IN THE
UNITED STATES COURT OF APEALS
FOR THE ELEVENTH CIRCUIT

Nos. 91-6060
91-6105
91-6118

The Haitian Refugee Center, Inc., et al.,
Appellees,

v.

James Baker, III, Secretary of State, et al.,
Appellants.

BRIEF AMICUS CURIAE OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Office of the United Nations High Commissioner for Refugees (hereinafter "UNHCR") is not a corporation.

STATEMENT REGARDING ORAL ARGUMENT

Amicus UNHCR adopts the Statement Regarding Oral Argument contained in Appellees' brief.

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Amicus UNHCR adopts the Statement Of Jurisdiction contained in Appellees' brief.

STATEMENT OF THE ISSUES

Amicus UNHCR adopts the Statement Of The Issues contained in Appellees' brief.

STATEMENT OF THE CASE

Amicus UNHCR adopts the Statement Of The Case contained in Appellees' brief.

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91-6105
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INTEREST OF THE AMICUS

The Office of the United Nations High Commissioner for Refugees [hereinafter "UNHCR"] is charged by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problems of refugees.[1] The Statute of the Office of the High Commissioner

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[1] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), 5 U.N. GAOR Supp. (No. 20) 46 Annex at 46, para. 1, U.N. Doc. A/428 (1950).

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 also formally recognized in the 1967 United Nations Protocol relating to the Status of Refugees [hereinafter "1967 Protocol"], to which the United States became a party in 1968:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for 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]

1967 Protocol, Art. II. The views of UNHCR are informed by forty years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides direct assistance to refugees throughout the world and has representatives in over 80 countries. The Office was acknowledged for its work on behalf of refugees by the award of the Nobel Peace Prize in 1954 and again in 1981.

The present case directly concerns the interpretation of provisions contained in the 1951 Convention and 1967 Protocol, multilateral treaties

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[2] Id. at 47, para. 8(a).

[3] Jan. 31, 1967, art. II, para. 1, 19 U.S.T. 6223, 6226, T.I.A.S. No. 6577, at 4, 606 U.N.T.S. 267, 270. The 1967 Protocol and the 1951 Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter "1951 Convention"], are multilateral treaties that provide the primary international definition of "refugee" and set forth the rights and obligations of persons who satisfy that definition. These international instruments have been signed by over 110 countries and are the only refugee accords of global scope.

whose application the High Commissioner is expressly mandated to supervise. This case presents questions involving the essential interests of refugees within the mandate of the High Commissioner. UNHCR understands that the parties have asserted additional grounds on appeal for the enforceability of the principle of non-refoulement under United States law. Consequently, in this brief, UNHCR wishes to reiterate its position regarding the proper interpretation of the 1951 Convention and its 1967 Protocol.

UNHCR is authorized by all parties to this case to represent that they have no objections to UNHCR presenting its views as amicus curiae.

SUMMARY OF ARGUMENT

Central to the present lawsuit is the international principle of non-refoulement set forth in Article 33 of the 1951 Convention and incorporated by reference in the 1967 Protocol. Article 33 proscribes the return of refugees "in any manner whatsoever" to the frontiers of territories where their lives or freedom would be endangered. Although international guidelines and State practice support at least the temporary admission of "boat people" and asylum seekers in situations of mass influx, this case concerns neither admission nor asylum. The sole issue is the obligation of States not to return refugees to a place where their lives or freedom would be threatened by persecution.

Appellants assert that Article 33 applies only to refugees present within the territory of a contracting State. Consequently, they argue, that provision offers no protection to Haitian refugees intercepted on the high seas and placed on United States Coast Guard vessels, or transferred to United States naval facilities. Thus, Appellants argue that international law poses no bar to the return of such refugees to a place where, by definition, their lives or freedom would be threatened. Appellants ignore the plain language of Article 33, as well as the essential purpose and

intent of the treaty. In asking the district court to adopt this restrictive interpretation of Article 33, Appellants rely largely on supplementary and ambiguous comments made by another government's delegate at a negotiating conference convened to complete the 1951 Convention. They also ignore conflicting comments made at other negotiating sessions by a member of the United States delegation.

Amicus wishes to make clear that the principle of *non-refoulement* contained in Article 33 is the international community's guarantee that refugees shall not be returned to the frontiers of a territory where their lives or freedom would be threatened. This guarantee to refugees is a specific and fundamental protection that is independent from the question of admission to the United States or the grant of asylum.

This brief seeks first to demonstrate that international law is part of the law of the United States. Consequently, the obligations of the United States and the concomitant rights of refugees must be construed consistently with United States treaty commitments and applicable principles of international customary law.

Second, this brief will show that the 1967 Protocol prohibits States from handing over refugees to a place where their lives or freedom would be threatened by persecution. The principle of non-refoulement is triggered as soon as an individual satisfies the criteria provided in the definition of a "refugee," irrespective of whether they have been recognized as such by a State or international organization. Article 33 categorically prohibits Contracting States from delivering a refugee to a territory where his life or freedom would be threatened; it envisions no exception predicated upon the place from which a refugee is returned. Thus obligation arises wherever the government acts. Moreover, under the rules established by the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good

faith in accordance with the ordinary meaning of its terms and in light of its context, object and purpose. Recourse to supplementary materials, including the negotiating history of the treaty, is a last resort and should be considered only when the meaning of the text is ambiguous or when application of the general rules of interpretation would lead to an absurd or unreasonable result. Here, interpretation of Article 33 according to the ordinary meaning of its terms -- preventing the return of refugees "in any manner whatsoever" -- leads to a result that is fully consistent with the object and purpose of the treaty to provide international protection to refugees.

ARGUMENT

I. INTERNATIONAL LAW IS PART OF THE LAW OF THE UNITED STATES: THE OBLIGATIONS OF THE UNITED STATES MUST BE CONSTRUED CONSISTENTLY BOTH WITH TREATIES TO WHICH THE UNITED STATES IS A PARTY AND WITH CUSTOMARY INTERNATIONAL LAW

It is axiomatic that international law is part of the law of the United States. The Paquete Habana, 175 U.S. 677, 700 (1900).[4] International law posseses the same status as federal common law.[5] Consequently, federal courts are "bound by the law of nations, which is a part of the law of the land." The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815). This basic principle has been accepted from the earliest days of the United States, see

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[4] "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. at 700. See also Centre for the Independence of Judges and Lawyers, 19 B.R. 635, 646 (D. Utah 1982).

[5] See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810-11 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985). But see Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 Harv. L. Rev. 853, 870-78 (1987) (arguing that customary international law is superior to federal common law in that it is not superseded by subsequent legislation).

Ware v. Hylton, 3 U.S. (3 Da.) 199, 281 (1796), and has received more recent confirmation from the Supreme Court and elsewhere. See, e.g., First National City Bank v. Banco Para el Comercio Exterior de Cuba, 103 S.Ct. 2591, 2598 (1983); Op. Att'y. Gen. 27 (1972) ("[t]he law of nations, although not specifically adopted by the Constitution or any municipal act, is essentially a part of the law of the land"); see also Restatement (Third) of the Foreign Relations Law of the United States, sec. 111 and Comment e ("[c]ustomary international law, like other federal law, is part of the 'law of the United States'").

The international obligations of States derive both from commitments embodied in international accords and from customary international law. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820). See also Statute of the International Court of Justice, Article 38. Proof of international customary law requires consistency and generality in practice, although no particular duration. Likewise, universality and complete uniformity are not required, but the practice must be accepted as law. See generally Browlie, Principles of Public International Law 4-11 (1990). International agreements themselves constitute the "practice of states" and contribute to the estblishment of customary international law.[6] Id., sec. 102, Comment i.

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[6]State practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of states, and empirical evidence of the extent to which the customary law rule is observed. See North Sea Continental Shelf Cases, I.C.J. Rep. 37 (1969). Customary international law is binding on all nations and creates enforceable rights and obligations for individuals. See The Paquete Habana, 175 U.S. 677; see also Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (determining that the international consensus against the practice of torture has developed to the point that freedom from torture is now a right, the violation of which sustains a cause of action under the Alien Tort Statute); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (norms of international law develop over time), cert. denied, 470 U.S. 1003 (1985).

A multilateral agreement may become part of customary international law where it "is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states." Id.

The principle of non-refoulement is embodied in at least three international treaties: the 1951 Convention, the 1967 Protocol, and the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa [hereinafter, "OAU Convention"]. Non-refoulement is similarly a guiding principle of the 1984 Cartagena Declaration on Refugees [hereinafter, "Cartagena Declaration"] formulated by members of the Organization of American States. One or both of the "universal" instruments, the 1951 Convention and 1967 Protocol have been adopted by more than 110 States, including the United States. Each of the regional instruments has similarly been widely accepted. Of the numerous reservations registered by parties to these various agreements, none has purported to weaken or abridge the absolute right of a refugee to be protected by the principle of non-refoulement. The 1951 Convention and 1967 Protocol, in fact, permit no such reservations.

Indeed, under any standard of proof, the principle of non-refoulement is so universally accepted by nations as to constitute a peremptory norm of international law. That is, non-refoulement is a

> 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 on the Law of Treaties, adopted May 22, 1969, entered into force Jan. 27, 1980, U.N. Doc. A/CONF. 39/27 at 289 [hereinafter "Vienna

Convention"].[7] Consequently, this Court's determination that the 1951 Convention and 1967 Protocol are not self-executing is not wholly conclusive as to whether the United States must observe the fundamental obligation of non-refoulement.

II. THE PRINCIPLE OF NON-REFOULEMENT PROHIBITS STATES, WHATEVER THEY MAY ACT, FROM RETURNING REFUGEES TO TERRITORIES WHERE THEIR LIVES OR FREEDOM WOULD BE THREATENED

A. Article 33 Protects Individuals As Soon As They Satisfy The Criteria Set Forth In The Definition Of "Refugee," Irrespective Of Whether They Have Entered The Territory Of Another State

Under the 1951 Convention, a "refugee" is any person who, "owing to a 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. I(A)(2) at 152. The 1967 Protocol incorporates this definition,[8] and this same language served as the basis for the definition of "refugee" set forth in the 1980 Refugee Act. See INS v. Cardoza-Fonseca, 480 U.S. 421, 437 (1987).

The recognition of refugee status under international law is essentially declaratory in nature. The UNHCR Handbook on Procedures and

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[7]Although the United States has signed but not ratified the Vienna Convention, the Department of State, in submitting this agreement for ratification by the Senate, stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. I, 92d Cong., 1st Sess. 1 (1971).

[8]The 1967 Protocol by reference incorporated the substance of the 1951 Convention definition, but universalized the definition by prospectively eliminating its temporal and geographic restrictions. These changes were effected in order to respond to the changing nature of refugee flows after World War II. Gunning, Expanding the International Definition of Refugee: A Multicultural View, 13 Fordham Int'l L.J. 35, 45 (1989).

Criteria for Determining Refugee Status [hereinafter "Handbook"] paragraph 28 emphasizes that:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills 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.[9]

Thus, the refugee's right to protection accrues if he or she satisfies the criteria for refugee status set out in the definition (flight from the state territory for the stated reasons), regardless of whether a formal refugee status determination has been made. See also Vigile v. Sava, 535 F. Sur 1002, 1018 (S.D.N.Y.), rev'd on other grounds sub nom. Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982) (noting the term "'refugee' is a self-imposed label, not one requiring the imprimatur of [the State]").

For this reason, asylum seekers with a presumptive or prima facie claim to refugee status are entitled to protection. This point has been stressed by the Executive Committee of the UNHCR's Programme in its Conclusions on International Protection [hereinafter "Executive Committee Conclusions".]

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[9]The UNHCR Handbook was prepared in 1979 at the request of State members of the Executive Committee of the High Commissioner's Programm, including the United States in order to provide guidance to governments in applying the terms of the Convention and Protocol. The Handbook is based on UNHCR's experience, including the practice of States in determining refugee status, exchanges of views between the Office of the High Commissioner and the competent authorities of Contracting States, and literature devoted to the subject over the preceding quarter of a century. The Handbook has been widely cited with the approval both governments and judicial decisions. Federal courts have turned to the Handbook for guidance in the interpretation of the 1967 Protocol. See, e.g. Cardoza-Fonseca, 480 U.S. at 439 n.22. ("the Handbook provides significant guidance in construing the Protocol...[and]in giving content to the obligations that the Protocol establishes")

See, e.g., Executive Committee Conclusion No. 6 (XXVIII) (reaffirming "the fundamental importance of the principle of non-refoulement . . . irrespective of whether or not individuals have been formally recognized as refugees."). [10] A State that undertakes a program of return or involuntary repatriation of foreign nationals to their country of origin is obliged, absent other effective measures of protection, to institute an effective system of status determination to ensure that their obligations under Article 33 are scrupulously observed. Cf. UNHCR Handbook at 46.

Appellants contend that the prohibition against non-refoulement applies only to refugees present within the territory who are not residents therein. See Appellant's Reply Brief at 7. The Executive Committee Conclusions, however, suggest a different interpretation. The observance of the non-refoulement principle is of fundamental importance both at the border and within the territory of a State. See e.g., Executive Committee Conclusion No. 6 (XXVIII). "In all cases the fundamental principle of non-refoulement -including non-rejection at the frontier- must be scrupulously observed." Executive Committee Conclusion No. 22 (XXXII) (emphasis added) This obligation extends to all situations of large-scale influx. See Executive Committee Conclusion No. 19 (XXXI) provides in para. (a). Paragraph (b) (ii) of that same Conclusion also states that "persons seeking asylum should always receive at least temporary refuge." Furthermore, "in cases of large-scale influx, asylum-seekers rescued at sea should always be admitted,

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[10] Report of the 28th Session of the High Commissioner's Programme, U.N. Doc. A/AC.96/549 (1977), para. 53.4(c). The Executive Committee Conclusions, customarily adopted by consensus of the 44 member States (including the United States), evidence an important measure of State support for particular protection practices and standards, and contain international guidelines which can serve as a reference point for States developing or orienting their national policies on refugee issues.

at least on a temporary basis." Executive Committee Conclusion No. 23 (XXXII) para. 3.

The principle of non-refoulement must be interpreted in the context of overall developments of the refugee concept. See Goodwin-Gill, The Refugee in International Law 73 (1983) [hereinafter "Goodwin-Gill"]. To maintain that the principle of non-refoulement applies only to refugees already within the territory would defeat the purpose of the above-mentioned Executive Committee Conclusions -- to protect all persons, whether already in the territory of a States, at the border or on the high seas, from forcible repatriation to a country where their lives would likely be at risk.[11]

State practice also confirms that the obligation of non-refoulement extends to measures such as rejection at the frontier. See Exec. Order No. 12324, 46 Fed.Reg. 48109 (1981), reprinted in 8 U.S.C. sec. 1182 (1982) (providing in actions taken beyond the territorial waters of the United States that "no person who is a refugee will be returned without his consent" and directing the Attorney General to ensure "strict observance of our international obligations concerning those who genuinely flee persecution. . ."); [12] UNHCR Executive Committee Conclusion No. 6, supra (reaffirming principle of non-refoulement "both at the border and within the territory"). That refugees should be protected on the high seas is further evidenced

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[11] See also Goodwin-Gill at 77 n. 42 (referring to various General Assembly Resolutions urging governments scrupulously to observe humanitarian principles, including non-refoulement and the grant of asylum to those seeking refuge).

[12] See also OAU Convention, art. II(3) ("[n]o person shall be subjected...to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened").

international actions taken to promote rescue,[13] and to combat piracy and violence against asylum seekers at sea.[14]

B. The Plain Language Of Article 33 Prohibits The Forced Return Of Refugees Except In The Narrow Circumstances Specified In That Provision

The principle of non-refoulement contained in Article 33 guarantees to refugees the following specific, fundamental and universally applicable protection:

> 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) (emphasis added).[15]

The language of Article 33 is categorical and does not condition this obligation in any manner upon the place where the refugee invokes its protection. The principle of non-refoulement is so absolute and so essential

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[13] See Executive Committee Conclusions No. 23 (XXXII), 32nd Session of the High Commissioner's Programme (1981), para. 3 (noting that the practice of disembarking persons rescued at sea at the next port of call "should also be applied in the case of asylum seekers at sea").

[14] See Executive Committee Conclusion No. 20 (XXXI) (1980) (recommending measures to prevent "criminal attacks on asylum-seekers at sea . . . involving extreme violence and indescribable acts of physical and moral degradation, including rape, abduction and murder").

[15] Paragraph 2 of Article 33 provides the only exception to the principle of non-refoulement, the case of individual refugees who are regarded as danger to the security of the country in which they are located or, having been convicted of a particularly serious crime, constitute a danger to the community. In their submissions to the district court below, Appellants do not claim to have identified any such individuals, and appear not to rely upon the exception provided by paragraph 2 as a basis for returning Haitian refugees.

to the treaty-based system of refugee protection established by the international community that Article 42 of the 1951 Convention, and Article VII of the 1967 Protocol prohibit States from making any reservation to Article 33 when signing or acceding to these treaties.

The United States traditionally has been one of the staunchest defenders of international refugee protection in general, and the universal application of the principle of non-refoulement in particular. For example, on November 25, 1974, U.S. Representative Clarence Clyde Ferguson, Jr. made a statement to the Third Committee of the U.N. General Assembly concerning the subject of refoulement. Ambassador Ferguson stated:

> Once again my government wishes to stress, in this forum, the overriding importance among the High Commissioner's manifold activities of his function of providing international protection for refugees. 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. It is the High Commissioner's task to work unceasingly toward affording such guarantee. His chief tools in so doing are the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. As the Committee knows Article 33 of the Convention contains an unequivocal prohibition upon contracting states against the refoulement of refugees "in any manner whatsoever" to territories where their life or freedom would be threatened on grounds of race, religion, nationality, membership of a particular social group or political opinion.
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> * * *
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> 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 ever more firmly embedded in international law.

A.W. Roone, Digest of United States Practice in International Law - 1974, Office of the Legal Advisor, Department of State (1975). (quotation in original)(emphasis added).

C. A States' Responsibility To Act In Conformity With International Obligations Extends To Actions Taken Outside Its Borders

Under general principles of international law State responsibility may arise directly from the acts and omissions of its government officials and agents, or indirectly where the domestic legal and administrative systems fail to enforce or guarantee the observance of international standard.[16] The fact that the harm caused by State action may be inflicted outside the territory of the actor does not diminish State responsibility.[17]

Typically, State responsibility arises when one State complains of harm to its nationals resulting from the actions of another state, whether committed in or outside of its territory. Thus, a State's obligations under international law extend outside of its physical territory. The United Nations Human Rights Committee has taken the position that a State Party may be accountable under Article 2(1) of the 1966 Covenant on Civil and Political Rights for violations committed by its agents outside of the State.[18] Similarly, the European Commission on Human Rights has considered that the obligations of States under the European Convention on Human Rights extend to "all persons under their actual authority and responsibility, whether that authority is

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[16]Brownlie, System of the Law of Nations: State Responsibility, Part I, 150-51 (1983).

[17]Id. at 135-37, 159-66. This principle is also well settled in United States law. See, e.g., Almaida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973); United States v. Brennan, 538 F.2d 711, 715 (5th Cir. 1970); United States v. Hidalgo-Gato, 703 F. 2d 1267 (11th Cir. 1983).

[18]See Sieghart, The International Law of Human Rights (1983).

exercised within their own territory or abroad."[19]

The liability of a State for official actions taken overseas follows from the express terms of the non-refoulement obligation, as set forth in Article 33 and from customary international law. With respect to Article 33 and analogous provisions in the various regional instruments, a State's duties are owed not to the State of origin or habitual residence, but to the other State parties. In the case of peremptory norms, such as non-refoulement, the duty is owed to the international community at large.

D. The Purpose, Intent, And Meaning Of Article 33 Are Unambiguous

The proscription contained in Article 33 against the refoulement of refugees "in any manner whatsoever" is clear from the plain language of the treaty. Under the general rules of treaty interpretation established by the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose."[20] The object and purpose of the 1951 Convention and 1967

[19] Id.

[20] Adopted May 22, 1969, entered into force Jan. 27, 1980, U.N. Doc. A/CONF. 39/27 at 289, Section 3, art. 31. Article 31 of the Vienna Convention [hereinafter "Vienna Convention"] defines the "context" for the purpose of interpreting a treaty as follows:

> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. (3) There shall be taken into account, together with the context: (a) any subsequent agreement

Protocol are to extend the protection of the international community to refugees, and "to assure refugees the widest possible exercise of . . . *[their]* . . . fundamental rights and freedoms." 1951 Convention, Preamble.

The principle of non-refoulement -- the most essential protection provided by international refugee law -- is stated in mandatory terms and allows for no territorial limitations. When the drafters of the 1951 Convention as a whole wished to condition the rights of refugees on their physical location or residence, they did so expressly in the language of the treaty. Articles 4 concerning freedom of religion and 27 rrelating to the issuance of travel documents state expressly state that the obligations of States under these provisions are limited to refugees present in the territory of the State. Similarly, Article 18 on the right of self-employment and Article 26 regarding freedom of movement expressly apply only to refugees lawfully on the territory of the Contracting State. Articles 15, 17(1), 19, 21, 23, 24, and 28 (regarding, respectively, rights related to association, employment, exercise of the liberal professions, housing, public relief, labor conditions, and travel documents) all are likewise expressly conditioned on the refugee's legal status within the territory of the State.

In stark contrast to all of these provisions, Article 33 contains no such restriction. To the contrary, Article 33 prohibits the return of refugees "in any manner whatsoever." Id. (emphasis added). Appellants broadly argue

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> between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. (4) A special meaning shall be given to a term if it is established that the parties so intended.

that this fundamental legal protection loses all force and effect on the high seas. See Appellants Reply Brief at 4. Such an interpretation would permit a State to evade this solemn treaty commitment (and any other similar international obligation) merely by relocating its officials or agents to off-shore locations. The international community could not have intended such a result when it memorialized the principle of non-refoulement in Article 33.

E. The Negotiating History To The 1951 Convention Provides Guidance Only Where The Meaning Of The Treaty Language Is Ambiguous or Obscure

The rules of treaty interpretation, as set forth in the Vienna Convention permit recourse to "supplementary means of interpretation" (including the preparatory work of a treaty) only where the meaning of the treaty language is "ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable." Vienna Convention, art. 32. When the meaning of the treaty is clear from its text when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable, and recourse to such sources is discouraged.[21]

Nevertheless, in urging the district court to adopt their restrictive view of the obligations of States under Article 33, Appellants rely almost exclusively on the comments made by the delegate of the Netherlands to the Conference of Plenipotentiaries, which drafted the final version of Article 33. During the Conference the Dutch delegate expressed the view that the

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

word "return" related only to refugees already within the territory and that "the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by Article 33." See Defendants' Memorandum Opposing Injunctive Relief at 25, quoting Haitian Refugee Center v. Gracey, 809 F.2d 794, 840 n.133 (D.C. Cir. 1987) (Edwards, J., dissenting in part and concurring in part).[22]

Appellants argued to the district court that the Dutch delegate's views reflected "an agreement" among the delegates as to the meaning of refoulment. Defendants' Memorandum at 26. In fact, the record is not so clear. The Dutch delegate's views were informed by "conversations he had" and by earlier support from four other delegates for a similar Swiss interpretation. Twenty-six States, however, participated in the drafting of the 1951 Convention. Although the Dutch delegate's comments were placed on the record without objection, it cannot be assumed that all delegates were in accord simply because they did not object to their colleague's request to memorialize his views.[23]

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[22]The portions of the negotiating history cited by Appellants have apparently generated confusion among some courts regarding the distinction between the mandatory right of non-return and discretionary benefit of asylum. In considering the applicability of Article 33 to Haitian refugees on the high seas, these comments led Judge Edwards in Gracey for example, to conclude that Article 33 on non-return did not apply because "the ideal of unconditional asylum was diluted by the need for other practical guarantees." Gracey, 809 F. 2d at 840 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part) (emphasis added).

[23]The Dutch delegate's comments are contained in the Summary Record of the Thirty-Fifth Meeting of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (hereinafter, "Conference") held July 25, 1951, U.N. Doc. A/CONF.2/SR.35 at 21 (Dec. 3, 1951). Delegates to the drafting sessions were permitted to have their opinions placed on the record of the meetings in order to preserve their views at the time of that meeting. However, such comments do not serve as the final official interpretation of the treaty, nor did they bind the delegate or his government. For example, at a meeting of the Conference two weeks earlier,

The Dutch delegate made these comments primarily due to his concern with the possibility that the draft Article 33 would require his government to *grant* entry in the case of a mass migration. The Dutch comments reflect the fears of a small country in Europe which bordered a much larger country that had produced many refugees a few years earlier during World War II. The Dutch delegate was concerned that refusal to grant entry, in the face of such an overwhelming influx might constitute refoulement. Whatever may have been the concerns of various drafters of the 1951 Convention regarding rights of entry and asylum, it is abundantly clear that no State sought to reserve for itself the right to reach out beyond its borders and forcibly return refugees to the country from which they fled. [24]

While attempting to focus the attention of the district court on comments of the Dutch delegate, Appellants failed to mention that its own

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the Dutch delegate explained that his concern was that of "a country bordering on others . . . about assuming unconditional obligations as far as mass influxes of refugees were concerned on the condition unless international collaboration was sufficiently organized to deal with such a situation." Summary Record of the Sixteenth Meeting of the Conference held July 11, 1951, U.N. Doc. A/CONF.2/SR.16 at 11 (Nov. 23, 1951) (emphasis added). In contrast to the negotiating sessions, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (hereinafter, "Final Act") July 2-25, 1951, 189 U.N.T.S. 138, which officially completed the 1951 Convention, included official recommendations of the Conference on certain issues relating to refugee protection, including facilitation of travel documents, the principle of family unity, welfare services, and international co-operation in the field of asylum and resettlement. Although the Final Act did not refer to the principle of non-refoulement, it recommended "that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement." Id. at para. D.

[24]Even the Netherlands has in practice adopted a view of refoulement that goes further than the minimal requirements of Article 33. At the 35th Session of the Executive Committee of the High Commissioner's Programme, the Netherlands' representative confirmed that even persons with unsubstantiated claims to refugee status should be admitted where there are compelling humanitarian factors favoring admission. U.N. Doc. A/AC.96/SR/374, para. 38.

representative had taken a drastically different view at the earlier drafting sessions. During the session of the Ad Hoc Committee on Statelessness and Related Problems, a member of the United States delegation, Mr. Louis Henkin, stated:

> 54. The Committee had, it was true, decided to delete the chapter on admittance, considering that the convention should not deal with the right of asylum and that it should merely provide for a certain number of improvements in the position of refugees. It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.
>
> 55. Whatever the case might be, whether or not the refugee was in a regular position, 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.

Summary Record of the Twentieth Meeting of the Ad Hoc Committee on Statelessness and Related Problems held Feb. 1, 1950, U.N. Doc.E/AC.32/SR.20 at 11-12 (Feb. 10, 1950) (emphasis added). The delegate of Israel, Mr. Robinson, expressed complete agreement, stating that "[t]he article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance, and must grant to all refugees the guarantees provided . . .." Id. (emphasis added). The Israeli delegate thus 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. (emphasis added).

The American and Israeli positions at the Convention negotiating sessions regarding non-rejection at the frontier have received renewed support in

United States practice and in the statements of United States officials.[25] The response of the United States to the plight of Indochinese "boat refugees" was to grant entry and asylum to vast numbers of individuals. The Office of the United States Coordinator for Refugees, in a 1984 report to Congress, noted with approval that, "[d]espite the heavy burden often imposed by enormous numbers of refugees, asylum countries generally have not forcibly repatriated refugees against their will to countries which they have fled." Office of the U.S. Coordinator for Refugee Affairs, Proposed Refugee Admissions and Allocations for Fiscal Year 1984, Report to Congress for Fiscal Year 1984, at 12 (1983). Indeed, Ambassador Richard Clark, then the United States Coordinator for Refugee Affairs, stated that the policy of the United States was "to encourage Southeast Asian states to be more generous in offering first asylum -- in particular not to refuse admission to "boat refugees." Nash, Digest of United States Practice in International Law - 1979 at 403, Office of the Legal Advisor, Department of State (1983) (emphasis added).

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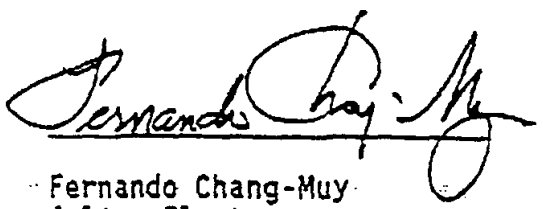
25 The Vienna Convention specifically recognizes subsequent State practice as part of the "context" for the purpose of the interpretation of a treaty. See Vienna Convention, Art. 31.

CONCLUSION

For the foregoing reasons, amicus UNHCR urges that the grant of injunctive relief by the District Court should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief Amicus Curiae Of The Office Of The United Nations High Commissioner For Refugees In Support Of Appellees was served this thirty-first day of December 1991 on:

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