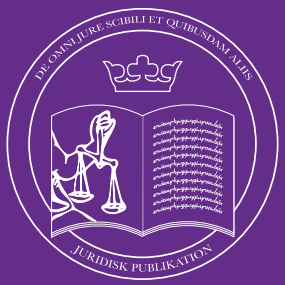

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The Prohibition of Refoulement in Refugee Law and the Matter of Extraterritorial Applicability

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THE PROHIBITION OF *REFOULEMENT* IN REFUGEE LAW AND THE MATTER OF EXTRATERRITORIAL APPLICABILITY

By Hevi Dawody Nylén[1]

1. INTRODUCTION

The issue of whether 'right to asylum' exists as an established human right within international law has been discussed and addressed by several scholars.[2] That discussion is far too extensive for the scope of this article. However, what can be stated and shortly concluded is that there is no *opinio juris*, not at this point of writing at least, that supports the enforced application of the right to asylum as a right that imposes obligations upon states. Keeping in mind Article 14 of the 1948 Universal Declaration of Human Rights (UDHR), which states that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution',[3] we might to some extent approach a closer agreement to a 'recognized' right to asylum. Still, worth to recall is that the UDHR is a non-binding instrument and is still perceived and treated as such. Article 12 of the 1966 International Covenant on Civil and Political Rights (ICCPR),[4] which contrary to Article 14 of the UDHR upholds a binding provision, which shapes the individual's right to leave his or her own home country, might be considered a right which purposefully imbeds the 'right to asylum'.

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2 To mention some examples, see for instance, McAdam, J, Goodwin-Gill, G.S, *The Refugee in International Law*, (3rd edition), Oxford University Press, 2007, p. 371: '… there remains insufficient State practice or *opinio juris* to support a concomitant duty on the State to grant asylum to those seeking it.'; Noll, G, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection*, Lund University Publications, 2000, pp. 357–62; Noll, G, 'Seeking asylum at embassies. A right to entry under international law?', International Journal of Refugee Law, 2005, p. 547; Morgenstern, 'The Right of Asylum', 26 BYIL 327, 1949: 'The practice of states has not admitted a right of individuals to asylum' and 'No international treaty entitles individuals to claim asylum from states,' pp. 331 and 336; Li, Y, *Exclusion from Protection as a Refugee: An Approach to a Harmonizing Interpretation in International Law*, International Refugee Law Series, vol. 9, Brill Nijhoff, Leiden, 2017, p. 43; Ratcovich, M, *International Law and the Rescue of Refugees at Sea,* Stockholm University, 2019, p. 115.

3 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 15 March 2022].

4 The 1966 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

However, delving deeper into the wording of Article 12 of the ICCPR – this provision rather restrictively embodies the element of one's right to *leave*, not an extended acknowledged right to *enter* another country and invoke a right to be granted asylum.[5] This evidently creates two opposite sides of the same coin. One side providing the individual the right to leave his or her country of origin, the other being the potential of meeting a foreign country's closed border when exercising their right. Evidently, this causes grave consequences to the individual concerned, particularly in situations where the individual was forced to leave his or her habitual environment and cross international borders due to fear of persecution.

With the awareness of the two instruments constituting the legal framework of international refugee law – the 1951 Refugee Convention and the 1967 Protocol[6] – one might think that these instruments in one way or another highlight some references to an obligation resting upon a state to invite foreigners to enter the state for the purpose to seek asylum. Surprisingly, neither the Refugee Convention nor its Protocol contains any wordings that establish an individual right to be granted asylum.

Despite the humanitarian objectives of the Refugee Convention and its purpose to achieve humanitarian protection, the legal framework does not entail an implicit right to invoke a right to seek asylum or to enjoy asylum as a consequence of one's individual right to 'leave' their home country. Thus far, within such context, states sovereignty and territorial integrity prevail over the individual's interest to seek and enjoy protection. However, drawing this analysis a bit further and shifting the attention to the fundamental principle that once rooted the foundation of the entire refugee legal framework – the *non-refoulement* principle – one might possibly run into other interesting outcomes.

The only provisions in the Refugee Convention dealing with admission are Articles 31–33. While Articles 31 and 32 focus on the prohibition of imposing penalties on those who illegally enter the territory of a state party and merits concerning expulsion of a refugee who is lawfully on the territory of a state, Article 33 addresses the issue of expulsion from the perspective of prohibiting

5 Hathaway, J.C, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 300.

6 *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 15 March 2022]; *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: https://www.refworld.org/docid/3ae6b3ae4.html [accessed 15 March 2022].

the refugee to be expelled or returned to a frontier of territories where his or her life or freedom would be threatened (the prohibition of *refoulement*).

Many commentators and scholars have shared a consistent approach that a right to asylum does not exist within the normative scope of the Refugee Convention.[7] However, there is still an ongoing discussion on whether the prohibition of *refoulement* within the context of Article 33 does in fact have extraterritorial applicability and, thus, a wider normative scope than initially intended.[8]

This article analyses the potential extraterritorial applicability of Article 33 and the outcome it may constitute to the legal framework of refugee law and its interaction with human rights law in general. The analysis focuses on matters related to the aspect of entering a state and seeking international protection. This article analyses this issue by firstly introducing the landmark ruling of the *Sale v. Haitian Centers Council* case, to thereafter follow up with some scholarly and commentator statements and discussions. Finally, this article concludes with an analysis and main remarks on what substantial impact an extraterritorial applicability of the *non-refoulement* principle in refugee law might have.

2. THE *SALE V. HAITIAN CENTERS COUNCIL* CASE: ADDRESSING THE ISSUE OF EXTRATERRITORIAL APPLICABILITY

The issue of extraterritorial applicability of the *non-refoulement* principle within refugee law usually becomes important during the escape towards the potential host-State, for instance, when the refugee and asylum seekers cross the high seas. This issue was addressed in a landmark case by the US Supreme Court – the *Sale* case.[9]

The merits of the case were as follows. Asylum seekers from Haiti had boarded a ship with destination US where they intended to seek asylum protection. The applicants were prohibited from crossing the US territorial waters as they were

7 Lauterpacht and Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in: Feller, E, Türk, V, Nicholson, F, *Refugee Protection*, (eds), 87, 113 at para 75; Kälin, Caroni, and Heim in: Zimmermann (ed), The 1951 Refugee Convention, Article 33, para 1, at paras 1–2.

8 Li, *Exclusion from Protection as a Refugee*, pp. 29–30.

9 Chris *Sale*, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al., 509 U.S. 155; 113 S. Ct. 2549;125 L.Ed. 2d 128; 61 U.S.L.W. 4684; 93 Cal. Daily Op. Service 4576; 93 Daily Journal DAR 7794; 7 Fla. Law W. Fed. S 481, United States Supreme Court, 21 June 1993, available at: https://www.refworld.org/cases,USSCT,3ae6b7178.html [accessed 31 January 2022].

intercepted beforehand by American coastguards and returned to their home country without assessing whether the asylum seekers on board were refugees and in need of international protection.[10] Thus, one of the legal questions that the US Supreme Court had to consider was whether the interception by the American coastguard was a violation of the principle of *non-refoulement* as enshrined in Article 33(1) of the Refugee Convention. To clarify, even though the *non-refoulement* principle refers to the term of *refugee*, the legal scope of the provision is also applicable to asylum seekers for the purpose of providing effective protection.[11]

To give a final decision on the issue, the Court had to examine whether the *non-refoulement* principle in Article 33(1) contains extraterritorial applicability. Most of the judges concluded that Article 33(1) did not hold extraterritorial applicability as the words of 'expel' and 'return' like the French term '*refouler*' were consistent with the meaning of the term 'deport'. By using a literal interpretation of the wordings in Article 33(1), the Court concluded that the purpose of the prerequisite in the provision was for the principle to only be applicable on asylum seekers and refugees within the territory of the host-State given that it would, otherwise, be impossible to return, expel or deport the applicant without them initially being present within the frontiers of the state concerned.[12]

Furthermore, the Court acknowledged the consequences of recognizing extraterritorial applicability of the *non-refoulement* principle as part of the exception rule in Article 33(2) by stating that:

> Under the second paragraph of Article 33 an alien may not claim the benefit of the first paragraph if he poses a danger to the country in which he is located. If the first paragraph did apply on the high seas, no nation could invoke the second paragraph's exception with respect to an alien there: an alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1

10 Ogg, K, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates', Refugee Survey Quarterly, vol. 33, Issue 4, 2014, p. 92.

11 Goodwin-Gill, McAdam, *The Refugee in International Law*, pp. 232–33.

12 *Sale v. Haitian Centers Council*, at para 156.

> obligated the signatory state only with respect to aliens within its territory.[13]

Therefore, the US Supreme Court determined, by analysing the wordings of the drafters, that Article 33(1) could not have been supposed to be applied on the high seas as the reference to 'a danger to the security of the *country in which he is*'[14] in Article 33(2) confirms the necessity of the refugee being present in the state of asylum. Consequently, as the high seas are not considered *a country*, refugees and asylum seekers present on the high seas cannot benefit from the application of the *non-refoulement* principle according to Article 33(1). According to the Court, an extended interpretation of the principle causing a broader scope of application would 'violate the spirit of Article 33'[15] and despite the intention to comprehend the humanitarian purposes it 'cannot impose uncontemplated obligations on treaty signatories.'[16]

Justice Blackmun, on the other hand, disagreed with the majority's conclusion. He focused in his dissenting opinion on the importance, when interpreting a particular legal instrument, of giving the words their plain meaning in light of its context and purpose.[17] Given that Justice Blackmun took his point of departure following the terms described in the general rule of interpretation enshrined in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT),[18] he concluded that Article 33(1) does include extraterritorial applicability since the purpose of the entire Refugee Convention is to prevent the return of refugees to a place where they might be subject to persecution.

Hence, when interpreting the term 'return' in light of the purpose of the Refugee Convention – a requirement for the refugee to initially be present within the host-State's territory does not exist. With lack of binding impact or precedential value, it is still worth mentioning that this case was also brought before the Inter-American Commission of Human Rights. The Commission came to the same conclusion as dissenting Justice Blackmun

13 *Sale v. Haitian Centers Council*, at paras 179–180.

14 *Sale v. Haitian Centers Council*, at para 156(c) (emphasis added); Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates', p. 92.

15 *Sale v. Haitian Centers Council*, at para 183.

16 *Sale v. Haitian Centers Council*, at para 157.

17 *Sale v. Haitian Centers Council*, at paras 190–93.

18 Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, adopted at Vienna on 23 May 1969, entered into force on 27 January 1980, states the following: 'A treaty shall 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.'

and stated that 'Article 33 has no geographical limitations.' However, the Commission did not more precisely develop their reasoning in relation to their presented conclusion.[19]

3. THE *SALE* CASE: SUPPORTING THE DISSENTING OPINION

The US Supreme Court's decision in the *Sale* case has been criticized by many scholars and the office of the United Nations High Commissioner for Refugees (UNHCR), whose shared position has been in alignment with dissenting Judge Blackmun's opinion emphasizing that:

> Article 33.1 is clear not only in what it says, but also in what it does not say: It does not include any geographical limitation. It limits only where a refugee may be sent "to", not where he may be sent from. This is not surprising, given that the aim of the provision is to protect refugees against persecution.[20]

Although Grahl-Madsen argues in favour of interpreting the principle to only be invoked and claimed by those who are already present within the territories of the Contracting States,[21] many other commentators, scholars, and the UNHCR, in general, have a shifting attitude towards the extraterritorial applicability of the *non-refoulement* principle – acknowledging it to be possible to invoke at state frontiers and outside state borders.[22] This is a perspective that has been emphasised by the UNHCR stating that it 'is of the view that

19 See *Inter-American Commission on Human Rights, The Haitian Centre for Human Rights et al. v. United States*, case 10.675, 13 March 1997, at para. 157; Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates', p. 93.

20 Gilbert, G, Rüsch, A.M, *Jurisdictional Competence Through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?*, 12 Journal of International Criminal Justice, 2014, 1093, p. 1097 n 14 with reference to the dissenting opinion by Cf. Blackmun J., at 193, in: case *Sale v. Haitian Centers Council*.

21 Grahl-Madsen, A, *The Status of Refugees in International Law*, Vol. II, (Leiden: A.W. Sijthof, 1972. pp. xvi, 182), p. 94. From the readings of Grahl-Madsen's statement, it seems as Grahl-Madsen's reasoning is impeding any potential dimension of extraterritorial applicability of the *non-refoulement* within the context of the Refugee Convention.

22 Kälin, Caroni, and Heim in: Zimmermann (ed), The 1951 Refugee Convention, Article 33, para 1, at paras 86–91, 105–111; Lauterpacht and Bethlehem, 'The scope and content of the principle of *non-refoulement:* Opinion', in: Feller, Türk, Nicholson, *Refugee Protection*, (eds), 87, pp. 110–15; Gammeltoft-Hansen, T, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011, pp. 44–157; Goodwin-Gill, G.S, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*', 23 International Journal of Refugee Law, 2011, p. 443, pp. 446–57; Goodwin-Gill, McAdam, *The Refugee in International Law*, pp. 50–284; Hathaway, *The Rights of Refugees under International Law*, 2005, pp. 335–42.

the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.'[23]

3.1 ANALYSING THE MEANING OF 'IN ANY MANNER WHATSOEVER'

One of the main elements criticized by Hathaway – concerning the Court's reasoning in the *Sale* case – is the absence of considering the intentions of the drafters to amend Article 33 in a way of prohibiting the *refoulement* to a territory to where the person might be subject to persecution 'in any manner whatsoever'. This is supposed to 'refer to various methods by which refugees could be expelled, refused admittance or removed.'[24] Given that the *non-refoulement* principle in Article 33(1) includes the reference to 'in any manner whatsoever' the objectives of the duty to not return a person to a place of persecution entail a wider scope of application.[25] The foundation of the Refugee Convention would therefore be 'fundamentally undermined by an approach to Article 33 which effectively authorized governments to deny them all rights by forcing them back home, so long as the repulsion occurred before the refugees reached a state party's territory.'[26]

Although a derogation of the *non-refoulement* principle under Article 33 can be permissible – it does not mean that it can be allowed under every count. If the derogation of the *non-refoulement* principle under refugee law would amount to deportation to a frontier where the person concerned would face torture, cruel, inhuman, or degrading treatment or punishment and come within the scope of the recognized non-derogable customary norms of human rights law – the derogation of the core principle within refugee law would not be permissible.[27] The wording of 'in any manner whatsoever' ensures that the foundation of the *non-refoulement* principle within the context of refugee law

23 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, pp. 12 and 19, at paras 24 and 43 (emphasis added).

24 Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, February 2, 1950, at para 109; Hathaway, *The Rights of Refugees under International Law*, 2005, p. 338.

25 See also Lauterpacht and Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in: Feller, Türk, Nicholson, *Refugee Protection*, (eds), p. 87.

26 Hathaway, *The Rights of Refugees under International Law*, 2005, p. 338 n 271 with reference to interpretive remarks by UNHCR in 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', EC/50/SC/CRP.17, at para 23.

27 Türk, Nicholson, Feller, *Refugee protection in international law* – UNHCR's Global Consultations on International Protection, Cambridge University Press, 2009, p. 10.

is protected and maintained. And particularly, that no derogation or restriction against the essence of the *non-refoulement* principle is adopted without cautious manner. As described by Türk and Nicholson – '[t]he application of these exceptions is conditional on strict compliance with principles of due process of law and the requirement that all reasonable steps must be taken to secure the admission of the individual concerned to a third country.'[28]

These terms are even more crucial to meet in times of increased mass influx. Also, the ambitious effort established by the international community to reduce security measures[29] is another reason why it is important to value and maintain the fundamental principles of refugee law and human rights by which human value is protected and built upon. States are indeed allowed, as an integral part of their territorial sovereignty, to regulate and control their borders to prevent illegal entrance and to ensure that entrance to the state are not abused by actors who threaten national security and interests. Nevertheless, the mechanism to check borders must still be consistent with the importance of identifying those in need of international refugee protection and, thus far, be protected from not being returned to a dangerous place of persecution.[30]

3.2 ANALYSING THE MEANING OF 'EFFECTIVE CONTROL'

Since the US Supreme Court in the above-mentioned *Sale* case did not consider that some rights under the Refugee Convention, including the *non-refoulement* principle, were necessarily dependent on territorial or other levels of attachment to establish its applicability, the Court did not recognize that international rights *can be applied outside* of a state's territorial borders. Most importantly, what needs to be observed is whether the state concerned is exercising 'effective control'. As confirmed by the European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ), in a situation when a state exercises 'effective control' of de facto jurisdiction outside its territory, the duty to respect and protect some of the international rights becomes inevitably obliged upon

28 Türk, Nicholson, Feller, *Refugee protection in international law*, p. 10.

29 The need to adopt and establish several security measures became mostly urgent after the attacks in the United States on 11 September 2001 and their aftermath, see for instance UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection', November 2001; Türk, Nicholson, Feller, *Refugee protection in international law*, p. 11.

30 UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection', 29 November 2001, at paras 5–9; See further UNHCR documents related to the issue: UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', UN doc. EC/GC/01/4, 19 February 2001; UNHCR, 'Refugee Protection and Migration Control: Perspectives from UNHCR and IOM', UN doc. EC/GC/01/11, 31 May 2001; UNHCR, 'Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Asylum Systems', UN doc. EC/GC/01/17, 4 September 2001.

the state.[31] Hathaway recognizes even a minimum level for initiating the legal obligation to respect those essential rights (as the *non-refoulement* principle) to include 'both situations in which a state's consular or other agents take control of persons abroad; and where the state exercises some significant public power in foreign territory which it has occupied, or in which it is present by consent, invitation, or acquiescence.'[32] Therefore, the point of departure the majority of the US Supreme Court takes by approaching a restrictive interpretation of the textual and historical context of the principle of *non-refoulement* within the context of refugee law cannot be justified.[33] As formulated by dissenting Justice Blackmun:

> Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal because the word "return" does not mean return [and] because the opposite of "within the United States" is not outside the United States […].[34]

> The Convention […] was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on *refoulement*, as broad as the humanitarian purpose that inspired it, is easily applicable here, the Court's protestations of importance and regret notwithstanding.[35]

Thus far, an essential reminder is that rules of international law are not only exclusively applicable *within* the borders of a state. Many rules – and most importantly rights under the 1951 Refugee Convention – are not limited to a territorial dimension. Several rights, the duty of *non-refoulement* under Article 33 included, are applicable regardless of the requirement to be attached to a territorial border. Important to bear in mind, therefore, is that the prohibition of *refoulement* under international law is ensured to any refugee that falls under the jurisdiction of a state party. When a state party then

31 Hathaway, *The Rights of Refugees under International Law,* 2005, p. 339; See further, Hathaway, *The Rights of Refugees under International Law*, (2nd edition), Cambridge University Press, 2021, p. 386.

32 Hathaway, *The Rights of Refugees under International Law*, 2005, p. 339; See further Hathaway, *The Rights of Refugees under International Law*, 2021, pp. 379–390; Andrew G. Pizor, 'Sale v. Haitian Centers Council: The Return of Haitian Refugees', Fordham International Law Journal, vol. 17, Issue 4, 1993, pp. 1062–1114.

33 Hathaway, *The Rights of Refugees under International Law*, 2005, p. 340.

34 *Sale v. Haitian Centers Council*, at para 189.

35 *Sale v. Haitian Centers Council*, at paras 207–8.

exercises its jurisdiction, the state is obliged to respect the *non-refoulement* principle in cases when 'the refugees themselves are subject to that state party's effective authority and control (whether lawfully or not), even if outside that state's territory.'[36]

4. HOW UNHCR VIEWS THE EXTRATERRITORIAL APPLICABILITY OF THE *NON-REFOULEMENT* PRINCIPLE IN REFUGEE LAW

The UNHCR has also assessed the subject of extraterritorial applicability of the *non-refoulement* principle pursuant to Article 33(1). Like the conclusions provided by scholars, the point of departure that the UNHCR takes when analysing the potential effect of extraterritorial applicability of the principle of *non-refoulement* in refugee law is the notion of *exercising effective control* or a comparable sort of authority.

The UNHCR concludes in its Advisory Opinion on 'the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 *Convention relating to the Status of Refugees* and its 1967 Protocol' that 'the decisive criterion is not whether such persons are on the State's national territory, or within a territory which is de jure under the sovereign control of the State, but rather whether or not he or she is subject to that State's effective authority and control.'[37] To reach this conclusion, the UNHCR refers to the general rule of interpretation in Article 31 of the VCLT.

The vital element is to consider a purposive interpretation of the provision. Interpreting a restrictive approach to limit the scope of Article 33(1) to consider only the territory of the host-State would threaten the object and purpose of the Refugee Convention and contradict the humanitarian purposes of the convention – that 'human beings shall enjoy fundamental rights and freedoms without discrimination' and the importance to 'assure refugees the widest possible exercise of these fundamental rights and freedoms.'[38] Given the outcome of the purposive interpretation of Article 33(1) – the terms 'expel' or 'return' does not entail a requirement for the person to be present within the state's territory for a state to expel the person to another state. Instead, '[t]he obligation set out in Article 33(1) of the 1951 Convention is subject to

36 Hathaway, *The Rights of Refugees under International Law*, 2021, p. 384.

37 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at para 35.

38 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at para 29.

a geographic restriction only with regard to the country where a refugee may not be *sent to*, not the place where he or she is *sent from*.'[39]

Additionally, the UNHCR relied on the systemic integration regulated in Article 31(3)(c) of the VCLT stating that international rules can be considered when interpreting a particular rule.[40] With reference to systemic integration, the UNHCR considered elements from international human rights law – especially rights prohibiting similar treatment as stated in the cornerstone of international refugee law's *non-refoulement* principle. The UNHCR also recalls the Committee against Torture's[41] statement on recognizing the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to be applicable in situations when a state party exercises authority extraterritorially.[42]

Adopting a restrictive interpretation and a limited context of Article 33(1) of the Refugee Convention would not only be inconsistent with its object and purpose but also 'be inconsistent with the relevant rules on international human rights law.'[43] Anchored to this statement the wordings of the ICJ could be associated to as a reminder – 'human rights obligations presumptively apply within any area under the effective control of a state party.'[44] Just like the applicability of the *non-refoulement* principle under human rights law is not depended on whether the person is present on the actual territory of the

39 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at para 26 (emphasis added).

40 Article 31(3)(c) of the 1969 VCLT states the following: 'There shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties.'

41 The Committee against Torture (CAT) is the body of 10 independent experts having the main authority to monitor the implementation of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its Contracting States. The CAT can also hold its Contracting States accountable for breaching human rights obligations. For more information about the CAT, see https://www.ohchr.org/en/treaty-bodies/cat.

42 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at paras 37–38; *Advisory Opinion of the International Court of Justice in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, at paras 109 and 111; See further the *Case Concerning Armed Activities on the Territory of the Congo* (*DRC v. Uganda*), (2005) ICJ Gen. List No. 116, 19 December 2005, at para 216.

43 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at para 43.

44 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Rep 136, at para 110.

state, but instead on whether the individual falls under the effective control of that particular state party, similar understanding should be applied on the *non-refoulement* principle in international refugee law.[45]

5. PARALLELS TO THE *HIRSI V. ITALY* CASE

In the *Hirsi v. Italy* case, the ECtHR reached the same conclusion as the UNHCR in its Advisory opinion mentioned above.[46] In parallel with the *Sale* case, the *Hirsi* case was also about the issue of a state authority intercepting boats without assessing if anyone of the refugees on board needed international protection – in this case, it concerned the practice of Italy intercepting boats from Libya. The Court stated that the action conducted by Italian authorities to return refugees to Tripoli (to later be handed over to the Libyan authorities) after having intercepted their vessel 35 nautical miles south of Lampedusa was a violation of several rights under the European Convention of Human Rights (ECHR),[47] such as the prohibition against torture and inhuman treatment,[48] prohibition against collective expulsion of aliens[49] and right to effective remedies if rights and freedoms of the ECHR have been violated.[50] The Court concluded that the Member State must ensure that the persons they found outside its actual territory are not at risk of being subject to persecution when being returned, despite if the persons failed with complying with an asylum application.[51] In alignment with the humanitarian purposes of the Refugee Convention and the close connection with the merits of the *Hirsi* case had with the legal framework of international refugee law – the Court established a positive obligation to adopt a general prohibition of *refoulement* pursuant in Article 33(1) to be applicable outside the Member States' territory if the concerned state party exercised effective

45 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at para 43.

46 ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment, 23 February 2012.

47 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 15 March 2022].

48 Article 3 of the ECHR: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

49 Article 4 of Protocol No. 4, (ECHR): Collective expulsion of aliens is prohibited.

50 Article 13 of the ECHR: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

51 ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment, 23 February 2012, at paras 133–38.

control or de facto jurisdiction.[52] The outcome of the *Hirsi* case also ties the link between international refugee law and human rights law in a way to support extraterritorial applicability of the *non-refoulement* principle in the context of the Refugee Convention.[53]

6. THE IMPACT OF THE EXTRATERRITORIAL APPLICABILITY OF THE *NON-REFOULEMENT* PRINCIPLE IN REFUGEE LAW

For a refugee to invoke the prohibition rule of Article 33, the person must ascertain his or her refugee status. Under these conditions, this inevitably demands a recognized possibility to enter the territory for asylum assessments. As much as the underlined interpretation of the *non-refoulement* principle within refugee law can contain a right to enter, the essence for extraterritorial applicability in a way of improving an effective application of the Refugee Convention could also be considered as a signal towards the Contracting States to not breach their international obligation. Simply by preventing refugees to reach their frontiers because of states need to 'move' their border controls.[54] Thus, one of the main arguments for why there is a need to imply an extra-territorial application relates to the effectiveness of the Refugee Convention.

Furthermore, the interest to adopt general extraterritorial applicability of Article 33(1) stands in alignment with the extraterritorial applicability of rights regulated in human rights treaties. As argued by Li, 'a dynamic and human rights-oriented interpretation therefore supports a parallel extraterritorial applicability of the Refugee Convention.'[55] Yet, the recognition of extra-territorial applicability of Article 33(1) does not *per se* result in an established obligation to *a right to asylum*. The debate on whether a right to asylum exists under international law has been discussed and analysed by several scholars and commentators.[56] Although the elements of a human rights-oriented interpretation exist within the legal framework of refugee law, the *opinio juris*

52 Li, *Exclusion from protection as a refugee*, pp. 32–3.

53 See further ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment, 23 February 2012 – 'Concurring opinion of Judge Pinto de Albuquerque', pp. 59–79.

54 Li, *Exclusion from Protection as a Refugee*, p. 32.

55 Li, *Exclusion from Protection as a Refugee*, p. 32; UNHCR, *Advisory Opinion on the Extra-territorial Application of Non-Refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at paras 34–42; Fischer-Lescano, Löhr, Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', 21 International Journal of Refugee Law 2009, 256, p. 269; Lauterpacht and Bethlehem, 'The principle of *non-refoulement*', in Feller, Türk, Nicholson (eds), *Refugee Protection*, 87, pp. 110–11; Gammeltoft-Hansen, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control*, pp. 81–9.

56 See n 2 for references.

of the international community do not support an extended normative scope of Article 33(1) to also establish a recognized right to asylum within international law.[57] Instead, what the extraterritorial applicability of Article 33(1) does, in fact, is to enhance the effectiveness of the Refugee Convention. It inserts a guarantee that states do not avoid their obligations through established methods to prevent refugees from accessing their territories. And, likewise, it strengthens the interrelation between international refugee law and human rights law out of the already recognized extraterritorial applicability of human rights instruments.[58]

Even though the wording of Article 33(1) is unclear in terms of the extraterritorial dimension, what can be stated is that the provision applies to refugees both at territories of the Contracting States and outside the territories whenever the state party exercises jurisdiction, meaning exercising authority or effective control.[59] This interpretation is supported by the humanitarian purposes of the Refugee Convention, aiming to guarantee refugees' rights and freedoms.[60] The spirit of the Refugee Convention's object and purpose would therefore only be possible to fulfill if the refugee is allowed to cross and enter the territory of a safe state.[61] Emphasized by Goodwin-Gill and McAdam, it is critical to bear in mind that '[i]t does not matter how the asylum seeker comes within the territory or jurisdiction of the State; what counts is what results from the actions of State agents once he or she does. If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is *refoulement* contrary to international law.'[62]

57 See n 2 for references.

58 See Li, *Exclusion from Protection as a Refugee*, pp. 28–38.

59 UNHCR *Advisory Opinion on the Extraterritorial Application of Non-Refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at paras 6, 32–3, 43; Goodwin-Gill, 'The Right to Seek Asylum at Sea and the Principle of *Non-Refoulement*', pp. 444–55; Gammeltoft-Hansen, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control*, pp. 64–8, 98–9, 120–25; Li, *Exclusion from Protection as a Refugee*, p. 31.

60 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at para 29; Kälin, Caroni, and Heim in: Zimmermann (ed), The 1951 Convention, Article 33, para 1, at paras 86–91; Li, *Exclusion from Protection as a Refugee*, pp. 31–2.

61 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at para 28.

62 Goodwin-Gill, McAdam, *The Refugee in International Law*, p. 233.

7. FINAL ANALYSIS: KEY ELEMENTS TO CONSIDER

To recap some of the most central statements provided by the US Supreme Court, it initially grounded its reasoning by referring to the drafters and the historical notion of Article 33. The Court stressed that 'the text and negotiating history of Article 33 […] are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders.'[63] Furthermore, the Court relied much on its own understanding of how the prohibition against *refoulement* was approached, with a European understanding of the principle, to only be applicable in relation to scenarios concerning actions at the state's borders, or from within. According to the US Supreme Court, the term 'return' in Article 33 was not meant to equal 'a defensive act of resistance of exclusion at border rather than an act of transporting someone to [their come state, or some other country] […] In the context of the Convention, to 'return' means to 'repulse' rather than to 'reinstate'.'[64] Furthermore, in relation to a state's possibility to exclude refugees from the benefit of the *non-refoulement* principle if the refugee poses a danger to the security of the host-State is another factor that points to a territory-based interpretation, since the merit of the wording of the provision is that the danger is caused to the security 'of the country in which he is.'[65]

What the US Supreme Court therefore observed was that an extended interpretation of the *non-refoulement* principle within the Refugee Convention that reached outside the scope of a treaty-based interpretation 'would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.'[66] From the Court's view, an alien cannot therefore benefit from the conditions deriving from the *non-refoulement* principle (33.1) nor the exclusion from the probation against *refoulement* (33.2) if the person is not within the state's borders.[67] However, as the wording of the exclusion rule of the prohibition of *refoulement* depends on the precondition that the refugee poses a danger to the security of the host-State, this is to some extent a trivial standpoint. Why? Simply because a person is quite limited to pose a danger to the security of a state if that person is not present and can conduct an action to where such

63 *Sale v. Haitian Centers Council*, at para 178.
64 *Sale v. Haitian Centers Council*, at para 182.
65 Article 33 of the 1951 Refugee Convention.
66 *Sale v. Haitian Centers Council*, at para 180.
67 *Sale v. Haitian Centers Council*, at para 187.

a critical risk may occur. In that sense, a textual reading of Article 33(2) should be considered more logical.[68] Still, what is worth to have in mind, and as observed by dissenting Justice Blackmun, '[t]he tautological observation that only a refugee already in a country can pose a danger to the country 'in which he is' proves nothing.'[69]

Interestingly enough, the US Supreme Court relied their interpretation and understanding of the *non-refoulement* principle within the context of Article 33 to align with the silence from the drafters on commentating whether the provision and the notion of 'return' is aimed to apply outside state territorial borders. Consequently, this gives the interpretative impression that if nothing is mentioned, then it cannot exist or potentially come into force. Despite the reference to the historical negotiations amongst the drafters, the US Supreme Court seems to not fully consider the initial purpose of also applying and considering the entire 1951 Refugee Convention as a living instrument. A living instrument that needs to adapt to normative changes in the world legal order and tentatively approach to a closely related body of law – namely, human rights law.

As initiated above, whether there is a recognized extraterritorial applicability within the scope of Article 33(1) is not entirely clear. A hypothetical reason for the division might be an outcome of some domestic judicial opinions that stand in support with the US Supreme Court's reasoning. A clear example is the *Roma Rights Centre* decision case[70] where Lord Hope stressed in *obiter dicta* that he did 'not, with respect, think that the *Sale* case was wrongly decided […] The majority recognised the moral weight of the argument that a nation should be prevented from repatriating refugees to their potential oppressors whether or not the refugees were within that nation's borders […] But in their opinion both the text and the negotiating history of article 33 affirmatively indicated that it was not intended to have extraterritorial effect.'[71]

Again, what can clearly be identified is the reference to the negotiating history and the intention that was put forward in order not to accept an extra-territorial dimension over Article 33. Similar support has also been given in judicial opinions from the High Court of Australia, where the judicial body

68 Hathaway, *The Rights of Refugees under International Law*, 2021, p. 381.
69 *Sale v. Haitian Centers Council*, at para 194.
70 *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2005] 2 AC 1 (UK HL, Dec. 9, 2004).
71 *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2005] 2 AC 1 (UK HL, Dec. 9, 2004), at para 68.

has in some cases more evidently, and in other more subtly, approved the US Supreme Court's approach of a territory-based interpretation of Article 33.[72]

One might detect some judicial support for the US Supreme Court's decision in the *Sale* case. However, the judges showing such support are part of a distinct minority.[73] Additionally, many of the judicial decisions supporting the *Sale* case were decided in accordance with domestic rules, rather than international law. This was highlighted by the UNHCR, with reference to the Australian court decision in the *CPCF v. Minister for Immigration and Border Protection*:

> [I]t is important to stress that, at international law, the principle of *non-refoulement* […] applies wherever and however a state exercises jurisdiction […] UNCHR considers that there is only one superior court decision [citing to *Sale* in the US Supreme Court] that is at variance with this understanding and that decision […] was based on an interpretation of national rather than international law.[74]

Confirming the position taken by the UNHCR, and engaging in a further advocacy to not make space to the rulings from other domestic courts approving the *Sale* case, Judge Pinto de Albuquerque from the ECtHR declared:

> With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations *Convention relating to the Status of Refugees*, and departs from the common rules of treaty interpretation […] Unlike other provisions of the [Refugee Convention], the applicability of Article 33(1) does not depend on the presence of the refugee in the territory of a State […] [T]he French term of *refoulement* includes the removal, transfer, rejection, or refusal of admission of a person. The deliberate insertion of the French word in the English version has no other possible meaning than to stress the linguistic equivalence between the verb return and the verb refouler. Furthermore, the preamble of the Convention states that it endeavours to 'assure refugees the widest possible exercise of these fundamental rights and freedoms'

72 See for instance, *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55 (Aus. HC, Oct. 26, 2000); *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002); *CPCF v. Minister for Immigration and Border Protection*, [2015] HCA 1 (Aus. HC, Jan. 28, 2015).

73 Hathaway, *The Rights of Refugees under International Law*, 2021, p. 386.

74 UNHCR, 'Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations', Feb. 4, 2015 (emphasis added).

> and this purpose is reflected in the text of Article 33 itself through the clear expression 'in any manner whatsoever'.[75]

What is put forward affirmatively in this quote is the varied understanding of the French term of *refoulement* to mean several things – everything from removal, transfer, rejection, or refusal of admission of a person. The ambiguous reference the US Supreme Court makes by constantly referring to the negotiating history of the drafters and their silence on confirming extraterritorial applicability is in contradiction to the ordinary and literal meaning of Article 33 of the Refugee Convention and the fundamental elements required to uphold and maintain when interpreting a provision in accordance with the general rule of interpretation. The fact that the US Supreme Court observes the prohibition of a state to not 'expel or return' to mean that the person is required to arrive at the territory of the state indicates the understanding of the US Supreme Court, that the rule to avoid 'return' only relates to 'a defensive act of resistance or exclusion at a border' and do not contain any reference to 'actually sending them home.'[76] Thus far, this perspective would root serious consequences as the rule to avoid 'return' of a refugee would, according to the US Supreme Court, not be associated to any action that would cause a deportation of the refugee back to a place where the person is subject to a well-founded fear of persecution. This understanding by the US Supreme Court has been crucially emphasised by Hathaway to be 'the plainest and most obvious breach of the object and purpose of the duty conceived by the drafters: namely, to prohibit measures which would cause refugees to be 'pushed back into the arms of their persecutors'.'[77] Yet, this is unfortunately what happened to the Haitians seeking international protection, and, similarly, can be seen as a repetitive action forced upon Rohingya refugees being driven back to Burma by Indonesia, Thailand, and Malaysia.[78]

To not respect the fundamental and humanitarian purposes of the Refugee Convention, and the vital element that Article 33's duty of *non-refoulement* is not attached to a territorial border, but rather to whether the state party is exercising jurisdiction, will result in continuously increased cases amounting to unlawful *refoulement* and breaches of international law.[79] Therefore, it is critical to step aside from the uncertain understanding of the US Supreme

75 *Hirsi Jamaa and Others v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012), separate opinion of Judge Pinto de Albuquerque, at paras 67–8.

76 Hathaway, *The Rights of Refugees under International Law*, 2021, p. 382.

77 Hathaway, *The Rights of Refugees under International Law*, 2021, pp. 382–83; See also statement of the Chairman, Mr. Leslie Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at para 26.

78 Hathaway, *The Rights of Refugees under International Law*, 2021, p. 387.

79 Hathaway, *The Rights of Refugees under International Law*, 2021, p. 387.

Court in the *Sale* case and stand in uniformity with the majority of the voices respecting the humanitarian objectives of the Refugee Convention and the ordinary meaning of its provisions.