

31-12-2015

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Recommended Citation

Mansfield, James (2015) "Extraterritorial Application and Customary Norm Assessment of Non-Refoulement: The Legality of Australia's 'Turn-Back' Policy," *The University of Notre Dame Australia Law Review*: Vol. 17, Article 8.  
Available at: <http://researchonline.nd.edu.au/undalr/vol17/iss1/8>

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# EXTRATERRITORIAL APPLICATION AND CUSTOMARY NORM ASSESSMENT OF *NON-REFOULEMENT*: THE LEGALITY OF AUSTRALIA'S 'TURN-BACK' POLICY

JAMES MANSFIELD\*

## Abstract

This article considers whether the Commonwealth Government's border protection policy of turning back asylum seeker boats breaches its international obligation not to *refoule* refugees, as imposed under the *Refugee Convention* art 33(1). In addressing this issue the article examines whether art 33(1) applies extraterritorially, and whether a similar obligation has become embedded in customary international law. The conclusions reached are applied to specific situations where Australia has returned refugees.

## I INTRODUCTION

In September 2013, the Commonwealth Government implemented 'Operation Sovereign Borders', a border protection policy that seeks to prevent asylum seekers reaching Australia's territory.<sup>1</sup> The policy involves a joint multi-agency taskforce, Border Protection Command ('BPC'),<sup>2</sup> using naval vessels to intercept and turn back asylum seekers travelling by boat once they reach Australia's contiguous zone.<sup>3</sup> This typically involves BPC towing or escorting the boats back to other states.<sup>4</sup> As of 28 January 2015, BPC had turned back 15 boats containing 429 asylum seekers.<sup>5</sup> In one incident on 1 May 2014, BPC intercepted a boat carrying 18 asylum seekers near Ashmore Reef (an Australian territory in the ocean west of Darwin)<sup>6</sup> and escorted it back to Indonesia<sup>7</sup> (after adding three more).<sup>8</sup> In another incident in late June 2014, BPC intercepted a boat containing Sri Lankan asylum seekers of Sinhalese and Tamil ethnicities west of Cocos Islands and detained them, before transferring them to Sri Lankan authorities on 6 July.<sup>9</sup>

This article examines whether such actions taken under Australia's turn back policy breach Australia's *non-refoulement* obligations under art 33(1) of the *Convention Relating to the*

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<sup>1</sup> See Liberal Party/National Party of Australia, *The Coalition's Operation Sovereign Borders Policy* (July 2013) 10 <<http://www.nationals.org.au>>.

<sup>2</sup> Australian Government, Australian Customs and Border Protection Service, *Border Protection Command* (10 June 2014) <<http://www.customs.gov.au/aboutus/protectingborders/bpc/default.asp>>.

<sup>3</sup> See Liberal Party/National Party of Australia, *The Coalition's Policy for a Regional Deterrence Framework to Combat People Smuggling* (August 2013) 15 <http://www.nationals.org.au>.

<sup>4</sup> See Natalie O'Brien, 'Boat Turnbacks May Breach International Law: UNHCR', *The Sydney Morning Herald* (online), 11 January 2014 <http://www.smh.com.au>.

<sup>5</sup> Peter Dutton, Minister for Immigration and Border Protection, 'Operation Sovereign Borders Delivers Six Months Without a Successful Smuggling Venture' (Media Release, 28 January 2015) <<http://www.minister.immi.gov.au/peterdutton/2015/Pages/Media-Releases.aspx>>.

<sup>6</sup> Michael Bachelard, 'Australian Navy Turns Back Asylum Seeker Boat to Indonesia After Loading Three Extra People', *The Sydney Morning Herald* (online), 6 May 2014 <<http://www.smh.com.au>>.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Scott Morrison, Minister for Immigration and Border Protection, 'Australian Government Returns Sri Lankan People Smuggling Venture' (Media Release, 7 July 2014).

*Status of Refugees 1951* ('*Refugee Convention*')<sup>10</sup> and under customary international law ('CIL'), which prohibit states from sending refugees to territories where there is a real risk they would face persecution on specific grounds.<sup>11</sup> Of particular concern is the extent to which Australia's obligations may differ extraterritorially, depending on whether a refugee is intercepted within the contiguous zone<sup>12</sup> or on the high seas.<sup>13</sup>

Part II examines Australia's extraterritorial obligations under art 33(1). Drawing on principles of treaty interpretation and decisions in both international and foreign courts, it is suggested and argued that obligations under art 33(1) apply whenever a refugee falls within a state's jurisdiction, which would occur when a state, or its agents, exercise effective control or authority over a refugee. Consequently, the *non-refoulement* obligation should not be limited territorially and should apply regardless of where a boat is intercepted.<sup>14</sup> Moving beyond the *Refugee Convention*, Part III suggests and argues that sufficient evidence of state practice and *opinio juris* exist to embed the extraterritorial *non-refoulement* obligation under CIL. A number of states which are not parties<sup>15</sup> to the *Refugee Convention* or its *Protocol Relating to the Status of Refugees 1967* ('*Refugee Protocol*')<sup>16</sup> will not be legally bound by the *non-refoulement* obligation<sup>17</sup> and refugees will therefore not be afforded art 33(1) protection in these states. However, if art 33(1) has become a CIL rule, these non-States Parties will be bound by the *non-refoulement* obligation.<sup>18</sup> Part IV applies the conclusions reached in Parts II and III to two incidents where the Commonwealth Government returned boats and suggests that Australia's actions breached art 33(1) and its CIL equivalent. Noting the challenges associated with the enforcement of Australia's international obligations, Part V concludes by reflecting upon some concerns raised regarding the implications for Australia and those who may potentially have been *refouled*.

## II EXTRATERRITORIAL APPLICATION OF ART 33(1)

Article 33(1) states:

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<sup>10</sup> See *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

<sup>11</sup> *Ibid*; United Nations High Commissioner for Refugees, 'Application No 43844/98 – *T I v United Kingdom*: Submissions to the European Court of Human Rights' (2000) 12 *International Journal of Refugee Law* 268, 269; Tamara Wood and Jane McAdam, 'Australian Asylum Policy all at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia-Malaysia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274, 293.

<sup>12</sup> The contiguous zone extends 12 nautical miles out from the perimeter of a state's territorial sea.

<sup>13</sup> The high seas consist of all maritime zones not within 200 nautical miles of any state.

<sup>14</sup> 'Interception' in this situation refers to physical interceptions as opposed to administrative interceptions such as visa controls. See, Barbara Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 *Fordham International Law Journal* 75, 83-4.

<sup>15</sup> For a list of States Parties to the treaties see United Nations, *Participant States to the Protocol Relating to the Status of Refugees*; United Nations, *Participant States to the Convention Relating to the Status of Refugees*.

<sup>16</sup> *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>17</sup> Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection* (Cambridge University Press, 2003) 87, 140.

<sup>18</sup> *Ibid*.

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.<sup>19</sup>

State and scholarly opinions as to whether art 33(1) applies extraterritorially have centred around the meaning of 'return'. The majority of scholars, including the Office of the United Nations High Commissioner for Refugees ('UNHCR') in its *Advisory Opinion* ('UNHCR's *Advisory Opinion*'),<sup>20</sup> contend that art 33(1) applies extraterritorially, thereby adopting a *wide* interpretation. However, some states (including the Commonwealth Government)<sup>21</sup> and state superior courts contend that art 33(1) only applies to a refugee within a state's territory, thereby adopting a *narrow* interpretation.<sup>22</sup> The authority supporting the narrow interpretation is the United States Supreme Court's decision in *Sale v Haitian Centers Council Inc* ('*Sale*').<sup>23</sup> The case arose due to a change in the United States ('US') policy surrounding the return of Haitian refugees intercepted on the high seas.<sup>24</sup> Between 1981 and 1992 potential Haitian refugees intercepted on the high seas were brought to the US for formal processing.<sup>25</sup> However, following a coup against the Haitian President in 1991, the number of Haitian asylum seekers fleeing Haiti increased.<sup>26</sup> In response to such increase, in 1992 the US changed its policy such that all Haitians intercepted on the high seas were returned to Haiti.<sup>27</sup> The US Supreme Court ruled (inter alia) that the US President's Executive Order that all aliens intercepted on the high seas could be repatriated was not limited by art 33. In other words, the US Court ruled that art 33 did not have an extraterritorial effect.

#### A *Method of Interpreting Treaties*

<sup>19</sup> *Refugee Convention* art 33(1).

<sup>20</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) 12 [24] <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4d9486929&query=extraterritorial>>. See, Tara Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 *International Journal of Refugee Law* 53, 71; Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256, 267-71; Mark Pallis, 'Obligations of States Toward Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 *International Journal of Refugee Law* 329, 345. See also, the dissenting opinion in *Sale v Haitian Centers Council Inc*, 509 US 155 (1993) 188-208 (Blackmun J).

<sup>21</sup> The Commonwealth of Australia, 'Defence to the Amended Statement of Claim', Defence in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 22 July 2014, 2 (f)(i)(A).

<sup>22</sup> See, eg, United States of America, Department of State Archive, *US Observations on UNHCR Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations* (28 December 2007) I <<http://2001-2009.state.gov/s/l/2007/112631.htm>>; *Sale v Haitian Centers Council Inc*, 509 US 155 (1993); Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951* (Division of International Protection of the United Nations High Commissioner for Refugees, 1997) Article 33 Comments (3) <<http://www.unhcr.org/3d4ab5fb9.html>>; Fischer-Lescano, Löhr and Tohidipur, above n 20, 265; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2002] 2 AC 1, 54 [68] (Lord Hope) ('*European Roma Rights*'); Ellen F D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42 *Vanderbilt Journal of Transnational Law* 279.

<sup>23</sup> 509 US 155 (1993).

<sup>24</sup> For a more detailed background to this case see Part III.

<sup>25</sup> United States President Ronald Reagan, *Interdiction of Illegal Aliens*, Executive Order 12324, 29 September 1981; United States President George Bush, *Interdiction of Illegal Aliens*, Executive Order 12807, 24 May 1992.

<sup>26</sup> Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Plank Yearbook of United Nations Law* 205, 241-2.

<sup>27</sup> United States President George Bush, *Interdiction of Illegal Aliens*, Executive Order 12807, 24 May 1992.

The *Vienna Convention on the Law of Treaties 1969* ('VCLT') art 31,<sup>28</sup> which is widely accepted as reflecting the CIL rule for the interpretation of treaties,<sup>29</sup> requires treaty provisions to 'be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>30</sup>

Context includes (inter alia) any agreements made between *all* parties when concluding the treaty.<sup>31</sup> State practice applying the treaty that establishes the parties' agreement regarding its interpretation and any relevant rules of international law must be taken into account together with the context.<sup>32</sup> These factors are integral to a treaty's interpretation because they form part of the legal system prevailing at the time of interpretation within which treaties must be interpreted and applied.<sup>33</sup>

Therefore, while the starting point for interpretation is the text of art 33(1) itself, this must be read in light of its context and the *Refugee Convention's* object and purpose.<sup>34</sup> A construction that advances the *Refugee Convention's* object and purpose should be adopted over a purely literal construction.<sup>35</sup>

## B *Applying the General Rule of Interpretation*

### 1 *Object and Purpose*

The preamble to the *Refugee Convention* indicates that it aims to ensure refugees have fundamental rights,<sup>36</sup> signifying a humanitarian object and purpose,<sup>37</sup> a purpose the UNHCR contends is to 'protect especially vulnerable individuals from persecution'.<sup>38</sup>

The object and purpose of treaties of humanitarian character, like the *Refugee Convention*, carry additional weight when interpreting treaties<sup>39</sup> because in such treaties, 'contracting States

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<sup>28</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

<sup>29</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* (Seabed Dispute Chamber of the International Tribunal for the Law of the Sea, Case No 17, 1 February 2011) [57]; *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, [64]-[65]; Lauterpacht and Bethlehem, above n 17, 103.

<sup>30</sup> VCLT art 31(1).

<sup>31</sup> Ibid art 31(2).

<sup>32</sup> Ibid art 31(3)(b)-(c). See also Lauterpacht and Bethlehem, above n 17, 104-5.

<sup>33</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, [53]. See also the discussion in Lauterpacht and Bethlehem, above n 17, 104, 105; James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 164.

<sup>34</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 12 [25]; Lauterpacht and Bethlehem, above n 17, 108; Hathaway, above n 33, 74.

<sup>35</sup> Hathaway, above n 33, 74. See also *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, 307 [46] (Kirby J).

<sup>36</sup> See Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 14 [29]; Lauterpacht and Bethlehem, above n 17, 106-7.

<sup>37</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 14 [29]; United States of America, Department of State Archive, above n 22, I(B); Lauterpacht and Bethlehem, above n 17, 106.

<sup>38</sup> Note, 'UN High Commissioner for Refugees Responds to US Supreme Court Decision in *Sale v Haitian Centers Council*' (1993) 32 *International Legal Materials* 1215.

<sup>39</sup> Lauterpacht and Bethlehem, above n 17, 104.

do not have any interest of their own; they merely have ... a common interest', being the accomplishment of higher purposes represented by such treaties' *raison d'être*.<sup>40</sup>

## 2 Ordinary Meaning of the Words

The ordinary meaning of 'return' includes 'to send back' and 'to bring, send, or put back to a former ... place'.<sup>41</sup> However, the majority in *Sale* held that 'return' has a narrower legal meaning due to insertion of ("refouler") following 'return',<sup>42</sup> it noted that 'return' is not listed as a translation of '*refouler*' in two respected English-French dictionaries.<sup>43</sup> Therefore, it concluded that '*refouler*' must restrict the meaning of 'return' and does not indicate equal meaning.

The *Sale* majority determined the English translation of '*refouler*' includes to 'repulse', 'repel', 'refuse entry', and 'drive back'.<sup>44</sup> They considered this restricted the meaning of 'return' to a 'defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination'.<sup>45</sup> However, the majority adopted an even narrower interpretation, concluding 'return' only refers to a refugee already within a state's territory but not yet resident there.<sup>46</sup> *Sale* was cited with approval in the subsequent House of Lords' decision, *R (European Roma Rights Centre) v Immigration Officer at Prague Airport ('European Roma Rights')*.<sup>47</sup>

However, in a strong dissent in *Sale*, Blackmun J condemned the majority's reasoning, calling their 'tortured reading unsupported and unnecessary',<sup>48</sup> and stating they led themselves astray by dispensing with the ordinary meaning of 'return' and adopting from the outset the assumption that 'return' had a narrower legal meaning.<sup>49</sup> Blackmun J noted the language used is unambiguous: vulnerable refugees shall not be returned.<sup>50</sup> It imposes no territorial limitation on the application of art 33(1); restricting only where refugees may be sent.<sup>51</sup>

The *Sale* majority accepted that '*refouler*' refers to rejection at the border; yet concluded 'return' did not apply to refugees outside a state's territory. These conclusions contradict each other. At a minimum, the majority ought to have concluded that 'return' also applied to refugees at the border yet outside a state's territory. The House of Lords in *European Roma Rights* accepted this.<sup>52</sup> Failing to accept this limited extraterritorial application indicates the *Sale* majority's decision may have been influenced by political considerations.<sup>53</sup>

<sup>40</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23.

<sup>41</sup> Merriam-Webster Online: Dictionary, *Return* (2014) definition of 'return' <<http://www.merriam-webster.com/dictionary/return>>.

<sup>42</sup> 509 US 155 (1993) 180.

<sup>43</sup> The two dictionaries are Denis Girard, *The New Cassell's French Dictionary: French-English, English-French* (Funk & Wagnalls, 1973) and Marguerite Marie Dubois, *Modern French-English Dictionary* (Librairie Larousse, 1978); *Sale*, 509 US 155 (1993) 180-1.

<sup>44</sup> 509 US 155 (1993) 181.

<sup>45</sup> *Ibid* 181-2.

<sup>46</sup> *Ibid* 182.

<sup>47</sup> [2005] 2 AC 1, 30-1 [18] (Lord Bingham), 54 [68] (Lord Hope).

<sup>48</sup> 509 US 155 (1993) 191.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* 190.

<sup>51</sup> *Ibid* 193.

<sup>52</sup> [2005] 2 AC 1, 38 [26] (Lord Bingham).

<sup>53</sup> See, eg, Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 247.

The majority failed to give ‘return’ its plain meaning,<sup>54</sup> instead adopting an interpretation that excluded actions that actually deliver a refugee back to their persecutors, the plainest meaning to be attached to ‘return’.<sup>55</sup>

Goodwin-Gill called it a decision of ‘domestic, not international law’,<sup>56</sup> stating the majority takes ‘passages out of context, misquotes academic and other commentators, misrepresents the sense of the UNHCR *Handbook*, and ignores whatever might obstruct its policy decision’.<sup>57</sup>

Contrary to the *Sale* majority’s conclusion, ‘return’ and ‘refouler’ do not limit territorially art 33(1)’s application. Article 33(1) prohibits a refugee’s return ‘in *any manner whatsoever*’,<sup>58</sup> indicating an intention ‘to prohibit any act of removal or rejection’ that places a refugee at risk of persecution.<sup>59</sup> The formal description of the act, whether it be expulsion, return, or rejection, is immaterial.<sup>60</sup> It covers ‘any imaginable action exposing the person concerned to the risk of persecution’,<sup>61</sup> including action taken beyond a State’s territory, at entry points, and in international zones.<sup>62</sup> Such actions are open from the use of ‘return’ as they constitute a form of ‘sending back’, which represents its literal meaning.

When interpreting a treaty, a text construction that advances a treaty’s object and purpose should be adopted over a purely literal construction.<sup>63</sup> The *Sale* majority acknowledged its narrow interpretation, which allows fleeing refugees to be gathered and returned to the country they sought to escape, violating art 33’s spirit.<sup>64</sup> Yet, it did not give consideration to the fact that its interpretation, which allow states to reach outside their territory and *refouler* refugees to countries where they face a risk of persecution, is fundamentally inconsistent with the humanitarian object and purpose of the *Refugee Convention*,<sup>65</sup> which seeks to provide rights to, and protect, refugees.<sup>66</sup> Similarly, the United States Government’s response to *UNHCR’s Advisory Opinion* (‘US Observations’), which contends art 33(1) does not apply extraterritorially, acknowledges the *Refugee Convention’s* humanitarian character,<sup>67</sup> but does not refer to this when interpreting art 33(1),<sup>68</sup> indicating they failed to take into account the *Refugee Convention’s* object and purpose as required by the *VCLT*.<sup>69</sup>

The US Government’s narrow interpretation leads to a situation where refugees who reach a state’s territory are protected, but those who do not are not protected. This encourages states to implement interception policies to prevent refugees entering their territory and gaining

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<sup>54</sup> Hathaway, above n 33, 337.

<sup>55</sup> *Ibid* 337-8.

<sup>56</sup> Guy S Goodwin-Gill, ‘The Haitian *Refoulement* Case: A Comment’ (1994) 6 *International Journal of Refugee Law* 103, 105 (emphasis in original).

<sup>57</sup> *Ibid* 104-5.

<sup>58</sup> *Refugee Convention* art 33(1) (emphasis added).

<sup>59</sup> Lauterpacht and Bethlehem, above n 17, 112.

<sup>60</sup> *Ibid*.

<sup>61</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 268.

<sup>62</sup> Lauterpacht and Bethlehem, above n 17, 106-7, 111; Goodwin-Gill and McAdam, above n 53, 246.

<sup>63</sup> Hathaway, above n 25, 74; see also *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, 307 [46] (Kirby J).

<sup>64</sup> 509 US 155 (1993) 183.

<sup>65</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 14 [29].

<sup>66</sup> ‘UN High Commissioner for Refugees Responds to US Supreme Court Decision’, above n 38; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 14 [29]; Lauterpacht and Bethlehem, above n 17, 106-7.

<sup>67</sup> United States of America, Department of State Archive, above n 22, I(B).

<sup>68</sup> *Ibid* I(A).

<sup>69</sup> See *VCLT* art 31(1).

protection, leaving fleeing refugees with nowhere to go. This is incompatible with the *Refugee Convention's* object and purpose to protect refugees.

Any ambiguity in the terms' literal interpretation 'must be resolved in favour of an interpretation' consistent with the treaty's humanitarian character.<sup>70</sup> Consequently, reading art 33(1) in light of the *Refugee Convention's* object and purpose supports art 33(1)'s extraterritorial application because it conforms to the *Refugee Convention's* humanitarian character, whereas a narrow interpretation does not.

### 3 Context

The *Refugee Convention's* provisions form the context within which to interpret art 33(1).<sup>71</sup>

#### (a) Article 33(1)'s Significance

Article 33(1) is one of the few provisions to which reservations are not allowed,<sup>72</sup> and its only exception is art 33(2),<sup>73</sup> when a refugee poses a security risk to the state.<sup>74</sup> This illustrates art 33(1)'s significance in the *Refugee Convention*,<sup>75</sup> as it is almost a non-derogable obligation.<sup>76</sup> Its *non-refoulement* obligation constitutes an 'essential ... component of international refugee protection',<sup>77</sup> signifying it has a fundamentally humanitarian character.<sup>78</sup> This supports an extraterritorial interpretation because a narrow interpretation is inconsistent with art 33(1)'s humanitarian character.

<sup>70</sup> Lauterpacht and Bethlehem, above n 17, 113.

<sup>71</sup> See *VCLT* art 31(2).

<sup>72</sup> *Refugee Convention* art 42(1). See also *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art VII(1).

<sup>73</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 4 [11].

<sup>74</sup> See *Refugee Convention* art 33(2).

<sup>75</sup> Lauterpacht and Bethlehem, above n 17, 101.

<sup>76</sup> *Ibid* 107; Aoife Duffy, 'Expulsion to Face Torture? *Non-Refoulement* in International Law' (2008) 20 *International Journal of Refugee Law* 373, 374.

<sup>77</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 5 [11]. See also Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (a); Executive Committee, Office of the United Nations High Commissioner for Refugees, *Problems of Extradition Affecting Refugees*, Conclusion 17 (XXXI) (16 October 1980) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 25 (XXXIII) (20 October 1982) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 65 (XLII) (11 October 1991) (c); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 68 (XLIII) (9 October 1991) (f); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 79 (XLVII) (11 October 1996) (j); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 81 (XLVII) (17 October 1997) (i); Executive Committee, Office of the United Nations High Commissioner for Refugees, *Conclusions on the Provision on International Protection Including Through Complementary Forms of Protection*, Conclusion 103 (LVI) (7 October 2005) (m); GA Res 51/75, UN GAOR, 51<sup>st</sup> sess, 82<sup>nd</sup> plen mtg, Agenda Item 105, UN Doc A/RES/51/75 (12 February 1997) [3]; GA Res 48/116, UN GAOR, 48<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 113, UN Doc A/RES/58/116 (20 December 1993) [3].

<sup>78</sup> Lauterpacht and Bethlehem, above n 17, 107.



(b) *Article 33(2)*

The *Sale* majority and US Observations contend that art 33(2) supports a narrow interpretation of art 33(1).<sup>79</sup> Article 33(2) only applies to refugees who are dangerous to the country in which they are *in*.<sup>80</sup> It does not apply to refugees outside a state's territory, even if they pose a danger.<sup>81</sup> The *Sale* majority reasoned that if art 33(1) applied extraterritorially, art 33(2) 'would create an absurd anomaly' where dangerous refugees intercepted on the high seas are entitled to protection, while those residing in a state are not.<sup>82</sup> Therefore, it is reasonable to assume art 33(1) was limited to applying to refugees within a state because art 33(2) was similarly limited.<sup>83</sup>

This argument contains fundamental flaws. Firstly, the provisions serve different purposes;<sup>84</sup> art 33(1) concerns protecting refugees<sup>85</sup> whereas art 33(2) concerns protecting States from dangerous refugees.<sup>86</sup> Article 33(2) permits states to return dangerous refugees within their territory, not seize and return refugees outside their territory which 'expresses precisely' the *Refugee Convention's* objectives and concerns.<sup>87</sup> That 'only a refugee already in a country can pose a danger to the country ... proves nothing'.<sup>88</sup> Secondly, the approach is methodologically wrong.<sup>89</sup> It uses 'the exception to infer the rule',<sup>90</sup> failing to recognise that '[n]onreturn is the rule' and art 33(2) is the exception.<sup>91</sup> Due to these flaws, this argument carries no weight.

(c) *Other Provisions with Territorial Requirements*

The *Refugee Convention* contains numerous provisions that expressly include territorial requirements, and these generally limit their scope to a state's territory.<sup>92</sup> This leads one to infer that where a provision was intended to apply only within a state's territory the drafters used express words to convey that intention.<sup>93</sup> Article 33(1) contains no such words, indicating that it is not territorially limited.

The US Observations contend that it is unreasonable to interpret every provision as applying extraterritorially absent an express limitation.<sup>94</sup> This stance is erroneous.<sup>95</sup> The *Refugee*

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<sup>79</sup> See *Sale*, 509 US 155 (1993) 179-80; United States of America, Department of State Archive, above n 22, I(A).

<sup>80</sup> *Refugee Convention* art 33(2).

<sup>81</sup> *Sale*, 509 US 155 (1993) 179.

<sup>82</sup> *Ibid* 179-80.

<sup>83</sup> *Ibid* 180; United States of America, Department of State Archive, above n 22, I(A).

<sup>84</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 13 [28]; Fischer-Lescano, Löhr and Tohidipur, above n 20, 270.

<sup>85</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 270.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Sale*, 509 US 155 (1993) 194 (Blackmun J).

<sup>88</sup> *Ibid*.

<sup>89</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 270.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Sale*, 509 US 155 (1993) 193 (Blackmun J).

<sup>92</sup> See *Refugee Convention* arts 2, 4, 15, 17(1) 18, 19, 21, 23, 24, 26, 27, 28, 32.

<sup>93</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 13-14 [28].

<sup>94</sup> United States of America, Department of State Archive, above n 22, I(A).

<sup>95</sup> Hathaway, above n 33, 339.

*Convention* aims to protect refugees *globally*.<sup>96</sup> Consequently, it is reasonable that its provisions apply extraterritorially absent an express limitation because the refugees it aims to protect regularly have to flee persecution through extraterritorial zones.

#### 4 *Factors Taken into Account together with Context*

##### (a) *Subsequent State Practice*

Subsequent state practice that establishes the parties' agreement regarding a treaty's interpretation must be taken into account together with a treaty's context.<sup>97</sup>

If all states parties act in a way that leads to an inference of common intention, that practice is material to a treaty's interpretation.<sup>98</sup> However, if only some states act a particular way according to *their* interpretation, the practice is not material.<sup>99</sup> This is because the actions of only some states cannot impose obligations on other states parties, as they have not consented to be bound in that way.<sup>100</sup> In addition, states' actions can be highly self-serving and not reflective of a treaty's correct interpretation.<sup>101</sup> This is especially so when the practice observed is that of states, whose behaviour a provision aims to constrain to protect individuals,<sup>102</sup> as in the case of art 33(1). Consequently, care must be taken when looking at state practice.

The UNHCR contends that Conclusions of its Executive Committee ('ExCom'), which consists of member states that demonstrate an interest in solving refugee problems,<sup>103</sup> express state practice.<sup>104</sup> While non-binding, these Conclusions represent agreements reached by member states and are relevant to the interpretation of refugee issues.<sup>105</sup>

Some ExCom Conclusions refer to *non-refoulement's* importance irrespective of whether a refugee is within a state's territory.<sup>106</sup> Some international refugee and human rights instruments also support *non-refoulement's* extraterritorial application, as they do not territorially restrict *non-refoulement* obligations.<sup>107</sup> However, the US Observations identify

<sup>96</sup> 'UN High Commissioner for Refugees Responds to US Supreme Court Decision', above n 30; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 5 [11].

<sup>97</sup> *VCLT* art 31(3)(b).

<sup>98</sup> Hathaway, above n 33, 70-1.

<sup>99</sup> *Ibid* 68-9. See also *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 191 (Judge Spender).

<sup>100</sup> Hathaway, above n 33, 68.

<sup>101</sup> *Ibid* 70-2; Gerald P McGinley, 'Practice as a Guide to Treaty Interpretation' (Winter 1985) 9 *The Fletcher Forum* 211, 219.

<sup>102</sup> Hathaway, above n 33, 71-2.

<sup>103</sup> Office of the United Nations High Commissioner for Refugees, *Step-by-step Guide to Joining UNHCR's Executive Committee* (2014) <<http://www.unhcr.org/pages/49dca6506.html>>.

<sup>104</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 15 [32].

<sup>105</sup> Office of the United Nations High Commissioner for Refugees, *ExCom Conclusions on International Protection* (2014) <<http://www.unhcr.org/pages/49e6e6dd6.html>>.

<sup>106</sup> Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement, Conclusion 6 (XXVIII)* (12 October 1977) (c); Executive Committee, Office of the United Nations High Commissioner for Refugees, *Protection of Asylum-Seekers in Situations of Large-Scale Influx, Conclusion 22 (XXXII)* (21 October 1981) (II)(A)(2).

<sup>107</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 15 [32]. See especially *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974); *American Convention on Human Rights, "Pact of San Jose"*, *Costa Rica*, signed 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978);

that ExCom Conclusions and other international instruments do not represent state practice establishing the parties' *agreement* regarding the *Refugee Convention's* interpretation.<sup>108</sup> At the time of writing, 94 states make up ExCom, and there were as few as 31 when some of the Conclusions cited were made;<sup>109</sup> considerably less than the 147 states parties.<sup>110</sup> With respect to the international instruments, some are only regional instruments,<sup>111</sup> meaning they reflect only some states' agreement; nor are their *non-refoulement* obligations identical to art 33(1).<sup>112</sup> Therefore, these Conclusions and instruments carry little weight in interpreting the *Refugee Convention*.<sup>113</sup>

A significant instrument representing subsequent State practice is the *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugee* ('*Declaration of States Parties*') adopted at the 2001 Ministerial Meeting of States Parties.<sup>114</sup> The States Parties agreed that the *Refugee Convention* 'must be interpreted in conformity with international human rights treaties'.<sup>115</sup> This is particularly significant with respect to the relevant rules of international law.

### (b) *Relevant Rules of International Law*

Any relevant rules of international law must be taken into account together with context when interpreting treaties.<sup>116</sup>

The *UNHCR's Advisory Opinion* states that '[i]nternational refugee law and international human rights law are complementary and mutually reinforcing regimes'.<sup>117</sup> Consequently, Article 33(1), which embodies the *Refugee Convention's* humanitarian character, should be interpreted consistently with international human rights law.<sup>118</sup> The *Declaration of States Parties* supports this.<sup>119</sup>

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*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, signed 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT').

<sup>108</sup> United States of America, Department of State Archive, above n 22, I(C); Note, Part III contends these sources indicate the existence of CIL.

<sup>109</sup> Office of the United Nations High Commissioner for Refugees, *ExCom Members and How to Apply* (2014) <<http://www.unhcr.org/pages/49c3646c89.html>>.

<sup>110</sup> United Nations, *Participant States to the Convention Relating to the Status of Refugees* (29 June 2014) United Nations Treaty Collection <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>.

<sup>111</sup> See *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974); *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, signed 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

<sup>112</sup> United States of America, Department of State Archive, above n 22, I(C).

<sup>113</sup> *Ibid.*

<sup>114</sup> Ministerial Meeting of the States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugee*, UN GAOR, UN Doc HCR/MMSP/2001/09 (16 January 2002, adopted 13 December 2001) ('*Declaration of States Parties*').

<sup>115</sup> *Ibid* Preamble para 3, Preamble para 6, paras 1-2; Fischer-Lescano, Löhr and Tohidipur, above n 20, 260.

<sup>116</sup> *VCLT* art 31(3)(c).

<sup>117</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 16 [34].

<sup>118</sup> *Ibid.*

<sup>119</sup> See *Declaration of States Parties*, UN Doc HCR/MMSP/2001/09, Preamble para 3, Preamble para 6, paras 1-2.

Under international human rights law, obligations can extend beyond states' territories.<sup>120</sup> They do so when states exercise jurisdiction extraterritorially,<sup>121</sup> which, as stated by the Human Rights Committee ('HRC') in *General Comment No 31*, occurs when states exercise effective control and authority over an area or persons.<sup>122</sup> This concept of jurisdiction is established in decisions of the HRC,<sup>123</sup> the European Court of Human Rights ('ECtHR'),<sup>124</sup> and the International Court of Justice ('ICJ').<sup>125</sup>

The *International Covenant on Civil and Political Rights 1966* ('ICCPR') art 2(1) and the *Convention for the Protection of Human Rights and Fundamental Freedoms 1950* ('ECHR') art 1 require states to uphold the rights of individuals subject to, and within, their jurisdiction, respectively.<sup>126</sup>

### (i) *De Facto Control*

With respect to the ICCPR, in *Delia Saldias de Lopez v Uruguay* and *Lilian Celiberti de Casariego v Uruguay*, the HRC concluded that a state could be held accountable for violations of the ICCPR that its agents commit on another state's territory.<sup>127</sup> It considered it to be unconscionable to interpret art 2(1) in a way that allowed states to commit violations on another state's territory which they could not commit on their own.<sup>128</sup> Consequently, it interpreted 'subject to its jurisdiction' as referring not to where a violation occurred but to the relationship between the individual and the state.<sup>129</sup> The ICJ confirmed this in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, concluding that obligations arise where states exercise jurisdiction extraterritorially.<sup>130</sup>

<sup>120</sup> Goodwin-Gill and McAdam, above n 53, 244.

<sup>121</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 4 [9], 16 [35].

<sup>122</sup> Ibid 16 [34]-[35]; Human Rights Committee, *General Comment No 31: The Nature of the General Obligation Imposed on States Parties to the Covenant*, 18<sup>th</sup> sess, 2187<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10].

<sup>123</sup> See Human Rights Committee, *Delia Saldias de Lopez v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) [12.2]-[12.3]; Human Rights Committee, *Lilian Celiberti de Casariego v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) [10.2]-[10.3].

<sup>124</sup> See *Loizidou* (1995) 20 EHRR 99, [62]; *Banković v Belgium (Admissibility)* [2001] XII Eur Court HR 333, 351-2 [59]-[61]; 355-6 [71]-[73]; *Issa v Turkey* (2005) 41 EHRR 27, [68]-[71]; *Öcalan v Turkey* [2005] IV Eur Court HR 131, 164-5 [91]; *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 132-3 [77]-[81].

<sup>125</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 180 [109]-[112].

<sup>126</sup> *International Covenant on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>127</sup> See Human Rights Committee, *Delia Saldias de Lopez v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) [12.3]; Human Rights Committee, *Lilian Celiberti de Casariego v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) [10.3].

<sup>128</sup> Human Rights Committee, *Delia Saldias de Lopez v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) [12.3]; Human Rights Committee, *Lilian Celiberti de Casariego v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) [10.3].

<sup>129</sup> See Human Rights Committee, *Delia Saldias de Lopez v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) [12.2]; Human Rights Committee, *Lilian Celiberti de Casariego v Uruguay*, 13<sup>th</sup> sess, UN Doc CCPR/C/13/D/56/1979 (29 July 1981) [10.2].

<sup>130</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 179-80 [110]-[111].

With respect to the *ECHR*, the ECtHR held that a state's jurisdiction extends extraterritorially where its authorities' acts produce extraterritorial effects.<sup>131</sup> This 'derives from the fact of such control' exercised directly or through agents.<sup>132</sup> Therefore, extraterritorial jurisdiction occurs where states exercise authority or control over a territory or individuals.<sup>133</sup> In *Banković v Belgium*, the ECtHR stressed the exceptional nature of this principle.<sup>134</sup> While a State's jurisdictional competence is primarily territorial,<sup>135</sup> it can be exercised extraterritorially, but this is limited by, and subordinate to, other states' sovereign territorial rights.<sup>136</sup> Consequently, the ECtHR limited extraterritorial jurisdiction to cases where

[a] State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.<sup>137</sup>

In acknowledging extraterritorial jurisdiction, the ECtHR adopted the HRC's reasoning, stating that the *ECHR* art1 'cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on' another state's territory which it could not perpetrate on its own.<sup>138</sup>

However, the ECtHR in *Banković v Belgium* commented that the *ECHR* only operates in contracting states' territories, not globally.<sup>139</sup> This appears to limit the *ECHR*'s extraterritorial application.<sup>140</sup> However, subsequent decisions have not followed this. For example, in *Öcalan v Turkey*, a person's arrest by Turkish security forces in an international zone of Nairobi Airport, and forced return to Turkey, meant that jurisdiction was exercised extraterritorially from the time they came under Turkish authority.<sup>141</sup>

In *Al-Skeini v United Kingdom*, the ECtHR identified the situation in *Öcalan v Turkey* as one of three circumstances that can result in extraterritorial jurisdiction.<sup>142</sup> This circumstance is the most relevant to refugee cases, with the ECtHR stating that the 'use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's' jurisdiction.'<sup>143</sup>

*Banković v Belgium* also raises an issue regarding the level of control required. The ECtHR held that NATO's bombing of Yugoslavia was not an exercise of extraterritorial jurisdiction

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<sup>131</sup> *Loizidou* (1995) 20 EHRR 99, [62]; see also *Issa v Turkey* (2005) 41 EHRR 27, [68].

<sup>132</sup> *Loizidou* (1995) 20 EHRR 99, [62]; see also *Issa v Turkey* (2005) 41 EHRR 27, [69].

<sup>133</sup> See Goodwin-Gill and McAdam, above n 45, 245.

<sup>134</sup> *Banković* [2001] XII Eur Court HR 333, 352 [61], 354 [67].

<sup>135</sup> *Ibid* 351-2 [59]; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 180 [109].

<sup>136</sup> *Banković v Belgium* [2001] XII Eur Court HR 333, 351-2 [59]-[60].

<sup>137</sup> *Ibid* 355 [71]; see also *Loizidou* (1995) 20 EHRR 99, [62]; *Issa v Turkey* (2005) 41 EHRR 27, [69].

<sup>138</sup> *Issa v Turkey* (2005) 41 EHRR 27, [71].

<sup>139</sup> [2001] XII Eur Court HR 333, 358-9 [80].

<sup>140</sup> Goodwin-Gill and McAdam, above n 53, 246.

<sup>141</sup> [2005] IV Eur Court HR 131, 164-5 [91].

<sup>142</sup> The other two circumstances are where diplomatic and consular agents present on foreign territory, exert authority and control over others; and where a State through consent, invitation or acquiescence of a foreign State's government, exercises all or some of the public powers normally exercised by that government. See *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [133]-[136].

<sup>143</sup> *Ibid* [136].

because the attack's victims were not under the NATO States' jurisdiction.<sup>144</sup> Therefore, jurisdiction does not exist simply because a state's actions impact upon a person.<sup>145</sup> However, this is distinguishable from situations involving the *refoulement* of maritime refugees by vessels, as vessels, which have a more physical and enduring presence than planes, are used to intercept, and often detain, refugees. In *Öcalan v Turkey*, effective physical control exerted over persons was sufficient to establish extraterritorial jurisdiction.<sup>146</sup> Sufficient control also exists where 'state vessels use their physical presence and strength' in order to make other vessels turn back<sup>147</sup> and where military vessels intercept refugees in international waters.<sup>148</sup>

These decisions support the proposition that states exercise *de facto* jurisdiction over territory outside their national territory if they, or their agents, attempt to exercise effective control over persons within that territory.<sup>149</sup> This requires a state to respect persons' rights when they are within the state's power or effective control, regardless of *where* they are,<sup>150</sup> making the existence of effective authority and control decisive.<sup>151</sup>

In addition, by choosing to have a contiguous zone and patrolling it in order to prevent infringements of immigration laws,<sup>152</sup> a state exercises effective control over that zone through the exercise of public powers as identified by the ECtHR.<sup>153</sup> These actions alone bring refugees within the contiguous zone under the state's jurisdiction, entitling them to rights associated with that jurisdiction.<sup>154</sup>

## (ii) *De Jure Control*

Recent decisions of international courts and bodies support the exercise of extraterritorial jurisdiction where states exert *de jure* control. Vessels on the high seas are subject to the exclusive jurisdiction of the state whose flag they fly.<sup>155</sup>

The ECtHR has recognised a state's extraterritorial jurisdiction in cases concerning acts carried out on vessels flying the state's flag.<sup>156</sup> Where control is exercised over persons on board such a vessel, there exists *de jure* control.<sup>157</sup> This is particularly relevant to the detention of refugees on government vessels, which fly their state flag, bringing refugees on board within the state's

<sup>144</sup> See *Banković v Belgium* [2001] XII Eur Court HR 333, 359 [82].

<sup>145</sup> Hathaway, above n 33, 168.

<sup>146</sup> [2005] IV Eur Court HR 131, 164-5 [91].

<sup>147</sup> See, eg, Fischer-Lescano, Löhr and Tohidipur, above n 20, 275-6.

<sup>148</sup> Hathaway, above n 33, 339.

<sup>149</sup> *Ibid* 160-1, 169; Lauterpacht and Bethlehem, above n 17, 111; Fischer-Lescano, Löhr and Tohidipur, above n 20, 275-6.

<sup>150</sup> Human Rights Committee, *General Comment No 31: The Nature of the General Obligation Imposed on States Parties to the Covenant*, 18<sup>th</sup> sess, 2187<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10].

<sup>151</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 16 [35]; see also Hathaway, above n 33, 160-1; Richard Barnes, 'Refugee Law at Sea' (2004) 53 *International and Comparative Law Quarterly* 47, 68.

<sup>152</sup> See *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 33(1)(a).

<sup>153</sup> See *Banković v Belgium* [2001] XII Eur Court HR 333, 355 [71]. See also *Loizidou* (1995) 20 EHRR 99, [62]; *Issa v Turkey* (2005) 41 EHRR 27, [69].

<sup>154</sup> See Hathaway, above n 33, 169-70.

<sup>155</sup> *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 132 [77]; *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 92(1).

<sup>156</sup> *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 132 [77].

<sup>157</sup> *Ibid*.

*de jure* control. In *Hirsi Jamma v Italy*, the ECtHR held that during the period between migrants boarding an Italian ship and being transferred to Libyan authorities, they were under the Italian authorities' 'continuous and exclusive *de jure* and *de facto* control'.<sup>158</sup>

This is supported by decisions of the Committee Against Torture on violations of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* ('CAT'), which like the *Refugee Convention* contains an express *non-refoulement* provision.<sup>159</sup> Article 2(1) raises the concept of jurisdiction. In *Communication No 323/2007*, the Committee held jurisdiction was applicable not only in respect of art 2(1) but in all the CAT's provisions.<sup>160</sup> In this case, Spanish authorities intercepted 369 migrants off the Mauritanian coast. The Committee concluded Spain maintained control over the migrants from the time their vessel was rescued and throughout the subsequent identification and repatriation process in Mauritania.<sup>161</sup> This indicates *de jure* control can be decisive in establishing extraterritorial jurisdiction.<sup>162</sup>

### (iii) *Applicability to the Refugee Convention*

Treaties must remain dynamic.<sup>163</sup> Their meanings change depending on the development of international legal and factual circumstances and concepts,<sup>164</sup> such as the development of general legal principles and changes in State behaviour.

Given the *Declaration of States Parties* that the *Refugee Convention* be interpreted in conformity with international human rights treaties,<sup>165</sup> and that treaties and the principle of *non-refoulement* must remain dynamic and able to adapt to changing concepts and circumstances over time,<sup>166</sup> the *Refugee Convention* ought to be interpreted in a manner consistent with the increased recognition of human rights treaties' extraterritorial application.<sup>167</sup>

The HRC's and ECtHR's reasoning applies equally to the *Refugee Convention*. Article 33(1) should not be interpreted so as to allow states to reach outside their territory and *refoule* refugees to territories where they face a risk of persecution as this would frustrate the *Refugee Convention's* humanitarian object and purpose<sup>168</sup> and is inconsistent with the concept of extraterritorial jurisdiction.<sup>169</sup>

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<sup>158</sup> *Ibid* 133 [81].

<sup>159</sup> See CAT art 3(1).

<sup>160</sup> Committee Against Torture, *Communication No 323/2007*, 41<sup>st</sup> sess, UN Doc CAT/C/41/D/323/2007 (21 November 2008) [8.2].

<sup>161</sup> *Ibid*.

<sup>162</sup> Violeta Moreno-Lax, 'Hiris Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *Human Rights Law Review* 574, 580; *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 133 [81].

<sup>163</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 260; Goodwin-Gill and McAdam, above n 53, 208.

<sup>164</sup> Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 *The Law and Practice of International Courts and Tribunals* 433, 480.

<sup>165</sup> See *Declaration of States Parties*, UN Doc HCR/MMSP/2001/09, Preamble para 3, Preamble para 6, paras 1-2.

<sup>166</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 260; Goodwin-Gill and McAdam, above n 53, 208.

<sup>167</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 269.

<sup>168</sup> *Ibid* 270.

<sup>169</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 19 [43].

Interpreting art 33(1) in a manner consistent with this extraterritorial jurisdiction concept requires that it apply extraterritorially wherever states exercise jurisdiction, which occurs where they exercise effective control and authority over refugees.<sup>170</sup> This concept was not addressed in *Sale* or *European Roma Rights*, and therefore, has not been rejected by these state superior courts.<sup>171</sup> It has received support from the United Kingdom Supreme Court, which explained that art 33(1)'s protection attached to refugees subject to a state's jurisdiction.<sup>172</sup>

Additionally, interception methods exist primarily for migration control and often lack sufficient safeguards for identifying those needing protection,<sup>173</sup> acting as a barrier to the *Universal Declaration of Human Rights*' right to seek asylum,<sup>174</sup> to which the *Refugee Convention*'s Preamble specifically refers.<sup>175</sup> Preventing refugees from presenting a request for asylum may breach this right.<sup>176</sup> Therefore, an interpretation of Article 33(1) that allows States to intercept and *refouler* refugees outside their territory is inconsistent with this fundamental right to request asylum.

## 5 Territorial Scope of Art 33(1)

Having discussed various influential factors, it is necessary to consider these in accordance with the general rule to determine the interpretation of art 33(1).

With regards to the *VCLT*'s requirement to interpret a treaty in good faith,<sup>177</sup> Lord Bingham in *European Roma Rights* stated that 'there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than' what it has agreed to.<sup>178</sup> Lord Bingham referred to ICJ decisions,<sup>179</sup> which held that 'good faith' 'is not itself a source of obligation where none' otherwise exists.<sup>180</sup> Such an imposition does not occur with respect to art 33(1)'s wide interpretation. The wide interpretation is open on the words used, meaning the good faith principle is being used only to choose one interpretation over the other, not to impose an obligation that does not otherwise exist.

As stated earlier, the ordinary meaning of 'return' means 'to send back',<sup>181</sup> and the ordinary meaning of '*refouler*' means to 'repulse', 'repel', 'refuse entry', and 'drive back'.<sup>182</sup> When these terms are read in light of their context and the *Refugee Convention*'s object and purpose, it is clear the wide interpretation applies. The phrase 'in any manner whatsoever'<sup>183</sup> which follows 'return' and '*refouler*' lends itself to an interpretation that prohibits any kind of act

<sup>170</sup> Ibid; Lauterpacht and Bethlehem, above n 17, 111.

<sup>171</sup> Justice North, 'Extraterritorial Effect of Non-Refoulement' (Speech delivered at the International Association of Refugee Law Judges World Conference, Bled, Slovenia, 7-9 September 2011).

<sup>172</sup> *R (ST) v Secretary for the Home Department* [2012] 2 AC 135, 147 [21] (Lord Hope of Craighead).

<sup>173</sup> Goodwin-Gill and McAdam, above n 53, 372.

<sup>174</sup> See Ibid; *Universal Declaration of Human Rights*, GA Res 217 (III) A, UN GAOR, 3<sup>rd</sup> Comm, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, Agenda Item 58, UN Doc A/RES/217(III) A (10 December 1948) art 14(1).

<sup>175</sup> *Refugee Convention* Preamble.

<sup>176</sup> Trevisanut, above n 26, 213.

<sup>177</sup> See *VCLT* art 31(1).

<sup>178</sup> [2005] 2 AC 1, 31 [19].

<sup>179</sup> Ibid 32 [19].

<sup>180</sup> *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Rep 69, 105 [94]; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ Rep 275, 297 [39]. See also D'Angelo, above n 22, 296.

<sup>181</sup> Merriam-Webster Online: Dictionary, above n 41, definition of 'return'.

<sup>182</sup> *Sale*, 509 US 155 (1993) 181.

<sup>183</sup> *Refugee Convention* art 33(1).



leading to a refugee's return, regardless of whether that act occurs inside or outside a state's territory.<sup>184</sup> It encompasses non-return and non-rejection.<sup>185</sup>

The *Refugee Convention's* fundamentally humanitarian object and purpose<sup>186</sup> would be frustrated if states were allowed to avoid their obligations simply by reaching outside their territory.<sup>187</sup> It would render the entire *Refugee Convention* irrelevant.<sup>188</sup> Therefore, the object and purpose support an interpretation that art 33(1) applies extraterritorially.

The *Refugee Convention's* provisions add further weight to an interpretation that art 33(1) applies extraterritorially. Article 33(1) is an essential element of international refugee protection.<sup>189</sup> The protection of refugees is seriously undermined if states can determine the *Refugee Convention's* point of application.<sup>190</sup> The express inclusion of territorial requirements in the *Refugee Convention's* other provisions<sup>191</sup> supports the conclusion that one would have been included in art 33(1) if it were intended to have a territorial limitation.<sup>192</sup>

The relevant rules of international law provide strong support for Article 33(1)'s extraterritorial application. Scholars and subsequent state practice, evident by the *Declaration of States Parties*, indicate the *Refugee Convention* must be interpreted in conformity with international human rights treaties.<sup>193</sup> An examination of human rights treaties reveals their application extends to wherever states exercise jurisdiction,<sup>194</sup> which occurs whenever they, or their agents, exert effective control or authority over persons.<sup>195</sup>

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<sup>184</sup> Lauterpacht and Bethlehem, above n 17, 106-7, 111; Goodwin-Gill and McAdam, above n 53, 246.

<sup>185</sup> Goodwin-Gill and McAdam, above n 53, 208.

<sup>186</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 14 [29]; United States of America, Department of State Archive, above n 22, I(B); Lauterpacht and Bethlehem, above n 17, 106.

<sup>187</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 269-70; Hathaway, above n 33, 163-4.

<sup>188</sup> Hathaway, above n 33, 163-4.

<sup>189</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 5 [11]. See also Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (a); Executive Committee, Office of the United Nations High Commissioner for Refugees, *Problems of Extradition Affecting Refugees*, Conclusion 17 (XXXI) (16 October 1980) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 25 (XXXIII) (20 October 1982) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 65 (XLII) (11 October 1991) (c); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 68 (XLIII) (9 October 1991) (f); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 79 (XLVII) (11 October 1996) (j); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 81 (XLVII) (17 October 1997) (i); Executive Committee, Office of the United Nations High Commissioner for Refugees, *Conclusions on the Provision on International Protection Including Through Complementary Forms of Protection*, Conclusion 103 (LVI) (7 October 2005) (m); GA Res 51/75, UN GAOR, 51<sup>st</sup> sess, 82<sup>nd</sup> plen mtg, Agenda Item 105, UN Doc A/RES/51/75 (12 February 1997) [3].

<sup>190</sup> Barnes, above n 151, 71.

<sup>191</sup> See *Refugee Convention* arts 2, 4, 15, 17(1) 18, 19, 21, 23, 24, 26, 27, 28, 32.

<sup>192</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 13-14 [28]; Hathaway, above n 33, 339.

<sup>193</sup> See *Declaration of States Parties*, UN Doc HCR/MMSP/2001/09, Preamble para 3, Preamble para 6, paras 1-2; Fischer-Lescano, Löhr and Tohidipur, above n 20, 260; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 16 [34].

<sup>194</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 180 [111]. See also *Banković v Belgium* [2001] XII Eur Court HR 333; *Loizidou* (1995) 20 EHRR 99.

<sup>195</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 16 [35]; *Banković v Belgium* [2001] XII Eur Court HR 333, 355 [71]. See also *Loizidou* (1995) 20 EHRR 99, [62]; *Issa v*

When interpreting art 33(1) in good faith in accordance with the ordinary meaning of its terms, considered in light of the totality of these factors, it is apparent that art 33(1) is clear and unambiguous; it establishes an obligation not to return a refugee to a country where they face a risk of persecution, and this ‘applies wherever a State exercises jurisdiction, including ... on the high seas’.<sup>196</sup>

### C Preparatory Work

Article 32 of the *VCLT* allows recourse to supplementary means of interpretation to confirm the meaning resulting from applying the general rule (under art 31), or to re-determine its meaning if found to be ambiguous, obscure, manifestly absurd, or unreasonable.<sup>197</sup>

Given the meaning of art 33(1) (resulting from applying the general rule) is unambiguous, the *Refugee Convention’s* preparatory work can only confirm art 33(1)’s meaning.<sup>198</sup> The US Observations having relied heavily on the *Refugee Convention’s travaux préparatoires* shows they placed too much significance on its drafting history.<sup>199</sup>

#### 1 *Travaux Préparatoires*

During the meetings of the *Ad Hoc Committee* that helped draft the *Refugee Convention*, it was stated that ‘turning a refugee back to the frontier of the country where his life ... is threatened ... would be tantamount to delivering him into the hands of his persecutors’.<sup>200</sup> The United States’ representative argued that regardless of whether a refugee was at the frontier or had crossed the border, they should not be turned back.<sup>201</sup> These comments indicate that art 33(1) was not understood by the drafters to have a territorial limitation.<sup>202</sup>

Grahl-Madsen, a leading commentator on the *Refugee Convention’s* drafting, provides a useful insight into the definition of terms and the agreement of states. According to him, ‘*refoulement*’ was used in Belgium and France to describe an informal way of removing persons from a territory and to describe ‘non-admittance at the frontier’, and the English translation of ‘*refoulement*’ corresponds to Anglo-American concepts of ‘exclusion’ and ‘refusal of leave to land’.<sup>203</sup>

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*Turkey* (2005) 41 EHRR 27, [71]; Bjarte Vandvik, ‘Extraterritorial Border Controls and Responsibility to Protect: A View from ECRE’ (2008-2009) 1 *Amsterdam Law Forum* 27, 29; Barnes, above n 151, 68.

<sup>196</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 12 [24], 13 [27]; Hathaway, above n 33, 339; Goodwin-Gill and McAdam, above n 53, 244-8.

<sup>197</sup> *VCLT* art 32.

<sup>198</sup> *Ibid.*

<sup>199</sup> See United States of America, Department of State Archive, above n 22, I(B).

<sup>200</sup> *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons – Memorandum by the Secretary General*, UN Document E/AC.32/2 (3 January 1950) Comments on Article 24 of the preliminary draft, para 3.

<sup>201</sup> *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, at 2.30 pm*, UN Doc E/AC.32/SR.20 (10 February 1950) Statement of Mr Henkin [54]-[55].

<sup>202</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 13-15 [27]-[31].

<sup>203</sup> Grahl-Madsen, above n 22, Article 33 Comments (2).

During a session of the Conference of Plenipotentiaries, the Swiss delegate, recognising that various interpretations could be attached to the words ‘expel or return’, stated that ‘return’ applied only to refugees who had already entered a state, but were not yet resident there,<sup>204</sup> and that ‘*refouler*’ could not apply to refugees who had not yet entered a state’s territory.<sup>205</sup> The representatives of France, Germany, Italy, the Netherlands, and Sweden agreed with this interpretation.<sup>206</sup>

From these discussions, Grahl-Madsen concluded that art 33(1) applies to refugees who are within a State’s territory.<sup>207</sup> While he acknowledged that ‘*refoulement*’ may mean ‘non-admittance at the frontier’, he felt it was ‘clear the prohibition against “refoulement” in Article 33 ... did not cover this aspect of ... “refoulement”’.<sup>208</sup> Grahl-Madsen noted the peculiar result this interpretation leads to, quoting Robinson, another scholar of this era, who stated ‘if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck’.<sup>209</sup> He noted, however, that ‘public opinion is apt to concern itself much more with the individual who has set foot on the nation’s territory ... than with people only seen as shadows’.<sup>210</sup> Therefore, according to Grahl-Madsen, the *travaux préparatoires* support a territorial limitation on art 33(1).<sup>211</sup>

Goodwin-Gill and McAdam, among others, suggest the most accurate assessment of the *travaux préparatoires* is ‘that there was no unanimity’ among states.<sup>212</sup> Grahl-Madsen was misguided in drawing conclusions based on statements of several delegates, as they did not represent a consensus among those present.<sup>213</sup> In addition, the Swiss and Dutch representatives’ comments related to their concern about art 33(1) requiring states to admit refugees in mass influx situations;<sup>214</sup> they never addressed art 33(1)’s extraterritorial application separate of this issue.<sup>215</sup>

Lauterpacht and Bethlehem also note there are ‘significant shortcomings’ to relying on the *travaux préparatoires* of ‘treaties negotiated at a time and in circumstances far distant from the point at which the question of interpretation and application arises’.<sup>216</sup> Interpretations of treaties must remain dynamic and be able to adapt to changing concepts and circumstances over time,<sup>217</sup> as must the principle of *non-refoulement*, which must be construed in light of the

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<sup>204</sup> See the dialogue of Mr Zutter, the Switzerland representative, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting*, UN GAOR, Agenda Item 5(a), UN Doc A/CONF.2/SR.16 (23 November 1951); Paul Weis (ed), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (Cambridge University Press, 1995) 326.

<sup>205</sup> See the dialogue of Mr Zutter, above n 204; Grahl-Madsen, above n 22, Article 33 Comments (3); Weis, above n 204, 329.

<sup>206</sup> Weis, above n 204, 331-5; Grahl-Madsen, above n 22, Article 33 Comments (3).

<sup>207</sup> Grahl-Madsen, above n 22, Article 33 Comments (2).

<sup>208</sup> Ibid Article 33 Comments (3).

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid Article 33 Comments (2). See also United States of America, Department of State Archive, above n 22, I(B).

<sup>212</sup> Goodwin-Gill and McAdam, above n 53, 206; see also Fischer-Lescano, Löhr and Tohidipur, above n 20, 271.

<sup>213</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 271.

<sup>214</sup> *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting*, UN GAOR, Agenda Item 5(a), UN Doc A/CONF.2/SR.16 (23 November 1951); Weis, above n 204, 325-38; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 13 [27].

<sup>215</sup> Goodwin-Gill and McAdam, above n 53, 206.

<sup>216</sup> Lauterpacht and Bethlehem, above n 17, 106.

<sup>217</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 260.

concept of asylum.<sup>218</sup> Consequently, the *Refugee Convention's travaux préparatoires* must be approached with care, as the world as it existed in 1951 is vastly different to the present day.<sup>219</sup>

This leads one to conclude that recourse to the *Refugee Convention's* preparatory work cannot confirm art 33(1)'s general rule interpretation. However, this failure to confirm the meaning does not affect the interpretation's validity, which is clear and unambiguous.<sup>220</sup>

#### D *Summing Up: Extraterritorial Application of Art 31(1)*

The above analysis supports an interpretation that art 33(1) applies extraterritorially in all areas outside a refugee's country of origin.<sup>221</sup> The decisive factor is not a refugee's location, but whether the refugee is under the relevant state's jurisdiction,<sup>222</sup> which is exercised wherever a state exercises effective control or authority over persons.<sup>223</sup>

### III CUSTOMARY INTERNATIONAL LAW STATUS OF NON-REFOULEMENT

Many Middle Eastern, South Asian, and Southeast Asian states are not States Parties to the *Refugee Convention* or *Refugee Protocol*,<sup>224</sup> making it necessary to address whether *non-refoulement* has developed into a CIL rule encompassing art 33(1). If it has, it binds *all* states.<sup>225</sup>

The majority of scholars and bodies agree that *non-refoulement* has gained CIL status,<sup>226</sup> and some specifically argue this encompasses art 33(1).<sup>227</sup> However, Hathaway, whose expertise in international refugee law is highly regarded, maintains there is insufficient evidence to justify this claim,<sup>228</sup> arguing the standard of state practice and *opinio juris* are not yet met.<sup>229</sup>

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<sup>218</sup> Goodwin-Gill and McAdam, above n 53, 208.

<sup>219</sup> Lauterpacht and Bethlehem, above n 17, 106.

<sup>220</sup> Fischer-Lescano, Löhr and Tohidipur, above n 20, 271.

<sup>221</sup> *Ibid* 267-8.

<sup>222</sup> *Ibid* 267; Lauterpacht and Bethlehem, above n 17, 110; Goodwin-Gill and McAdam, above n 53, 245-6.

<sup>223</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 16 [35]; *Banković v Belgium* [2001] XII Eur Court HR 333, 355 [71]. See also *Loizidou* (1995) 20 EHRR 99, [62]; *Issa v Turkey* (2005) 41 EHRR 27, [71].

<sup>224</sup> Twenty-five of 34 states in these regions are not participants to either treaty. See above n 15 for details on the list of States Parties to the treaties.

<sup>225</sup> Lauterpacht and Bethlehem, above n 17, 140.

<sup>226</sup> See Goodwin-Gill and McAdam, above n 53, 218-32, 248-50, 345-54; Wood and McAdam, above n 11, 293; Duffy, above n 76, 383, 389; Alice Edwards, 'Human Rights, Refugees, and the Right to 'Enjoy Asylum' (2005) 17 *International Journal of Refugee Law* 293, 301.

<sup>227</sup> See Lauterpacht and Bethlehem, above n 17, 143-50; D'Angelo, above n 22, 282; Robert L Newmark, 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' (1993) 71 *Washington University Law Quarterly* 833, 837; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 7 [15].

<sup>228</sup> See especially Hathaway, above n 33, 363-7.

<sup>229</sup> *Ibid* 364.

There are two strands of *non-refoulement*: persecution, which prohibits a refugee's return to territories where he or she faces a risk of persecution,<sup>230</sup> such as is in art 33(1);<sup>231</sup> and torture, which prohibits a person's return to territories where he or she faces a risk of torture, inhuman or degrading treatment, or other violations of fundamental human rights,<sup>232</sup> such as the *CAT*'s prohibition against torture.<sup>233</sup> This article addresses the persecution strand's CIL status.

### A *Treaties Crystallising into Custom*

In international refugee law, State practice relevant to the determination of CIL is principally derived from treaties,<sup>234</sup> which acts as a foundation for the development of CIL.<sup>235</sup> In *North Sea Continental Shelf (Germany v Denmark) (Judgment) ('North Sea Continental Shelf')*, the ICJ identified three elements material to determining whether a treaty rule has crystallised into a CIL rule.<sup>236</sup> Firstly, the provision must be of a fundamentally norm-creating character.<sup>237</sup> Secondly, a very widespread and representative participation in the treaty might 'suffice of itself'.<sup>238</sup> Thirdly, State practice in conformity with the provision should have been both extensive and virtually uniform, and should indicate a general recognition of a rule of law.<sup>239</sup> This third element in fact expresses the two elements required to show the development of CIL independently of a treaty:<sup>240</sup> consistent state practice and *opinio juris*.<sup>241</sup>

### B *Relevance of Torture Instruments*

*Non-refoulement*'s torture strand is generally accepted as being embedded in CIL.<sup>242</sup> Due to this and the considerable structural similarities between, and reasoning behind, the two *non-refoulement* strands, an examination of *non-refoulement* to torture provisions assists in addressing the norm-creating character of *non-refoulement* to persecution.

A comparison of each strand's most well-known provision illustrates their similarities. The *CAT* art 3(1) prohibits a person's return if he or she is likely to be tortured.<sup>243</sup> The *Refugee*

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<sup>230</sup> Francesco Messineo, 'Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?' in Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law Theory and Policy* (Ashgate, 2013) 131, 132-3.

<sup>231</sup> See *Refugee Convention* art 33(1).

<sup>232</sup> Messineo, above n 230, 132, 136.

<sup>233</sup> *Ibid* 137; *CAT* art 3(1).

<sup>234</sup> Lauterpacht and Bethlehem, above n 17, 141.

<sup>235</sup> *North Sea Continental Shelf (Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 41 [71], 43 [74]; Roozbeh B Baker, 'Customary International Law in the 21<sup>st</sup> Century: Old Challenges and New Debates' (2010) 21 *The European Journal of International Law* 173, 177; Anthony D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 *Columbia Law Review* 1110, 1127; Stephen Hall, *Principles of International Law* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2014) 46 [1.139].

<sup>236</sup> [1969] ICJ Rep 3.

<sup>237</sup> *Ibid* 41-2 [72].

<sup>238</sup> *Ibid* 42 [73].

<sup>239</sup> *Ibid* 43 [74].

<sup>240</sup> Lauterpacht and Bethlehem, above n 17, 143.

<sup>241</sup> *Ibid*; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 7 [14]; Hall, above n 235, 33 [1.102].

<sup>242</sup> Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1986) 26 *Virginia Journal of International Law* 857, 887-8.

<sup>243</sup> *CAT* art 3(1).

*Convention* art 33(1) prohibits a refugee's return if their life or freedom would be threatened for a convention reason.<sup>244</sup> Both prohibit a certain class of persons' return to a certain class of threat.

Prohibition to torture instruments usually apply to 'any persons'<sup>245</sup> whereas prohibition to persecution instruments are often limited to refugees.<sup>246</sup> However, this difference is not material because 'any persons' encompasses refugees, meaning both strands can be said to prohibit the return of refugees to the relevant risk. This means the only material difference these two prohibition strands is what a person cannot be returned to, being persecution versus torture. The two strands' similarities are highlighted by numerous international instruments which do not differentiate between the two, referring only to '*non-refoulement*'.<sup>247</sup> Due to these similarities, instruments concerning *non-refoulement* to torture can evidence the norm-creating character of *non-refoulement* to persecution.

The same cannot be said for the second and third elements identified in *North Sea Continental Shelf*. The two strands protect refugees from different things, persecution versus torture. This means that general *non-refoulement*, and *non-refoulement* to torture, cannot form the basis upon which a common *opinio juris* is formed, or state practice observed,<sup>248</sup> with respect to *non-refoulement* to persecution. Consequently, in relation to the third element, it is necessary to consider evidence specific to *non-refoulement* to persecution. In relation to the second element, if widespread and representative participation is to 'suffice of itself' to establish a CIL rule,<sup>249</sup> then the 'participation' acts to replace state practice and *opinio juris*. Therefore, only 'participation' that could otherwise contribute to state practice and *opinio juris* should be taken into account, being 'participation' in instruments containing *non-refoulement* to persecution provisions.

### C Fundamentally Norm-Creating Character

The first element is that the provision must 'be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.<sup>250</sup>

*Non-refoulement* to persecution is found in binding international instruments other than the *Refugee Convention*, including the *OAU Convention Governing the Specific Aspects of Refugee*

<sup>244</sup> *Refugee Convention* art 33(1).

<sup>245</sup> See, eg, *CAT* art 3(1); *International Covenant on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7.

<sup>246</sup> See, eg, *Refugee Convention* art 33(1).

<sup>247</sup> See Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees*, (22 November 1984) pt III [5]; Committee of Ministers, Council of Europe, *On the Protection of Persons Satisfying the Criteria in the Geneva Convention Who are Not Formally Recognised as Refugees*, Recommendation No R (84) 1, 366<sup>th</sup> mtg (25 January 1984) para 6; Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (a).

<sup>248</sup> Hathaway, above n 33, 365.

<sup>249</sup> See *North Sea Continental Shelf* [1969] ICJ Rep 3, 42 [73].

<sup>250</sup> *Ibid* 41-2 [72].

*Problems in Africa 1969*<sup>251</sup> and the *American Convention on Human Rights 1969*.<sup>252</sup> It also is found in non-binding instruments, including the *Bangkok Principles on Status and Treatment of Refugees 2001*<sup>253</sup> and the *Declaration on Territorial Asylum 1967*,<sup>254</sup> which the General Assembly adopted unanimously.<sup>255</sup> These binding and non-binding instruments affirm *non-refoulement* to persecution's normative character.<sup>256</sup>

Lauterpacht and Bethlehem, and Goodwin-Gill suggest the expression of *non-refoulement* in the CAT art 3(1) is of a norm-creating character, and not a mere contractual obligation.<sup>257</sup> Their reasoning is supported by interpretations of the prohibition on torture provisions of the ECHR,<sup>258</sup> the ICCPR,<sup>259</sup> and the *African Charter of Human Rights 1981*,<sup>260</sup> by the ECtHR,<sup>261</sup> the HRC,<sup>262</sup> and the African Commission on Human and Peoples' Rights,<sup>263</sup> respectively, which read in *non-refoulement* components because to not do so would be contrary to the relevant provisions.<sup>264</sup> These interpretations further confirm *non-refoulement*'s 'normative and fundamental character', particularly as the relevant articles make no reference to a prohibition on where a person can be sent.<sup>265</sup>

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<sup>251</sup> OAU stands for the Organisation of African Unity. The African Union (AU) replaced the OAU, however, the treaty retained its original title. *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) art II(3).

<sup>252</sup> *American Convention on Human Rights: "Pact of San José, Costa Rica"*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 22(8).

<sup>253</sup> Asian-African Legal Consultative Organization, *Revised Text of the Bangkok Principles on Status and Treatment of Refugees*, Res 40/3, 40<sup>th</sup> sess (24 June 2001) art III(1).

<sup>254</sup> *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN GAOR, 6<sup>th</sup> Comm, 22<sup>nd</sup> sess, 1631<sup>st</sup> plen mtg, UN Doc A/RES/2312 (XXII) (14 December 1967) art 3.

<sup>255</sup> Lauterpacht and Bethlehem, above n 17, 144.

<sup>256</sup> *Ibid* 143-4.

<sup>257</sup> Lauterpacht and Bethlehem, above n 17, 143; Guy S Goodwin-Gill, *The Refugee in International Law* (2<sup>nd</sup> ed, Oxford University Press, 1996) 134-7.

<sup>258</sup> See *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 3.

<sup>259</sup> See *International Covenant on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7.

<sup>260</sup> See *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1981) art 5.

<sup>261</sup> See *Soering v United Kingdom* (European Court of Human Rights, Plenary, Application No 13048/88, 7 July 1989) [88]; *Cruz Varas v Sweden* (European Court of Human Rights, Plenary, Application No 15577/89, 20 March 1991) [69]; *Vilvarajah v United Kingdom* (European Court of Human Rights, Chamber, Application No 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991) [102]-[103]; *Chahal v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 22414/93, 15 November 1996) [73]-[74], [79]-[80]; *T I v United Kingdom* [2000] III Eur Court HR 435, 456.

<sup>262</sup> See Human Rights Committee, *General Comment No 31: The Nature of the General Obligation Imposed on States Parties to the Covenant*, 18<sup>th</sup> sess, 2187<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.9 (10 March 1992) [9].

<sup>263</sup> See *Modise v Botswana* (African Commission of Human Peoples' Rights, 6 November 2000) Communication No 97/93, [92].

<sup>264</sup> See especially *Soering v United Kingdom* (European Court of Human Rights, Plenary, Application No 13048/88, 7 July 1989) [88];

<sup>265</sup> Lauterpacht and Bethlehem, above n 17, 143.

*Non-refoulement* is referred to in non-binding international instruments. Its importance is affirmed by the Council of Europe in Recommendation No R (84) 1<sup>266</sup> and by Central American States in the *Cartagena Declaration on Refugees 1984*.<sup>267</sup>

*Non-refoulement's* fundamental character has been expressed in several of ExCom's non-binding Conclusions.<sup>268</sup> These have referred to *non-refoulement's* general acceptance by states.<sup>269</sup>

The totality of this evidence supports the conclusion that *non-refoulement*, encompassing the persecution strand, is of a fundamentally norm-creating character.<sup>270</sup>

In *North Sea Continental Shelf*, the ICJ held that the relevant provision was not of a fundamentally norm-creating character.<sup>271</sup> One factor contributing to this was that there were 'very considerable ... unresolved controversies as to the' rule's exact meaning and scope which raised doubts as to its fundamentally norm-creating character.<sup>272</sup> While there is no controversy surrounding *non-refoulement* to persecution's general meaning, the discussion on art 33(1) in Part II indicates there is some controversy surrounding its extraterritorial application.<sup>273</sup> However, Part II indicates there is substantial scholarly support for art 33(1)'s extraterritorial application.<sup>274</sup> Therefore, while some states disagree with this interpretation,<sup>275</sup> the strength of their argument is *not considerable enough* to raise doubts about *non-refoulement* to persecution's fundamentally norm-creating character.

#### D Widespread and Representative Participation

The second element suggests that a very widespread and representative participation in a treaty may 'suffice of itself' to establish a CIL rule if it includes the participation of states whose

<sup>266</sup> Committee of Ministers, Council of Europe, *On the Protection of Persons Satisfying the Criteria in the Geneva Convention Who are Not Formally Recognised as Refugees*, Recommendation No R (84) 1, 366<sup>th</sup> mtg (25 January 1984) para 6.

<sup>267</sup> Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees*, (22 November 1984) pt III [5].

<sup>268</sup> See Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (a); Executive Committee, Office of the United Nations High Commissioner for Refugees, *Problems of Extradition Affecting Refugees*, Conclusion 17 (XXXI) (16 October 1980) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 25 (XXXIII) (20 October 1982) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 79 (XLVII) (11 October 1996) (j); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 81 (XLVII) (17 October 1997) (i).

<sup>269</sup> See Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (a).

<sup>270</sup> Goodwin-Gill, *The Refugee in International Law*, above n 257, 134-7; Messineo, above n 230, 142; Lauterpacht and Bethlehem, above n 17, 144.

<sup>271</sup> *North Sea Continental Shelf* [1969] ICJ Rep 3, 41-2 [72].

<sup>272</sup> *Ibid* (emphasis added).

<sup>273</sup> See also Newmark, above n 227, 837.

<sup>274</sup> See, eg, Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 16, 12 [24]; Magner, above n 20, 71; Fischer-Lescano, Löhr and Tohidipur, above n 20, 267-71; Pallis, above n 20, 345.

<sup>275</sup> See United States of America, Department of State Archive, above n 122, I; The Commonwealth of Australia, 'Defence to the Amended Statement of Claim', Defence in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 22 July 2014, 2 (f)(i)(A).



interests are specifically affected.<sup>276</sup> Subsequent ICJ decisions, which did not address state practice or *opinio juris* when addressing the CIL status of parts of the four *Geneva Conventions* of 1949, support this.<sup>277</sup> These *Geneva Conventions*<sup>278</sup> are generally considered to reflect CIL due to their widespread participation.<sup>279</sup> Currently, 186 of 195 states<sup>280</sup> have ratified or acceded to these treaties.<sup>281</sup>

An examination of major international treaties reveals 151 states have ratified or acceded to at least one treaty containing a *non-refoulement* to persecution provision.<sup>282</sup> This is roughly 23 per cent less participants than to the *Geneva Conventions*, which is significant enough to raise doubts that state participation is widespread and representative enough on its own to justify concluding a CIL rule exists.<sup>283</sup>

### E *State Practice and Opinio Juris*

The final element is that state practice must be both extensive and virtually uniform, and must show a rule's existence.<sup>284</sup> This latter factor refers to *opinio juris*. This is shown by a belief held by states that the practice is obligatory due to a binding rule's existence.<sup>285</sup>

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<sup>276</sup> See *North Sea Continental Shelf* [1969] ICJ Rep 3, 42 [73].

<sup>277</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 114 [220] ('*Nicaragua Merits*'); Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *The American Journal of International Law* 817, 819.

<sup>278</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

<sup>279</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 257-8 [79]-[82]; Theodor Meron, 'The Geneva Conventions and Public International Law' (2009) 91 *International Review of the Red Cross* 619, 625.

<sup>280</sup> Bureau of Intelligence and Research, *Independent States in the World* (9 December 2013) US Department of States, Diplomacy in Action <<http://www.state.gov/s/inr/rls/4250.htm>>.

<sup>281</sup> See United Nations, *Participant States to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (26 July 2014) United Nations Treaty Collection <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>; United Nations, *Participant States to the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (26 July 2014) United Nations Treaty Collection <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>; United Nations, *Participant States to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (26 July 2014) United Nations Treaty Collection <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>; United Nations, *Participant States to the Geneva Convention Relative to the Treatment of Prisoners of War* (26 July 2014) United Nations Treaty Collection <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>.

<sup>282</sup> See United Nations, *Participant States to the Convention Relating to the Status of Refugees*, above n 15; United Nations, *Participant States to the Protocol Relating to the Status of Refugees*, above n 15; United Nations, *Participant States to the American Convention on Human Rights "Pact of San José, Costa Rica"* (27 July 2014) United Nations Treaty Collection <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>; United Nations, *Participant States to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (27 July 2014) United Nations Treaty Collection <<https://treaties.un.org/pages/UNTSONline.aspx?id=2>>.

<sup>283</sup> See also Hathaway, above n 33, 365.

<sup>284</sup> *North Sea Continental Shelf* [1969] ICJ Rep 3, 43 [74].

<sup>285</sup> Baker, above n 235, 176-7; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 7 [14].

## 1 *Practice of States Parties versus Non-States Parties*

In *North Sea Continental Shelf*, the ICJ held that evidence of *opinio juris* could not be derived from the practice of states in simply complying with their treaty obligations, as an inference could not be drawn from this ‘that they believe themselves to be applying a mandatory rule of CIL’;<sup>286</sup> it should be derived from practice by states who are not parties to the relevant treaty.<sup>287</sup> However, it is unlikely the ICJ was referring to near universally accepted treaties.<sup>288</sup> *North Sea Continental Shelf* concerned a treaty that was ratified by very few states.<sup>289</sup> With near universally accepted treaties, practically all potential participants are States Parties, leaving little evidence available to demonstrate that non-States Parties behave in accordance with a rule.<sup>290</sup> Nor is the practice of the relatively small number of non-State Parties indicative of a general perception among states of a rule’s existence.<sup>291</sup> Therefore, where participation in a treaty is very widespread, the practice of non-States Parties is not necessary, or readily ascertainable for that matter, and the practice of States Parties carry probative weight, even where simply complying with treaty obligations.<sup>292</sup>

When it is shown that States Parties act in a particular way because they are required not only by their treaty obligation but also by a CIL rule, that carries greater probative weight as *opinio juris* of the rule’s existence<sup>293</sup> (for example, where statements supporting a CIL rule’s existence accompany States Parties’ practice).<sup>294</sup>

Although 151 States bound by a treaty containing a *non-refoulement* to persecution provision does not represent universal acceptance, it does represent a significant portion of states. Therefore, while there still is a reasonable number of non-States Parties that can evidence state practice and *opinio juris*, the practices of States Parties carry probative weight in establishing *non-refoulement* to persecution’s CIL status.

## 2 *State Inaction*

Inaction can evidence state practice of prohibitory rules.<sup>295</sup> *Non-refoulement* to persecution involves such a prohibition. However, inaction does not necessarily indicate the existence of

<sup>286</sup> *North Sea Continental Shelf* [1969] ICJ Rep 3, 43-4 [76].

<sup>287</sup> Hall, above n 235, 49 [1.144].

<sup>288</sup> Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *The American Journal of International Law* 348, 366.

<sup>289</sup> *North Sea Continental Shelf* [1969] ICJ Rep 3, 41-2 [72]-[73].

<sup>290</sup> Meron, ‘The Geneva Conventions as Customary Law’, above n 288, 365; see also D’Amato, above n 235, 1134.

<sup>291</sup> Jean-Marie Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’ (2005) 87 *International Review of the Red Cross* 175, 184.

<sup>292</sup> Meron, ‘The Geneva Conventions as Customary Law’, above n 288, 366-7; Henckaerts, above n 291, 184; see also José A Cabranes, ‘Customary International Law: What it is and What it is Not’ (2011) 22 *Duke Journal of Comparative & International Law* 143, 151-2.

<sup>293</sup> Meron, ‘The Geneva Conventions as Customary Law’, above n 288, 367.

<sup>294</sup> *Ibid* 368.

<sup>295</sup> Hall, above n 235, 35 [1.107]; Jordan J Paust, ‘Customary International Law: Its Nature, Sources and Status as Law of the United States’ (1991) 12 *Michigan Journal of International Law* 59, 76-7.

*opinio juris*.<sup>296</sup> While state practice supporting *non-refoulement* to persecution can be implied by state inaction in not *refouling* refugees, it is difficult to show this inaction occurs due to states' beliefs in the rule's existence.

### 3 *Positive Practice*

Positive actions evidencing state practice and *opinio juris* include declarations, the passing of laws, and responses to occurrences of *refoulement* or *prima facie refoulement*.

The volume of evidence that can be adduced to show extensive and virtually uniform state practice is too great to address for the purpose of this article. This article relies predominantly on the work of Goodwin-Gill and McAdam,<sup>297</sup> and Lauterpacht and Bethlehem,<sup>298</sup> who have addressed state practice and *opinio juris* in detail and concluded it justifies a finding that *non-refoulement* to persecution, encompassing art 33(1), has become CIL.

As Hathaway maintains the standard of state practice and *opinio juris* are not yet met,<sup>299</sup> some of the issues raised by him are addressed.

#### (a) *Acceptance in International and Domestic Law*

The widespread and representative participation of states in treaties containing *non-refoulement* to persecution provisions,<sup>300</sup> as well as the wide recognition of non-refoulement to persecution in other non-binding instruments,<sup>301</sup> evidence state practice and *opinio juris* supporting *non-refoulement* to persecution's existence under CIL.<sup>302</sup>

Evidence of *opinio juris* can include domestic actions such as adopting legislation.<sup>303</sup> Lauterpacht and Bethlehem have identified some 80 states that have enacted specific *non-refoulement* provisions or incorporated the *Refugee Convention* or *Refugee Protocol* into domestic law.<sup>304</sup> This occurs automatically for some of these states,<sup>305</sup> however, many have

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<sup>296</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 253-4 [65]-[67].

<sup>297</sup> Goodwin-Gill and McAdam, above n 53, 218-32, 248-50, 345-54.

<sup>298</sup> See Lauterpacht and Bethlehem, above n 17, 143-50.

<sup>299</sup> Hathaway, above n 33, 363, 364.

<sup>300</sup> See especially United Nations, *Participant States to the Convention Relating to the Status of Refugees*, above n 15; United Nations, *Participant States to the Protocol Relating to the Status of Refugees*, above n 15; United Nations, *Participant States to the American Convention on Human Rights "Pact of San José, Costa Rica"*, above n 282; United Nations, *Participant States to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, above n 282.

<sup>301</sup> See especially Asian-African Legal Consultative Organization, *Revised Text of the Bangkok Principles on Status and Treatment of Refugees*, Res 40/3, 40<sup>th</sup> sess (24 June 2001) art III(1); *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN GAOR, 6<sup>th</sup> Comm, 22<sup>nd</sup> sess, 1631<sup>st</sup> plen mtg, UN Doc A/RES/2312 (XXII) (14 December 1967) art 3.

<sup>302</sup> Lauterpacht and Bethlehem, above n 17, 147-8; Magner, above n 20, 65; Duffy, above n 76, 384; *Prosecutor v Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment))* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-14-AR72(E), 31 May 2004) [18]-[24].

<sup>303</sup> Brian D Leppard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) 172.

<sup>304</sup> Lauterpacht and Bethlehem, above n 17, annex 2.2.

<sup>305</sup> See, eg, Albania, Argentina, Togo, and Cameroon: *ibid*.

taken separate legislative action,<sup>306</sup> including two non-States Parties, Lebanon and Iraq.<sup>307</sup> This domestic legislation further evidences state practice and *opinio juris* supporting *non-refoulement* to persecution's CIL status.<sup>308</sup>

(b) *Mere Statements/Declarations*

Hathaway contends simple declarations are not sufficient to create CIL and a large representative group of states must solidify their commitment to a rule through actions.<sup>309</sup> This is supported by the ICJ, which held that mere declarations of a rule's existence are not sufficient for it to become CIL.<sup>310</sup> However, declarations cannot be ignored.<sup>311</sup> State practice must be appraised in light of instances where states have expressed their recognition of a CIL rule.<sup>312</sup> Therefore, statements will carry probative weight when they accompany state practice.

Some suggest that statements can evidence CIL in other circumstances.<sup>313</sup> More recent ICJ decisions recognise the normative value of General Assembly resolutions, stating they may act as evidence that go toward establishing the emergence of a CIL rule or an *opinio juris*.<sup>314</sup> Given it is state practice that must occur in a way that shows *opinio juris*,<sup>315</sup> this is likely an acknowledgement by the ICJ that things less than physical actions can be adequate state practice. So while mere statements cannot *create* norms, they can show a norm's existence or emergence. Where they do, the weight attached to them is reduced where the state has not acted upon them and no reasonable explanation exists for this failure.<sup>316</sup>

An analogy can be made from the ICJ's decision in *Nuclear Tests*, which recognised that unilateral declarations create legal obligations when the declaring state intends to become bound by its declaration.<sup>317</sup> Given declarations can bind states, they should also be able to evidence state practice and *opinio juris* in respect of the declaring State. Where a declaration is made in a way that indicates a state believes it is bound by a CIL rule, then this should have that effect and evidence state practice and *opinio juris*,<sup>318</sup> assisting in the emergence of CIL. This is especially applicable to prohibitory rules, such as *non-refoulement*, due to the difficulty in showing *opinio juris* accompanies inaction, placing increased reliance on statements to indicate *opinio juris*.

Several CIL scholars argue that the importance of state practice in establishing CIL has reduced. Cheng, examining the CIL status of two General Assembly Resolutions on outer

<sup>306</sup> See, eg, Belarus, Canada, Germany, New Zealand, and Tanzania: *ibid*.

<sup>307</sup> See *Loi réglementant l'entrée et le séjour des étrangers au Liban [Act of 1962 Governing the Entry of Residence of Foreigners in Lebanon, and their Exit from the Country]* (Lebanon) art 31 [Google trans]; *Loi sur les réfugiés politiques no 51 du 1971 [Act No Political Refugees No 51, 1971]* (Iraq) art 4 [Google trans].

<sup>308</sup> Lauterpacht and Bethlehem, above n 17, 148.

<sup>309</sup> Hathaway, above n 33, 363.

<sup>310</sup> *Nicaragua Merits* [1986] ICJ Rep 14, 97 [184].

<sup>311</sup> *Ibid* 98 [185].

<sup>312</sup> *Ibid*.

<sup>313</sup> See, eg, R R Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 *British Yearbook of International Law* 275, 300; Hall, above n 235, 35 [1.106].

<sup>314</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 254-5 [70]; *Nicaragua Merits* [1986] ICJ Rep 14, 99-100 [188].

<sup>315</sup> See *North Sea Continental Shelf* [1969] ICJ Rep 3, 43 [74].

<sup>316</sup> Hall, above n 235, 35 [1.106].

<sup>317</sup> *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253, 267 [43].

<sup>318</sup> See the discussion on unilateral declarations by the United States in respect of Haitian refugees in Goodwin-Gill and McAdam, above n 45, 248-50.

space, contends that CIL can develop instantly.<sup>319</sup> Cheng argues that state practice is only relied on because it *evidences* a rule's contents and the *opinio juris* of states.<sup>320</sup> All that is required is that *opinio juris* be clearly established, making it *the* material element.<sup>321</sup> This suggests that state practice may not play as significant a role as implied in *North Sea Continental Shelf*. Lopard supports this, contending that state practice's primary function is to evidence *opinio juris*.<sup>322</sup> This is consistent with the latter part of the ICJ's reasoning in *North Sea Continental Shelf*, that state practice must occur in a way that *indicates opinio juris*.<sup>323</sup> Baxter adopts a similar view in the context of treaties evidencing CIL, stating that 'firm statements by [a] State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times in a variety of contexts'.<sup>324</sup> Therefore, whether state practice takes the form of actions or statements is not significant; it just needs to clearly indicate the existence of a common *opinio juris* among states.

ExCom Conclusions carry weight in this area as they reflect the opinion of states whose interests are specifically affected by refugee issues.<sup>325</sup> Many Conclusions have reiterated the importance of *non-refoulement* in the *Refugee Convention*,<sup>326</sup> and Conclusion 6 commented on the general acceptance by states of the principle of *non-refoulement*,<sup>327</sup> indicating ExCom States believe *non-refoulement* to persecution is embedded in CIL.

The *Declaration of States Parties*, which was endorsed by the General Assembly, acknowledged the principle of *non-refoulement* was embedded in CIL.<sup>328</sup> The 126 States Parties present<sup>329</sup> adopted it unanimously.<sup>330</sup> This is strong evidence of these states' *opinio juris*, supporting *non-refoulement* to persecution's CIL status.

Over the years numerous states' representatives have recognised *non-refoulement* to persecution's CIL status. For example, in 1997, Denmark regarded art 33(1)'s *non-refoulement*

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<sup>319</sup> See Bin Cheng, *Studies in International Space Law* (Oxford University Press, 1997) 125-49.

<sup>320</sup> *Ibid* 138.

<sup>321</sup> *Ibid*.

<sup>322</sup> Lopard, above n 303, 126.

<sup>323</sup> *Ibid* 131 *North Sea Continental Shelf* [1969] ICJ Rep 3, 43 [74].

<sup>324</sup> See Baxter, above n 313, 300.

<sup>325</sup> Lauterpacht and Bethlehem, above n 17, 148; Office of the United Nations High Commissioner for Refugees, *Step-by-step Guide*, above n 103.

<sup>326</sup> See Executive Committee, Office of the United Nations High Commissioner for Refugees, *Problems of Extradition Affecting Refugees*, Conclusion 17 (XXXI) (16 October 1980) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 25 (XXXIII) (20 October 1982) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 79 (XLVII) (11 October 1996) (j); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 81 (XLVII) (17 October 1997) (i).

<sup>327</sup> Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (a).

<sup>328</sup> *Declaration of States Parties*, UN Doc HCR/MMSP/2001/09, Preamble para 4.

<sup>329</sup> Ministerial Meeting of the States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, *Report of the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN GAOR, UN Doc HCR/MMSP/2001/10 (18 January 2002) para 6.

<sup>330</sup> Note, the Declaration was adopted by consensus which must mean it was adopted unanimously given voting rule 23 states that the Meeting aims to accomplish things by consensus, indicating 'consensus' must be something greater than a simple agreement, Ministerial Meeting of the States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, *Draft Rules of Procedure*, UN GAOR, UN Doc HCR/MMSP/2001/02 (23 October 2001) rr 23, 24; *Ibid* paras 4, 24.

provision as being embedded in CIL.<sup>331</sup> In 2001, the Belgium representative, speaking on behalf of the European Union and 13 other European States, noted in relation to the *Refugee Convention* that *non-refoulement* had long been part of CIL.<sup>332</sup> This is strong evidence of these states' *opinio juris*.

(c) *Support of Non-States Parties*

Hathaway cites in support of his argument, that many Asian and Near East States have routinely refused to be formally bound by *non-refoulement*.<sup>333</sup> What Hathaway does not recognise is that a state's refusal to be bound by a treaty such as the *Refugee Convention* does not indicate their unwillingness to be bound by *non-refoulement* per se. They may simply object to other provisions, some of which provide rights to refugees<sup>334</sup> such as protection from discrimination and protection from penalisation for unlawful entry.<sup>335</sup> Malaysia and Indonesia are examples of this. Refugees in these countries have very few rights and sometimes face penalties for their 'irregular' arrival.<sup>336</sup> However, both States cooperate with the UNHCR by receiving asylum seekers and allowing the UNHCR to process them.<sup>337</sup> Their actions indicate they do not engage in the *refoulement* of refugees and respect the principle of *non-refoulement* to persecution,<sup>338</sup> supporting a belief they are bound by a CIL rule.<sup>339</sup> Thailand has expressed that 'in line with the principle of *non-refoulement*, asylum countries were under an obligation to' admit refugees,<sup>340</sup> suggesting Thailand believes non-States Parties are bound by *non-refoulement*.<sup>341</sup> In addition, the actions of Syria and Jordan, which both let in hundreds of thousands of Iraqi refugees during and after the Iraq war,<sup>342</sup> supports *non-refoulement* to persecution's existence in CIL.

(d) *Specific Occurrences of Refoulement*

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<sup>331</sup> Comments by Mr Lunding in Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 522<sup>nd</sup> Meeting*, UN GAOR, 48<sup>th</sup> sess, 522<sup>nd</sup> mtg, UN Doc A/AC.96/SR.522 (23 October 1997) [65].

<sup>332</sup> Comments by Mr Noirfalisse in Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 552<sup>nd</sup> Meeting*, UN GAOR, 52<sup>nd</sup> sess, 552<sup>nd</sup> mtg, UN Doc A/AC.96/SR.552 (5 October 2001) [50].

<sup>333</sup> Hathaway, above n 33, 364.

<sup>334</sup> Mary Cook, 'Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific' (2014) 63 *International & Comparative Law Quarterly* 247, 253.

<sup>335</sup> *Refugee Convention* arts 3, 31.

<sup>336</sup> See, eg, *Immigration Act 1959* (Malaysia) s 6(3); Cook, above n 334, 257, 259-60.

<sup>337</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 168-9 [28] (French CJ), 200-1 [131] (Gummow, Hayne, Crennan and Bell JJ), 235 [249] (Kiefel J); Office of the United Nations High Commissioner for Refugees, Indonesia, *Government Relations & Capacity Building* (2010) <<http://www.unhcr.or.id/en/what-we-do/government-relations-and-capacity-building>>.

<sup>338</sup> Cook, above n 334, 257, 267.

<sup>339</sup> *Ibid* 253.

<sup>340</sup> Comments by Mr Futrakul in Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 554<sup>th</sup> Meeting*, 52<sup>nd</sup> sess, 554<sup>th</sup> mtg, UN Doc A/AC.96/SR.554 (8 October 2001) [60].

<sup>341</sup> Goodwin-Gill and McAdam, above n 53, 227.

<sup>342</sup> Andrew Harper, 'Iraq's Refugee: Ignored and Unwanted' (2008) 90 *International Review of the Red Cross* 169, 177.

Hathaway's main contention, that the standard of state practice is not yet met,<sup>343</sup> is supported by many occurrences of *refoulement*,<sup>344</sup> which suggests states have not near-universally accepted *non-refoulement* to persecution.<sup>345</sup> It is not possible to address each of these occurrences; however, three will be addressed to indicate Hathaway's arguments are not tenable: (a) Tanzania's border closures and expulsion of Rwandan and Burundian refugees during the Great Lakes emergency;<sup>346</sup> (b) Macedonia's border closure to Albanian refugees fleeing Kosovo following NATO's bombing of Yugoslavia;<sup>347</sup> and (c) the US's interception of Haitian refugees.<sup>348</sup>

Hathaway fails to recognise that occurrences of *refoulement* do not necessarily indicate a lack of belief in the rule's existence. State practice does not have to conform perfectly to the rule.<sup>349</sup> It is sufficient if practice is generally consistent with the rule.<sup>350</sup> Inconsistent practices 'should generally be treated as breaches of the rule'.<sup>351</sup> Where a state acts *prima facie* inconsistently with the rule, but tries to defend its conduct as not breaching or being an exception to the rule, then regardless of whether such actions are correct or not, this confirms rather than weakens the rule.<sup>352</sup> This is because a state's attempt to explain its conduct indicates that the state believes a binding rule exists.<sup>353</sup> Therefore, it is sufficient if there is a consistent and settled practice supporting the rule's existence.<sup>354</sup>

Goodwin-Gill and McAdam argue that occurrences of *refoulement* by states have been accompanied by arguments that no obligation attached to the persons returned, on grounds of their refugee status or due to exceptions to *non-refoulement*, particularly in regard to threats to national security.<sup>355</sup>

On other occasions, justification is made on the basis of mass influxes of refugees being an exception to *non-refoulement*. Mass influxes can place significant strain upon a host state,<sup>356</sup> particularly 'fragile and poor' states.<sup>357</sup> Some scholars consider mass influxes to be an exception to art 33(1),<sup>358</sup> including Hathaway, who has stated '*non-refoulement* does not bind a state faced with a mass influx of refugees insofar as the arrival of refugees truly threatens its ability to protect its most basic national interests'.<sup>359</sup>

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<sup>343</sup> Hathaway, above n 33, 363.

<sup>344</sup> *Ibid* 279-300, 364.

<sup>345</sup> *Ibid* 364.

<sup>346</sup> *Ibid* 281, 364.

<sup>347</sup> *Ibid* 280, 364; Nils Coleman, 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 *European Journal of Migration and Law* 23, 33.

<sup>348</sup> Hathaway, above n 33, 290, 364.

<sup>349</sup> *Nicaragua Merits* [1986] ICJ Rep 14, 98 [186].

<sup>350</sup> *Ibid*.

<sup>351</sup> *Ibid*.

<sup>352</sup> *Ibid*.

<sup>353</sup> Duffy, above n 76, 386-7.

<sup>354</sup> James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8<sup>th</sup> ed, 2012, 27; *Nicaragua Merits* [1986] ICJ Rep 14, 108 [207]; *North Sea Continental Shelf* [1969] ICJ Rep 3, 44 [77].

<sup>355</sup> Goodwin-Gill and McAdam, above n 53, 224.

<sup>356</sup> Katy Long, 'No Entry!: A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (Evaluation Report No PDES/2010/07, United Nations High Commissioner for Refugees, Policy Development and Evaluation Service, 21 June 2010) 12 [74].

<sup>357</sup> *Ibid* 13 [83].

<sup>358</sup> Hathaway, above n 33, 367; Hailbronner, above n 242, 865-6.

<sup>359</sup> Hathaway, above n 33, 367.

(i) *Tanzanian Border Closure to Rwandan and Burundian Refugees*

In 1994, during the Great Lakes emergency, thousands of Rwandans fled to Tanzania to escape the Rwandan genocide.<sup>360</sup> As the crisis entered its post-emergency phase, the relief assistance provided to Tanzania declined.<sup>361</sup> In mid-1995, Tanzania closed its borders to thousands of Rwandan and Burundian refugees.<sup>362</sup> In 1996, it expelled 250,000 Rwandan refugees.<sup>363</sup> While these are prima facie breaches of *non-refoulement*, a closer examination is required.

The huge numbers of refugees stretched Tanzania's resources and caused security concerns.<sup>364</sup> Without adequate support provided from the international community, Tanzania was unable to cope with the burden of so many refugees to protect, invoking security and mass influx as reasons for the *refoulement*, indicating Tanzania's belief this was an exception to, and not a breach of, the rule.<sup>365</sup>

Consistent with this, on other occasions Tanzania claimed those returned were not refugees but illegal aliens subject to expulsion.<sup>366</sup> On one occasion where Burundian refugees were *refouled*, Tanzania stated that this had occurred accidentally, due to a misunderstanding of national policy.<sup>367</sup>

These justifications confirm rather than weaken the rule.<sup>368</sup>

(ii) *Macedonia's Border Closure to Albanians*

In the lead-up to the Kosovo crisis in the late 1990s, Macedonia stated it would close its borders if a mass influx occurred.<sup>369</sup> NATO commenced bombing Kosovo on 24 March 1999 following which thousands of Albanian refugees fled to Macedonia.<sup>370</sup> Macedonia accepted these refugees until 31 March 1999.<sup>371</sup> However, when a further 25,000 arrived on 1 April 1999, only 3,000 were permitted to enter.<sup>372</sup> The remainder were let in on 4 April 1999 when an agreement was reached to reopen the borders.<sup>373</sup>

Macedonia's decision to close its border was due to its political, economic and ethnic situation. Macedonia had economic concerns,<sup>374</sup> and there were fears it did not have the resources to

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<sup>360</sup> Long, above n 356, 25 [141].

<sup>361</sup> Ibid 25 [147].

<sup>362</sup> Associated Press, 'Tanzania Closes Border to Thousands of Refugees', *The Spokesman-Review* (Spokane) 1 April 1995, A6.

<sup>363</sup> ICG Central Africa, 'Burundian Refugees in Tanzania: The Key Factor to the Burundi Peace Process' (Report No 12, International Crisis Group, 30 November 1999) 4.

<sup>364</sup> Ibid; Long, above n 356, 25 [144]-[145]; Victoria Rodger, *Defining the Parameters of the Non-Refoulement Principle* (LMM Thesis, Victoria University of Wellington, 2001) [25].

<sup>365</sup> Goodwin-Gill and McAdam, above n 53, 224.

<sup>366</sup> US Committee For Refugees and Immigrants, *World Refugee Survey 1998* (1 January 1998) Refworld, Tanzania <<http://www.refworld.org/docid/3ae6a8c5c.html>>.

<sup>367</sup> US Committee For Refugees and Immigrants, *World Refugee Survey 2000* (1 June 2000) Refworld, Tanzania <<http://www.refworld.org/docid/3ae6a8a514.html>>.

<sup>368</sup> See *Nicaragua Merits* [1986] ICJ Rep 14, 98 [186].

<sup>369</sup> Long, above n 356, 34 [203]-[204]; Coleman, above n 347, 33-4.

<sup>370</sup> Hathaway, above n 33, 280, 364; Coleman, above n 347, 33.

<sup>371</sup> Long, above n 356, 33 [193]-[195].

<sup>372</sup> Ibid 33 [196].

<sup>373</sup> Ibid.

<sup>374</sup> Coleman, above n 347, 34.



accept more refugees<sup>375</sup> as its health system was already stretched prior to the crisis and the number of refugees who entered and sought to enter Macedonia, relative to its small population, was huge.<sup>376</sup> Albanians were the largest ethnic minority in Macedonia.<sup>377</sup> Macedonia feared that an influx of Albanians would upset its ethnic balance, destabilising its fragile political situation and radicalising the already restless Albanian minority.<sup>378</sup>

Macedonia's warning it would close its borders constituted a pre-emption that a mass influx of Albanian refugees posed a national security threat.<sup>379</sup> Macedonia feared the collective threat a mass influx of Albanian refugees posed, constituted a substantial risk to its political security.<sup>380</sup> Macedonia's later actions support this. After opening its borders, Macedonia closed them again for a short period to ensure a balance between the number of Albanians entering and leaving.<sup>381</sup> That Macedonia sought to defend its conduct as not breaching *non-refoulement* to persecution, rather than arguing the rule does not exist,<sup>382</sup> strengthens the rule's existence.

### (iii) *The US's Interception of Haitians*

In 1981, US President Reagan issued an Executive Order to intercept in international waters, and return, people fleeing Haiti, except for legitimate refugees.<sup>383</sup> The same Order required the observance of 'international obligations concerning those who genuinely feared persecution'.<sup>384</sup> This indicates the US believed it was bound not to return refugees intercepted on the high seas.<sup>385</sup> This policy continued for over a decade.<sup>386</sup> Following the coup against the Haitian President in 1991, the number of asylum seekers fleeing Haiti increased.<sup>387</sup> In 1992, President Bush issued a new Executive Order for the interception and return of *all* Haitians attempting to enter the US by the high seas.<sup>388</sup> The US justified its actions by arguing *non-refoulement* to persecution did not apply extraterritorially.<sup>389</sup> In 1989, it had commented that while its practice was to not return people likely to be persecuted, this did not reflect a principle of CIL or apply to refugees not yet within a state's territory.<sup>390</sup>

These actions and comments starkly contradict the US's practice over the previous eight years.<sup>391</sup> In 1982, the US Attorney General wrote to the UNHCR stating the United States was firmly committed to *non-refoulement* and that the US had taken steps to ensure persons

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<sup>375</sup> Rodger, above n 364, [34].

<sup>376</sup> Dončo Donev, Silvana Ončeva and Ilija Gilgorov, 'Refugee Crisis in Macedonia During the Kosovo Conflict in 1999' (2002) 43 *Croatian Medical Journal* 184, 184.

<sup>377</sup> Long, above n 356, 33 [198].

<sup>378</sup> *Ibid*; Coleman, above n 347, 34; Rodger, above n 364, [34].

<sup>379</sup> Long, above n 364, 35 [212].

<sup>380</sup> *Ibid* 33-4 [199]-[202].

<sup>381</sup> *Ibid* 35 [208].

<sup>382</sup> Amnesty International, *Former Yugoslav Republic of Macedonia: The Protection of Kosovo Albanian Refugees* (May 1999) 3 <<http://www.amnesty.org/en/library>>.

<sup>383</sup> United States President Ronald Reagan, *Interdiction of Illegal Aliens*, Executive Order 12324, 29 September 1981.

<sup>384</sup> *Ibid*.

<sup>385</sup> Newmark, above n 227, 853.

<sup>386</sup> United States President George Bush, *Interdiction of Illegal Aliens*, Executive Order 12807, 24 May 1992.

<sup>387</sup> Trevisanut, above n 26, 241-2.

<sup>388</sup> United States President George Bush, *Interdiction of Illegal Aliens*, Executive Order 12807, 24 May 1992.

<sup>389</sup> See *Sale*, 509 US 155 (1993).

<sup>390</sup> Goodwin-Gill, 'The Haitian *Refoulement* Case', above n 56, 106.

<sup>391</sup> *Ibid* 107.

intercepted at sea who had a ‘colourable claim of asylum’ were brought to the US for formal application processing to ensure nobody with a fear of persecution was mistakenly returned to Haiti.<sup>392</sup> In 1987, the US affirmed the importance of *non-refoulement* to persecution.<sup>393</sup>

According to Goodwin-Gill, *non-refoulement* to persecution has existed as a CIL rule since before 1992 when the US changed its policy and started intercepting and returning Haitian refugees.<sup>394</sup> Therefore, the US’s actions breach *non-refoulement* to persecution, as opposed acting as evidence against its existence.<sup>395</sup>

That the US employed a policy not to return Haitians with ‘colourable’ refugee claims for over a decade indicates it believed there was a rule prohibiting the *refoulement* of refugees on the high seas.<sup>396</sup> This led Goodwin-Gill to conclude the 1989 comment was just a self-serving comment drafted with the future Haitian interception programme in mind that came too late to excuse the US from liability.<sup>397</sup> Therefore, the policy to return Haitian refugees should not be considered state practice contrary to the CIL status of *non-refoulement* to persecution, or its extraterritoriality, as it was purely politically motivated and contrary to the US’s previous position which appeared to support *non-refoulement*’s CIL status.

#### 4 Summary of State Practice and *Opinio Juris*

While state inaction represents actual practice of *non-refoulement*, breaches are what stand out. While Hathaway argues breaches are too numerous,<sup>398</sup> it is clear from the above discussion that the standard of state practice and *opinio juris* are, or can be satisfied. Contrary to Hathaway’s contentions, mere statements can demonstrate a CIL rule,<sup>399</sup> and it is sufficient if there is a generally consistent practice among states.<sup>400</sup>

The widespread state participation in international instruments containing a *non-refoulement* to persecution provision<sup>401</sup> or recognition of *non-refoulement* to persecution,<sup>402</sup> and the

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<sup>392</sup> Ibid 106-7.

<sup>393</sup> Comments of Mr Moore in Executive Committee of the High Commissioner’s Programme, *Summary Record of the 415<sup>th</sup> Meeting*, 38<sup>th</sup> sess, 415<sup>th</sup> mtg, UN Doc A/AC.96/SR.415 (12 October 1987) [16].

<sup>394</sup> Guy S Goodwin-Gill, ‘Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific’ (2003) 12 *Pacific Rim Law & Policy Journal* 23, 29; Goodwin-Gill, ‘The Haitian *Refoulement* Case’, above n 56, 105, 106.

<sup>395</sup> Goodwin-Gill, ‘Refugees and Responsibility in the Twenty-First Century’, above n 394, 29; Goodwin-Gill, ‘The Haitian *Refoulement* Case’, above n 56, 105, 106.

<sup>396</sup> Newmark, above n 227, 853.

<sup>397</sup> Goodwin-Gill, ‘The Haitian *Refoulement* Case’, above n 56, 106.

<sup>398</sup> Hathaway, above n 33, 363, 364.

<sup>399</sup> See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 254-5 [70]; *Nicaragua Merits* [1986] ICJ Rep 14, 99-100 [188]; Cf Ibid 363.

<sup>400</sup> See *Nicaragua Merits* [1986] ICJ Rep 14, 98 [186]; Cf Hathaway, above n 25, 364.

<sup>401</sup> See United Nations, *Participant States to the Convention Relating to the Status of Refugees*, above n 12; United Nations, *Participant States to the Protocol Relating to the Status of Refugees*, above n 12; United Nations, *Participant States to the American Convention on Human Rights “Pact of San José, Costa Rica”*, above n 275; United Nations, *Participant States to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, above n 275.

<sup>402</sup> See Asian-African Legal Consultative Organization, *Revised Text of the Bangkok Principles on Status and Treatment of Refugees*, Res 40/3, 40<sup>th</sup> sess (24 June 2001) art III(1); *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN GAOR, 6<sup>th</sup> Comm, 22<sup>nd</sup> sess, 1631<sup>st</sup> plen mtg, UN Doc A/RES/2312 (XXII) (14 December 1967) art 3.

adoption into domestic law of *non-refoulement* provisions,<sup>403</sup> evidence state practice occurring in such a way as to show *opinio juris* of *non-refoulement* to persecution's existence in CIL.

ExCom's Conclusions,<sup>404</sup> individual states' comments,<sup>405</sup> non-States Parties' practices,<sup>406</sup> and especially the *Declaration of States Parties* confirming *non-refoulement* to persecution's CIL status,<sup>407</sup> all demonstrate the rule's existence.

An examination of the Tanzanian border closure, the Macedonian border closure, and the US Haitian policy, which are some of the instances Hathaway cites to support his contention that the standard is not met,<sup>408</sup> indicate the opposite. These occurrences of *refoulement* indicate violating states do not challenge *non-refoulement* to persecution's existence;<sup>409</sup> they argue their conduct does not breach, or is an exception to, *non-refoulement*. This is supported by the *UNHCR's Advisory Opinion* which states that in its experience, states have overwhelmingly indicated their acceptance that *non-refoulement* has become a CIL rule, demonstrated by them providing explanations and justifications to the UNHCR in situations of actual *refoulement*.<sup>410</sup> These actions indicate states believe the rule exists,<sup>411</sup> thereby supporting its existence.<sup>412</sup>

Taken together, the evidence indicates generally consistent State practice and *opinio juris* supporting *non-refoulement* to persecution's CIL status.

#### F *Summing Up: Customary International Law Status of Non-Refoulement*

The inclusion of *non-refoulement* to persecution provisions in many binding and non-binding international instruments affirms the principle's norm-creating character,<sup>413</sup> supporting its existence in CIL.<sup>414</sup> An examination of state practice also reveals consistent state practice and

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<sup>403</sup> Lauterpacht and Bethlehem, above n 13, annex 2.2.

<sup>404</sup> See Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (a); Executive Committee, Office of the United Nations High Commissioner for Refugees, *Problems of Extradition Affecting Refugees*, Conclusion 17 (XXXI) (16 October 1980) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 25 (XXXIII) (20 October 1982) (b); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 79 (XLVII) (11 October 1996) (j); Executive Committee, Office of the United Nations High Commissioner for Refugees, *General Conclusion on International Protection*, Conclusion 81 (XLVII) (17 October 1997) (i).

<sup>405</sup> See Comments by Mr Lunding in Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 522<sup>nd</sup> Meeting*, UN GAOR, 48<sup>th</sup> sess, 522<sup>nd</sup> mtg, UN Doc A/AC.96/SR.522 (23 October 1997) [65]; Comments by Mr Noirfalisie in Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 552<sup>nd</sup> Meeting*, UN GAOR, 52<sup>nd</sup> sess, 552<sup>nd</sup> mtg, UN Doc A/AC.96/SR.552 (5 October 2001) [50].

<sup>406</sup> Cook, above n 334, 253, 257, 267; Comments by Mr Futrakul in Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 554<sup>th</sup> Meeting*, 52<sup>nd</sup> sess, 554<sup>th</sup> mtg, UN Doc A/AC.96/SR.554 (8 October 2001) [60]; Goodwin-Gill and McAdam, above n 53, 227.

<sup>407</sup> See *Declaration of States Parties*, UN Doc HCR/MMSP/2001/09, Preamble para 4.

<sup>408</sup> Hathaway, above n 33, 280, 281, 290, 364.

<sup>409</sup> Goodwin-Gill and McAdam, above n 33, 230.

<sup>410</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 7 [15].

<sup>411</sup> Rodger, above n 364, [54].

<sup>412</sup> See *Nicaragua Merits* [1986] ICJ Rep 14, 98 [186].

<sup>413</sup> Lauterpacht and Bethlehem, above n 17, 143-4.

<sup>414</sup> *Ibid* 149.

*opinio juris*. Therefore, the two necessary elements identified in *North Sea Continental Shelf* are met, indicating *non-refoulement* to persecution has become embedded in CIL. In a refugee context, this encompasses art 33(1) and applies extraterritorially.<sup>415</sup>

#### IV LEGALITY OF AUSTRALIA'S POLICY

The conclusions reached in Parts II and III indicate that Australia's obligation not to *refoule* refugees can apply to refugees outside Australia's territory. This raises the question of whether Australia's actions enforcing its turn-back policy breach art 33(1) or its CIL counterpart. In order to consider this question, it is necessary to firstly understand how refugee status and *non-refoulement* apply in practice.

##### A *Refugee Status*

Protection from *refoulement* is granted to any person who meets the *Refugee Convention* art 1 definition of 'refugee'.<sup>416</sup> A person meets this definition by virtue of his or her circumstances.<sup>417</sup> As soon as a person satisfies art 1's criteria, he or she is a refugee.<sup>418</sup> Therefore, *non-refoulement* applies independently of any formal refugee status determination;<sup>419</sup> which is purely declaratory in nature.<sup>420</sup>

The corollary of this is that if Australia *refoules* a refugee without adequately assessing his or her refugee status, Australia cannot claim lack of knowledge or lack of formal refugee status as a defence; it will have breached its obligations.

##### B *Status Determination Process*

The *Refugee Convention* does not stipulate a procedure for refugee status determinations. However, its object and purpose support the need for case-by-case assessments of refugee status.<sup>421</sup> Where a state fails to properly identify and protect refugees, it breaches its *non-*

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<sup>415</sup> Ibid 149-50; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 7 [15].

<sup>416</sup> *Refugee Convention* art 1(A)(2) (definition of 'refugee'), see also the exclusionary provisions art 1(D)-(F) (definition of 'refugee').

<sup>417</sup> Hathaway, above n 33, 303.

<sup>418</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 2 [6]; Guy S Goodwin-Gill, 'Commentary: *Non-Refoulement* and the New Asylum Seekers' (1986) 26 *Virginia Journal of International Law* 897, 902.

<sup>419</sup> Goodwin-Gill, 'Commentary: *Non-Refoulement* and the New Asylum Seekers', above n 418, 902; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 2 [6]; see especially Executive Committee, Office of the United Nations High Commissioner for Refugees, *Non-Refoulement*, Conclusion 6 (XXVIII) (12 October 1977) (c); Office of the United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.3 (December 2011) 10 [28].

<sup>420</sup> Goodwin-Gill and McAdam, above n 53, 244.

<sup>421</sup> Ibid 530; Wood and McAdam, above n 11, 294; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 225 [216] (Kiefel J).

*refoulement* obligations.<sup>422</sup> This means asylum claims must be examined on their substantive merits<sup>423</sup> on an individual basis<sup>424</sup> if asylum seekers are to be returned without breaching international law.<sup>425</sup>

As such, Australia can only avoid breaching its obligations by ensuring that all asylum seekers who *may* be protected from *refoulement* have their refugee status properly determined.<sup>426</sup>

### C *What is Prohibited*

The prohibition in art 33(1) and its CIL counterpart on returning refugees to ‘territories’<sup>427</sup> indicates that the formal status of *where* refugees may not be *refouled* to is irrelevant, and is not limited to the refugees’ country of origin.<sup>428</sup> Return to any *territory* where they risk being persecuted is prohibited.<sup>429</sup>

Typically, *refoulement* involves refugees being directly returned to a territory where they face a risk of persecution. However, indirect *refoulement* is also prohibited.<sup>430</sup> This occurs in two ways. It occurs where a state simply turns around a boat, leaving refugees with no option but to return on their own accord to a territory where they face a risk of persecution.<sup>431</sup> It also occurs where a state returns refugees to another state; or turns around a boat, leaving refugees with no option but to return on their own accord to another state and the other state then returns the refugees to a territory where they face a risk of persecution.<sup>432</sup> This latter liability on the original *refouling* state exists because of art 33(1)’s prohibition on *refoulement* in ‘any manner whatsoever’.<sup>433</sup> Therefore, while *non-refoulement* does not require states to grant asylum,<sup>434</sup> it does require them to adopt a course of action that does not lead to refugees being returned to territories where they face a risk of persecution, whether directly or indirectly.<sup>435</sup> States may only return refugees if there is no real chance this will occur.<sup>436</sup>

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<sup>422</sup> Andreas Schloenhardt and Kate L Stacey, ‘Assistance and Protection of Smuggled Migrants: International Law and Australian Practice’ (2013) 35 *Sydney Law Review* 53, 62.

<sup>423</sup> Vandvik, above n 195, 29; Executive Committee, Office of the United Nations High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, Conclusion 30 (XXXIV) (20 October 1983) (e)(i).

<sup>424</sup> Lauterpacht and Bethlehem, above n 17, 118.

<sup>425</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 190-1 [94] (Gummow, Hayne, Crennan and Bell JJ), 224-5 [215]-[216] (Keifel J); *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290, 305-6 (Brennan J).

<sup>426</sup> See Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 3 [6].

<sup>427</sup> See *Refugee Convention* art 33(1).

<sup>428</sup> Trevisanut, above n 26, 222; Lauterpacht and Bethlehem, above n 17, 121-2.

<sup>429</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 3 [7].

<sup>430</sup> Goodwin-Gill, ‘*Commentary: Non-Refoulement and the New Asylum Seekers*’, above n 418, 902; Jon L Jacobson, ‘At-Sea Interception of Alien Migrants: International Law Issues’ (1991-1992) 28 *Willamette Law Review* 881, 817; Magner, above n 20, 87; *T I v United Kingdom* [2000] III Eur Court HR 435, 456-7.

<sup>431</sup> Goodwin-Gill and McAdam, above n 53, 276; Pallis, above n 20, 349.

<sup>432</sup> Goodwin-Gill and McAdam, above n 53, 252, 276; Wood and McAdam, above n 11, 293; see also *R (Adam) v Secretary of State for the Home Department* [2001] 2 AC 477, 527 (Lord Hobhouse); Pallis, above n 20, 349.

<sup>433</sup> *Refugee Convention* art 33(1)

<sup>434</sup> Weis, above n 204, 342; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 3 [8].

<sup>435</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 3 [7]-[8].

<sup>436</sup> Hathaway, above n 33, 301; Weis, above n 204, 342; Magner, above n 20, 65.

## D *Application to Australia*

*Non-refoulement* obligations bind all of a State's organs<sup>437</sup> as well as any entity acting on its behalf.<sup>438</sup> Therefore, BPC which carries out Australia's 'turn-back' policy<sup>439</sup> is bound by Australia's *non-refoulement* obligation.<sup>440</sup> Whether Australia has breached this obligation is discussed with respect to two incidents detailed below.

### 1 *Escorted Back to Indonesia*

The first incident concerned 18 asylum seekers intercepted near Ashmore Reef on 1 May 2014, and the three-day escort of their boat closer to Indonesia by BPC.<sup>441</sup> On 4 May, three additional asylum seekers were placed on the boat, before BPC directed them towards Indonesian territory and then left.<sup>442</sup>

There is little doubt that art 33(1) governs these acts. Part II identified that art 33(1) applies extraterritorially wherever states exercise jurisdiction,<sup>443</sup> which occurs where states exercise effective control or authority over persons.<sup>444</sup> This includes when states detain people on a vessel flying their state flag,<sup>445</sup> as occurred here in respect of the three asylum seekers transferred to the boat. State vessels intercepting boats, including engaging in turning boats around and transferring refugees, also meet the control threshold.<sup>446</sup> This boat's escort back to Indonesia involves greater control than simply turning a boat around as the escorting BPC vessel determined where the asylum boat went. Therefore, BPC arguably exercised effective authority over the boat and the asylum seekers on board it, extending art 33(1)'s operation onto them.

Obligations can also arise irrespective of physical control if the interception occurred in the contiguous zone.<sup>447</sup> Australia's choice to have a contiguous zone and to patrol it in order to prevent the infringement of its immigration laws brings the whole zone within Australia's jurisdiction for these purposes.<sup>448</sup> Consequently, any refugee who reaches Australia's

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<sup>437</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 4 [9].

<sup>438</sup> *Ibid*; Hathaway, above n 33, 340.

<sup>439</sup> Michael Bachelard, 'Australian Navy Turns Back Asylum Seeker Boat to Indonesia After Loading Three Extra People', *The Sydney Morning Herald* (online), 6 May 2014 <<http://www.smh.com.au>>; Scott Morrison, Minister for Immigration and Border Protection, 'Australian Government Returns Sri Lankan People Smuggling Venture' (Media Release, 7 July 2014) <<http://webarchive.nla.gov.au/gov/20140801014043/http://www.minister.immi.gov.au/media/sm/2014/sm216152.htm>>.

<sup>440</sup> See also Dale Stephens, 'Comparative Approaches to Security and Maritime Border Control' (2006) 81 *International Law Studies* 19, 20.

<sup>441</sup> Bachelard, above n 439.

<sup>442</sup> *Ibid*.

<sup>443</sup> See Fischer-Lescano, Löhr and Tohidipur, above n 20, 267; Lauterpacht and Bethlehem, above n 17, 110; Goodwin-Gill and McAdam, above n 53, 245-6; Hathaway, above n 33, 339.

<sup>444</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 16 [35]; *Banković v Belgium* [2001] XII Eur Court HR 333, 355 [71]; see also *Loizidou* (1995) 20 EHRR 99, [62]; *Issa v Turkey* (2005) 41 EHRR 27, [71].

<sup>445</sup> See *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 132 [77].

<sup>446</sup> Hathaway, above n 33, 339; Vandvik, above n 195, 32.

<sup>447</sup> See Part (II)(B)(4)(b)(i).

<sup>448</sup> See *Banković v Belgium* [2001] XII Eur Court HR 333, 355 [71]. See also *Loizidou* (1995) 20 EHRR 99, [62]; *Issa v Turkey* (2005) 41 EHRR 27, [69]; Hathaway, above n 33, 169-70.

contiguous zone is afforded the same protection as one who reaches its territorial sea. It is unclear whether this boat reached Australia's contiguous zone. However, following the turn-back policy, the interception was likely to have occurred once the boat reached Australia's contiguous zone.<sup>449</sup> Therefore, art 33(1) would arguably apply to the asylum seekers on this boat who are refugees. No reports suggest these asylum seekers had their refugee status determined. However, as refugee status determinations are purely declaratory in nature,<sup>450</sup> if any were refugees, Australia's failure to identify and protect them would arguably breach art 33(1).<sup>451</sup>

A Parliament of Australia research paper indicates that under the Howard Government's Pacific Solution (which is similar to the current turn-back policy), between September 2001 and February 2008, 70 per cent of asylum seekers arriving by boat were found to be refugees.<sup>452</sup> During 2009 and 2010 under the Rudd Government, 73 per cent were found to be refugees.<sup>453</sup> Therefore, there is a strong possibility that boats containing asylum seekers which are intercepted by Australian authorities would contain some refugees. This means there is a strong possibility Australia *refouled* refugees in this case.

The Commonwealth Government might contend that by returning refugees to Indonesia, they are not being returned to a territory where they face a risk of persecution. However, Australia cannot guarantee that the refugees will not be *refouled* by Indonesia because it is simply escorting them to the edge of Indonesia's territory. It has no agreement in place with Indonesia with respect to refugees returned in this manner to ensure they are protected. Consequently, the return of these asylum seekers would arguably breach art 33(1).

As the CIL version of *non-refoulement* to persecution encompasses art 33(1),<sup>454</sup> CIL would also arguably be breached.

## 2 *Detention and Transfer of Sri Lankans*

The second case involves the interception and detention by BPC of Sri Lankan asylum seekers of Sinhalese and Tamil ethnicities west of Cocos Islands in late June 2014, before their transfer to Sri Lankan authorities on 6 July.<sup>455</sup> These asylum seekers were screened to identify if any ought to be referred to a further determination process.<sup>456</sup> However, only three basic questions were asked: 'What are your reasons for coming to Australia? Do you have any other reasons for coming to Australia? Would you like to add anything else?'<sup>457</sup> If refugees did not state they sought asylum because they feared persecution, they were screened out and returned.<sup>458</sup>

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<sup>449</sup> See The Liberal Party/National Party of Australia, *Regional Deterrence Framework*, above n 3, 15.

<sup>450</sup> Goodwin-Gill and McAdam, above n 53, 244

<sup>451</sup> See Schloenhardt and Stacey, above n 422, 62.

<sup>452</sup> Janet Phillips, 'Asylum Seekers and Refugees: What are the Facts?' (Research Paper, Parliamentary Library, Parliament of Australia, 2013) 9-10.

<sup>453</sup> *Ibid.*

<sup>454</sup> Lauterpacht and Bethlehem, above n 17, 149-50; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 7 [15].

<sup>455</sup> Morrison, 'Australian Government Returns', above n 439.

<sup>456</sup> *Ibid.*; 'Australia Court Blocks Migrants' Return to Sri Lanka', *BBC News* (online), 7 July 2014 <<http://www.bbc.com/news/world-asia-28193492>>; Nick Evershed, Paul Farrel and Oliver Laughland, "'In" or "Out": What we know about "Enhanced Screening" of Asylum Seekers', *The Guardian* (online), 3 July 2014 <<http://www.theguardian.com>>.

<sup>457</sup> Evershed, Farrel and Laughland, above n 456.

<sup>458</sup> *Ibid.*

As discussed above, the detention of asylum seekers on an Australian vessel, as is the case here, extends the operation of art 33(1) onto those detained.

This incident differs from the previous one because *brief* screening occurred here. Although it is up to states to determine the process they use to assess refugee status,<sup>459</sup> that does not mean states can utilise inadequate procedures. If a refugee is screened out, arguably Australia will have breached its *non-refoulement* obligations.<sup>460</sup>

Given the alleged slaughter of Tamils by Sri Lanka's military toward the end of its civil war,<sup>461</sup> and the alleged *ongoing* mistreatment and torture of Tamils by Sri Lanka's government agencies,<sup>462</sup> it is likely that some of the asylum seekers were refugees. It is doubtful that Australia's screening process successfully identified these refugees as only one asylum seeker was identified as *possibly* having a claim to asylum.<sup>463</sup> Such a small proportion contradicts historical rates of successful claims made by Sri Lankan asylum seekers who arrive by boat, which is between 80 to 90 per cent.<sup>464</sup> Therefore, it is likely there were refugees among those returned. Given they were returned to authorities of the state they sought to flee from, which authorities have been suspected of severely mistreating Tamils, their return probably breached art 33(1).

As the CIL version of *non-refoulement* to persecution encompasses art 33(1),<sup>465</sup> CIL would also probably be breached.

## V CONCLUSION

The above discussions and conclusions indicate that BPC's actions in enforcing Australia's turn-back policy may have possibly breached Australia's international obligations imposed by the *Refugee Convention* and CIL not to *refoule* refugees to territories where they face a risk of persecution.

The challenges associated with enforcement of Australia's international obligations, and the concerns regarding the implications for Australia and those who may possibly have been *refouled* should be noted. One of the major problems of the *Refugee Convention* is that it 'lacks a supra-national enforcement mechanism with de facto power to compel state behaviour'.<sup>466</sup> It does not provide for the possibility of individual complaints against states to be made in

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<sup>459</sup> *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290, 300 (Mason, Deane and Dawson JJ), 305 (Brennan J); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 224 [215] (Keifel J).

<sup>460</sup> Sarah Whyte and Jason Koutsoukis, 'Four Questions, then Back to Sri Lanka', *The Sydney Morning Herald* (online), 3 July 2014 <<http://www.smh.com.au>>.

<sup>461</sup> 'UN Rights Council Approves Inquiry into Alleged Abuses in Sri Lanka War', *UN News Centre* (online), 27 March 2014 <<http://www.un.org/apps/news>>.

<sup>462</sup> Associated Press in Colombo, 'Sri Lanka Accused of Ill-Treating Women it Suspects of Tamil Tiger Links', *The Guardian* (online), 9 April 2014 <<http://www.theguardian.com>>; Karen Barlow, 'Refugee Council Warns Tamil Asylum Seekers' Lives in Danger Amid Reports Australia Handed them Back to Sri Lankan Navy', *ABC News* (online), 5 July 2014 <<http://www.abc.net.au>>; 'Torture in Sri Lanka – "Many Times I Would Lose Consciousness"', *News, Amnesty International* (online), 26 June 2013 <<http://www.amnesty.org/en/news>>.

<sup>463</sup> Oliver Laughland, Paul Farrell and Melissa Davey, 'Australia Returns Asylum Seekers to Sri Lanka: What Happens Next?', *The Guardian* (online), 7 July 2014 <<http://www.theguardian.com>>.

<sup>464</sup> See Phillips, above n 452, 9-11.

<sup>465</sup> Lauterpacht and Bethlehem, above n 17, 149-50; Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 7 [15].

<sup>466</sup> D'Angelo, above n 22, 288.



international courts or tribunals when alleged breaches occur.<sup>467</sup> Although it does provide that disputes between States can be referred to the ICJ at a disputing State's request,<sup>468</sup> this provision has never been invoked.<sup>469</sup> Consequently, breaches of its provisions are 'checked only by public opinion, national judicial interpretation, and international influence'.<sup>470</sup> Recent events in Australia have shown that these can be rather influential. In July 2014, the Commonwealth Government transferred to Sri Lankan authorities 41 Sri Lankan nationals and the fate of another 153 asylum seekers who had been intercepted was unclear.<sup>471</sup> Refugee advocates strongly criticised the Commonwealth Government,<sup>472</sup> and human rights lawyers brought a case in the High Court on the latter asylum seekers' behalf successfully seeking an interim injunction against their return,<sup>473</sup> which generated negative publicity for the Commonwealth Government.<sup>474</sup> After almost a month detained at sea, and in response to public pressure and the High Court case, the Commonwealth Government transferred the asylum seekers to the Curtin Detention Centre on Australia's mainland.<sup>475</sup> These asylum seekers are now in Nauru having their refugee status assessed.<sup>476</sup> This indicates that public scrutiny of the Commonwealth Government's actions can influence its decisions.

The High Court case addressed whether the powers granted under the *Maritime Powers Act 2013* (Cth), which allow officers to intercept and detain people, and take them anywhere,<sup>477</sup> authorised officers to detain the plaintiff and take him to India. While the plaintiff sought the Court's determination whether this power was constrained by Australia's *non-refoulement* obligations, including those imposed by the *Refugee Convention* and CIL,<sup>478</sup> this question was not answered, as the plaintiff did not submit any facts suggesting he feared persecution in India or that there was any risk of direct or indirect *refoulement* to Sri Lanka from India.<sup>479</sup> In making its decision, the High Court was restricted to interpreting the *Maritime Powers Act 2013* (Cth) by reference to Australia's domestic law, not international law.<sup>480</sup>

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<sup>467</sup> Júlia Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of *Non-refoulement* and the Prohibition of Torture and Other Forms of Ill-treatment' (2012) 14 *European Journal of Migration and Law* 119, 134.

<sup>468</sup> *Refugee Convention* art 38.

<sup>469</sup> James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2<sup>nd</sup> ed, 2014) 3.

<sup>470</sup> Michael Campagna, 'Effective Protection Against *Refoulement* in Europe: Minimizing Exclusionism in Search of a Common European Asylum System' (2009) 17 *University of Miami International and Comparative Law Review* 125, 135.

<sup>471</sup> Ben Doherty, '53 Australian Lawyers Condemn Return of Asylum Seekers to Sri Lanka', *The Sydney Morning Herald* (online) 7 July 2014 <[www.smh.com.au](http://www.smh.com.au)>.

<sup>472</sup> *Ibid*; Ross Peake, 'Canberra Refugee Protesters Accused Federal Government of Piracy for Sending Back Tamil Asylum Seekers to Sri Lanka', *The Canberra Times* (online), 8 July 2014 <[www.canberratimes.com.au](http://www.canberratimes.com.au)>.

<sup>473</sup> 'High Court Injunction Blocks Handover of 153 Asylum Seekers to Sri Lanka', *ABC News* (online), 8 July 2014 <[www.abc.net.au/news](http://www.abc.net.au/news)>.

<sup>474</sup> Leo Shanahan, 'High Court Blocks Return of 153 Asylum Seekers to Sri Lanka Military', *The Australian* (online), 7 July 2014 <[www.theaustralian.com.au](http://www.theaustralian.com.au)>.

<sup>475</sup> Matt Siegel and Jane Wardell, 'Sri Lankan Asylum Seekers Arrive in Australia After Weeks Held at Sea', *Reuters* (online), 28 July 2014 <[www.reuters.com](http://www.reuters.com)>.

<sup>476</sup> Ian Lloyd Neubauer, 'Australian court upholds refugee imprisonment at sea', *Aljazeera* (online), 1 February 2015 <<http://www.aljazeera.com>>.

<sup>477</sup> *Maritime Powers Act 2013* (Cth) ss 54, 69, 71, 72.

<sup>478</sup> CPCF, 'Plaintiff's Submissions', Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 11 September 2014, 1 [5], 9-14 [45]-[67].

<sup>479</sup> *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (28 January 2015) [13] (French CJ), [124]-[126] (Hayne and Bell JJ), [169] (Crennan J), [441] (Keane J).

<sup>480</sup> See, eg, *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (28 January 2015) [13] (French CJ), [462] (Keane J).

If Australia is to continue its turn-back policy, it must adopt a course of action that is consistent with *non-refoulement*.<sup>481</sup> This means Australia can only turn back asylum seekers if it does not lead to refugees being *refouled* to territories where they face a risk of persecution.<sup>482</sup> Australia can only be sure this will not occur if they assess the refugee status of all asylum seekers that they intend to turn back, which must be determined by examining, on an individual basis,<sup>483</sup> the substantive merits of each asylum seeker's claim.<sup>484</sup>

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<sup>481</sup> See Lauterpacht and Bethlehem, above n 17, 113.

<sup>482</sup> Office of the United Nations High Commissioner for Refugees, *Advisory Opinion*, above n 20, 3 [7]-[8].

<sup>483</sup> Lauterpacht and Bethlehem, above n 17, 118.

<sup>484</sup> Vandvik, above n 195, 29; Executive Committee, Office of the United Nations High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, Conclusion 30 (XXXIV) (20 October 1983) (e)(i).