain Meaning Of Article 33.

The decisions of this Court, as well as Article 31 of the Vienna Convention, require that the 1951 Convention be interpreted consistently with international law. In this case, petitioners' interpretation of Article 33 ignores the customary norm of non-return which, as understood by other international agreements and practice, applies wherever a State encounters refugees.[29]

INS v. *Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring); *INS* v. *Stevic*, 467 U.S. 407, 421 (1984).

[28] Section 243(h), as amended in 1980, now reads:

> (h) Withholding of deportation or return (1) The Attorney General shall not deport *or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (Supp. 1992) (emphasis added).

[29] Customary international law "results from a general and consistent practice of states followed by them out of a sense of legal obligation." *Restatement*, at § 102, comment b, § 111. The pertinent State practice is reflected in treaties, national constitutions, declarations, and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary norm is observed. See *The Paquete Habana*,

This norm is reflected in two treaties drafted not long after the 1967 Protocol. Article 22(8) of the 1969 American Convention on Human Rights [30] requires that no alien be "deported or returned to a country" where his right to life or personal freedom is in danger of being violated. Article II(3) of the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, states that "[n]o person shall be subjected . . . 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." Neither of these agreements places territorial restrictions on a government's obligation of non-return, and neither has been interpreted, even by reservation, to allow such restrictions.

The Cartagena Declaration on Refugees (Cartagena de Indias, Nov. 22, 1984), which was formulated and endorsed by a number of Latin American States, likewise reflects this norm. The Colloquium that adopted the Declaration unanimously concluded that the principle of *non-refoulement* was "imperative in regard to refugees and in the present state of international law should be acknowledged and observed as rule of *jus cogens*." [31] See 1985 Report of the United Nations High Commissioner for Refugees, U.N. Doc. E/1985/62 (1985), at 6-7, ¶ 23 (quoting Colloquium on the International Protection of

175 U.S. 677 (1900); *North Sea Continental Shelf Cases*, 1969 I.C.J. 37. Customary international law is binding on all nations and, as "part of our [U.S.] law," *Paquete Habana*, 175 U.S. at 700, creates enforceable rights and obligations for individuals in U.S. courts. *Id.*

[30] OAS Official Records, OEA/Ser.K/XVI/1.1.

[31] In international law, *jus cogens* refers to 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." Vienna Convention, art. 53.

Refugees in Central America, Panama and Mexico). As recently as 1991, the Organization of American States ("OAS") General Assembly, which includes the government of the United States, reiterated its endorsement of the Cartegena Declaration. See 1991 Legal Resolution of Situation of Refugees, Repatriated and Displaced Persons in the American Hemisphere, AG/RES. 1103 (XXI-0/91) (June 7, 1991).

Moreover, at the 1980 session of the UNHCR Executive Committee, the delegate of the United States discussed the problems of refugees at sea and "endorsed the . . . conclusion[] . . . that *non-refoulement* should be considered a principle of international law." Thirty-First Session of the Executive Committee of the High Commissioner's Programme, 10, U.N. Doc. A/AC.96 SR.322 (1980). The United States' view was part of the clear trend in international law that, in 1985, led the High Comissioner to observe that the principle of non-return had crystallized to the status of *jus cogens*. 1985 Report of the United Nations High Commissioner for Refugees, *supra*, at ¶¶ 22-23. Describing the principle of *non-refoulement* as a "peremptory norm of international law," the High Commissioner reported to the United Nations General Assembly that this norm is not governed by geographical or territorial limitations. *Id.* at ¶22 (noting that the "principle requires that no person shall be subject to such measures as rejection at the frontier").[32]

International law also prohibits extraterritorial acts that violate other rights regarded as fundamental. For exam-

[32] See also L. Sohn & T. Buergenthal, *The Movement of Persons Across Borders* 123 (1992) ("The general prohibition against a State's return of a refugee to a country where his or her life would be threatened . . . has become a rule of customary international law"); G. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 Va. J. Int'l L. 899, 902 (1986) ("The binding obligations associated with the principle of *non-refoulement* are derived from conventional and customary international law . . .

ple, the United Nations Human Rights Committee has held that a State party may be accountable under Article 2 (1) of the 1966 International Covenant on Civil and Political Rights [33] for violations of the rights therein recognized committed by its agents in the territory of another State, whether with or without the acquiescence of the government of that State.[34] The Committee determined that the qualification "subject to its jurisdiction," contained in Article 2(1) of the Covenant, does not refer to the place where the violation occurs, but to the relationship between the individual and the State concerned.[35] To like effect, the European Commission on Human Rights has concluded that States' obligations under the European Convention on Human Rights extend to "all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad." [36]

The customary international law rule of non-return reflects a judgment by the international community that the obligations of a State with respect to such a fundamental right cannot stop at the State's borders.[37] The

[33] G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, Annex (1966). The United States signed the 1966 Covenant in 1977 and acceded to it in June 1992.

[34] Article 2(1) specifies that states will "respect and . . . ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . ."

[35] See P. Sieghart, *The International Law of Human Rights* 58 (1983).

[36] Sieghart, *supra*, at 58 (citation omitted).

[37] A parallel approach can be found in U.S. domestic law, where it is common for obligations of the sovereign to arise wherever the sovereign acts and not merely at the territorial borders. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272-73 (1973); *United States* v. *Hidalgo-Gato*, 703 F.2d 1267 (11th Cir. 1983).

obligation not to return a refugee arises wherever the government encounters the individual refugee, irrespective of whether that government waits for the refugee to arrive at the border or intercepts him or her on the high seas. For this reason, the Executive Committee of UNHCR, which is comprised of 46 nations, including the United States, has passed numerous guidelines for the protection of refugees on the high seas.[38] These guidelines recognize that the bedrock protections of Article 33 extend to international waters, and thus beyond the borders of any particular State.

These international agreements and interpretations support and confirm the extraterritorial applicability of the fundamental duty of non-return.[39] If, as the government contends, Article 33 was limited to actions occurring

[38] See UNHCR, *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, HCR/IP/2 (1986), Executive Committee Conclusions, No. 23 (XXXII) Problems Related to the Rescue of Asylum Seekers in Distress at Sea, ¶ 3 (1981) (practice of disembarking persons rescued at sea at next port of call "should also be applied in the case of asylum seekers rescued at sea"); No. 21 (XXXII) General, ¶ (g) (1981) (calling for "intensification of efforts to protect refugees from acts of violence at sea"); No. 20 (XXXI) Protection of Asylum-Seekers at Sea, ¶ (b) (1980) (recommending measures to prevent "criminal attacks on asylum-seekers at sea.").

[39] This basic principle of *non-refoulement* has been reaffirmed every year by the Executive Committee of the UNHCR Programme. See, *e.g.*, *Conclusions on the International Protection of Refugees*, *supra*, Executive Committee Conclusions No. 41 (XXXVII) General, ¶(j) (1986); No. 36 (XXXVI) General, ¶(f) (1985); No. 33 (XXXV) General, ¶(c) (1984); No. 29 (XXXIV) General, ¶(c) (1983); No. 25 (XXXIII) General, ¶(b) (1982); No. 21 (XXXII) General, ¶(f) (1981); No. 17 (XXXI) Problems of Extradition Affecting Refugees, ¶(b) (1980); No. 15 (XXX) Refugees Without an Asylum Country, ¶(b) (1979); No. 11 (XXIX) General, ¶(c) (1978); No. 6 (XXVII) Non-refoulement, ¶(c) (1977).

within a contracting State, this limitation should have been incorporated in subsequent hemispheric agreements and should have influenced the interpretive rulings construing comparable protections. Instead, this evidence demonstrates that the fundamental protection embodied in Article 33 is available wherever needed, and, thus, that Article 33 governs the behavior of contracting States wherever they may act.[40]

D. Article 40 Does Not Limit The Scope Of Article 33 To A State's Own Borders.

Petitioners contend that Article 40, the so-called "territorial application clause," limits a contracting State's

[40] Petitioners mistakenly suggest that the draft Convention on Territorial Asylum demonstrates that Article 33 does not apply extraterritorially. U.S. Br. at 47-48. This argument reflects a fundamental misunderstanding concerning the difference between asylum and *non-refoulement*. Asylum can only be obtained by persons who are already within a State's territory. That asylum thus has a territorial aspect is neither surprising nor relevant to the scope of the principle of *non-refoulement*, which does not address a refugee's right to seek asylum (*i.e.*, to remain and be protected within an asylum country, whether temporarily or permanently), but rather the absolute right not to be returned to a place of persecution. It was precisely because international law only guaranteed refugees the right not to be returned that the U.N. General Assembly sought to convene a conference aimed at crafting a permanent solution to the problems of refugees in the form of a right to asylum.

This same confusion is reflected in the works of the commentators cited by petitioners. See, *e.g.*, S. Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recueil des Cours (Hague Academy of International Law) 318 (1976) (discussing *non-refoulement* within the context of the Convention's failure "to mention *asylum* as a right") (emphasis added); 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972) (discussing *non-refoulement* in a chapter entitled "A Right to be Granted Asylum?"). These comments likewise led Judge Edwards erroneously to conclude that Article 33 does not apply to refugees on the high seas because "the ideal of *unconditional asylum* was diluted by the need for other practical guarantees." *Haitian Refugee Center v. Gracey*, 809 F [illegible] 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part) (emphasis added).

obligations under Article 33 to the State's borders. U.S. Br. at 41. In fact, the United States has long taken the view that despite the inclusion of territorial application clauses in various treaties, "*the application of a treaty is not necessarily confined to the territory of a party.*" [41]

Article 40 is largely an anachronism reflecting the common colonial relationships still existing in 1951. At the time the Convention was drafted, territorial clauses, or "colonial clauses" [42] as they were then called, were frequently included in treaties because many of the colonial powers lacked clear sovereignty over their dependent territories. There was also disagreement among the colonial powers as to whether treaties to which they acceded automatically extended to their dependent holdings without the assent of the local colonial governments. Consequently, a practice was established of including in treaties a clause permitting States to extend affirmatively the Convention to territories over which they had control. Consistent with this practice, paragraph 3 of Article 40 refers to extension of the Convention to territories where "the consent of the governments of such [colonial] territories" might be required.[43]

As discussed above, the Convention contains some articles that are intended to have effect only where certain physical presence or legal status requirements are satisfied. The territorial application clause in Article 40 therefore clarifies the scope of the word "territory" in,

[41] *Yearbook of the International Law Commission 1966*, vol. II, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1967), at 65 (statement of United States representative) (emphasis added).

[42] See *Report of the Ad Hoc Committee on Refugees and Stateless Persons*, U.N. [illegible]/1850, E/AC. 32/8 (1950), at 28.

[43] The *travaux preparatoires* of the Convention confirm that this was the purpose of Article 40. U.N. Doc. A/Conf.2/SR.27 (1951) at 7-10; see also Robinson, *supra*, at 171 ("Par. 1 permits variations in the geographical application but only inso[illegible] as dependent territories are concerned").

for example, Article 15 (right of association), Article 17 (wage-earning employment), and Article 21 (housing). However, the territorial application clause has no relevance to provisions, such as Article 33, that do not include the word "territory."

III. THE NEGOTIATING HISTORY OF ARTICLE 33 DOES NOT DEMONSTRATE THAT THE TREATY PERMITS STATES TO INTERCEPT REFUGEES ON THE HIGH SEAS AND REPATRIATE THEM AGAINST THEIR WILL.

Petitioners also rely on a statement by the Netherlands' delegate at the Convention's negotiating conference, the Conference of Plenipotentiaries, as support for their contention that Article 33 does not apply extraterritorially. This reliance is misplaced for two reasons. First, the isolated statement of a delegate to the Convention cannot be used to alter the plain meaning of the treaty itself. Second, placed in its proper context, the Dutch delegate's comment does not demonstrate that Article 33 applies only to refugees who are already present within a State.

Because the plain meaning of Article 33 clearly precludes the forced repatriation of refugees, "there is no necessity of looking further to discover 'the intent of the Treaty parties.'" *United States* v. *Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring); *id.* at 370 (Kennedy, J., concurring) (same).[44] Reliance on a treaty's negotiating history, or its *travaux preparatoires*, is appropriate only where the terms of the document are obscure or lead to "manifestly absurd or unreasonable"

[44] See also *Case of the S.S. "Lotus,"* P.C.I.J., Ser. A, No. 10 (1927), at 16 ("there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself"); *Interpretation of Article 3(2) of the Treaty Lausanne*, P.C.I.J., Ser. B, No. 12 (1925), at 22 (where treaty language is clear, "the question does not arise whether consideration of the work done in preparation of the Treaty of Lausanne (*les travaux preparatoires*) would also lead to the conclusions set out above").

results.[45] Because those conditions are not present with respect to Article 33,[46] reliance on the *travaux* here is entirely unnecessary.

In addition, the general rule of treaty construction allowing resort to preparatory work "has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." *Arizona* v. *California*, 292 U.S. 341, 360 (1934). Here, the government has not introduced evidence that the comment upon which it now seeks to rely was communicated to the United States' government or the Senate in connection with the ratification of the Convention.

In any event, it is clear that, when placed in its proper context, the Dutch delegate's comment is not an official interpretation of the Convention nor a binding limitation on the Convention's plain language. Rather, it may best be characterized as a parliamentary gesture by a delegate whose views did *not* prevail upon the negotiating conference as a whole. Earlier in the proceedings, the

[45] Article 32 of the Vienna Convention states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

[46] Indeed, petitioners' interpretation leads to absurd results. As Nehemiah Robinson observes, a restrictive reading of the term "*refoulement*" leads to the incongruous conclusion that "if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck. *It cannot be said that this is a satisfactory solution.*" Robinson, *supra*, at 163 (emphasis added). Again, this commentator's failure to reconcile this incongruity with his interpretation of the treaty undermines the government's reliance on his conclusions.

Ad Hoc Committee delegates from France, Belgium, and the United Kingdom made clear that the principle of *non-refoulement*, which existed only in France and Belgium, proscribed the rejection of refugees at a country's frontier. See *supra* at p. 9. Consistent with the United States' historically strong support of non-return, the United States delegate to the Committee, Mr. Louis Henkin, confirmed that:

> . . . Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.
>
> *Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened.* No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.

Ad Hoc Committee on Statelessness and Related Problems, *Summary Record of the Twentieth Meeting* 11-12, ¶ 54-55, U.N. Doc. E/AC.32/SR.20 (1950) (emphasis added). Speaking next, the Israeli delegate to the Ad Hoc Committee reiterated that Article 33 "must, in fact, apply to all refugees, whether or not they were admitted to residence," *id.* at 12-13, ¶ 60, and concluded that "[t]he Committee had already settled the humanitarian question of sending any refugee . . . back to a territory where his life or liberty might be in danger." *Id.* at 13, ¶ 61.

The issue having thus previously been settled, the Dutch delegate sought, unsuccessfully, to limit the language of the treaty. Relying on the opinion of the delegate from Switzerland, where the term *"refoulement"* did not exist, Baron van Boetzelaer of the Netherlands

> recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" (*"refoulement"*) related to a refugee already within the territory but not yet resident there.
>
> . . . .
>
> At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation.
>
> . . . .
>
> In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.
>
> There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be *placed on the record.*

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Thirty-Fifth Meeting* 21, U.N. Doc. A/Conf.2/SR.35 (1951) (emphasis added).

Significantly, formal amendments to the Convention to which delegates consented were "agreed to" or "adopted." [47] The Dutch delegate's comment, by contrast, was merely placed on the record, a tacit acknowledgement that the views he expressed did not enjoy sufficient support to alter the actual language of the treaty. Accordingly, it cannot be assumed that other delegates agreed

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[47] Thus, for example, a Swedish suggestion that the words "membership of a particular social group" be inserted into Article 33 after the word "nationality" was "adopted unanimously." *Id.* at 22. Two other changes to the actual wording of Article 33 were followed by the comment: "It was so agreed." *Id.*

with the comment simply because they did not object to their colleague's request to memorialize it.[48] The process of placing comments on the record did not reflect agreement with such comments, only that they were recorded and preserved.

The agreement to place this comment on the record thus provides no support for petitioners' contention that Article 33 applies only to refugees within a State, and certainly does not demonstrate that the treaty drafters intended to permit a State to act many miles from its territory to intercept and return refugees to the country from which they fled. Indeed, petitioners have cited no evidence whatsoever that the drafters ever contemplated, let alone approved of, a course of conduct so at odds with the humanitarian goals of Article 33. Unlike the Netherlands, the United States could close its borders without forcing the return of refugees to Haiti. Instead, it has gone a step further and effectively prevented the Haitian refugees from fleeing either to the United States or to any other country in the same general direction. Nothing in the treaty's negotiating history remotely suggests that the drafters intended to permit such action.[49]

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[48] While the Dutch delegate purported to state what he "gathered" was a "general consensus of opinion," his statement reflects at most the views of only six of the 26 states that participated in the drafting of the 1951 Convention. Article 33 was eventually adopted by a 20 to 0 vote, with three abstentions. *Summary Record of the Thirty-Fifth Meeting*, *supra*, at 25.

[49] Indeed, the Dutch delegate himself expressly qualified his stated concerns. Earlier in the negotiations he had made clear that his country was concerned about mass migrations *"unless international collaboration was sufficiently organized to deal with such a situation."* Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Sixteenth Meeting* 11, U.N. Doc. A/Conf.2/SR.16 (1951) (emphasis added). During the past 40 years, such collaboration has been organized under the auspices of the Office of the United Nations High Commissioner for Refugees.

In short, the *travaux preparatoires* hardly represent "extraordinarily strong contrary evidence"[50] which repudiates the plain meaning of Article 33. Therefore, the plain meaning should control.

CONCLUSION

For the foregoing reasons, UNHCR, as *amicus curiae*, respectfully urges that the decision of the Second Circuit be affirmed.

Respectfully submitted,

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[50] *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982).