Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

1993

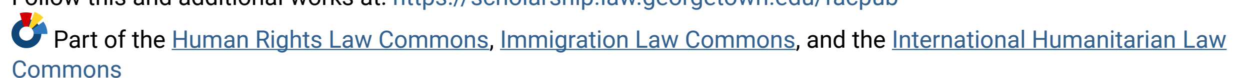
Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol

Andrew I. Schoenholtz
Georgetown University Law Center, schoenha@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/2158
https://ssrn.com/abstract=3377592

7 Geo. Immigr. L.J. 67 (1993)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub



Part of the Human Rights Law Commons, Immigration Law Commons, and the International Humanitarian Law Commons

AIDING AND ABETTING PERSECUTORS: THE SEIZURE AND RETURN OF HAITIAN REFUGEES IN VIOLATION OF THE U.N. REFUGEE CONVENTION AND PROTOCOL

ANDREW I. SCHOENHOLTZ*

I. INTRODUCTION

Pursuant to Executive Order 12,807 of May 23, 1992, the "Kennebunkport Order," United States Coast Guard cutters have been intercepting boatloads of Haitian citizens in international waters off the coast of Haiti and turning them over to the Haitian authorities in Port-au-Prince. No questions are being asked to determine if any of these citizens are *bona fide* refugees fleeing persecution. All are simply returned.[1]

Does the Protocol relating to the Status of Refugees (Protocol),[2] to which the United States is a party,[3] permit the U.S. government to do

* B.A., Hamilton College, 1973; Ph.D., Brown University, 1982; J.D., Harvard Law School, 1986. The author is an attorney at Covington & Burling in Washington, D.C. He represents the Lawyers Committee for Human Rights as an *amicus* in the *McNary* case. The author is grateful to John W. Douglas and Carlos M. Vázquez for their helpful suggestions on earlier drafts of this Article.

1. President Bush initiated this policy, which is presently being enforced by President Clinton. The Clinton Administration is pressing for a political solution to the ouster of President Aristide and the human rights abuses being carried out by the present military regime in Haiti, and says that its policy of enforcing the Kennebunkport Order is temporary. *See* Ruth Marcus & Al Kamen, *Aides Say Clinton Will Extend Policy on Returning Haitians*, WASH. POST, Jan. 14, 1993, at A25; *see also* WASH. POST, Jan. 15, 1993, at A1, A16. Both during the campaign and after his election, President Clinton vowed to change the summary return policy. *See* Statement of Governor Bill Clinton on Haitian Refugees, U.S. Newswire, July 29, 1992 *available in* LEXIS, Nexis library, Wires File ("I am appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum. . . .This process must not stand."); *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. Newswire, July 29, 1992, *available in* LEXIS, Nexis Library, Wires File ("The Court of Appeals made the right decision in overturning the Bush Administration's cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing."); Governor Clinton Reaffirms Opposition to Bush Administration's Policy on Haiti, U.S. Newswire, Sept. 9, 1992, *available in* LEXIS, Nexis Library, Wires File ("I want to reaffirm my opposition to the Bush Administration's cruel policy of returning Haitian refugees to their oppressors in Haiti without a fair hearing for political asylum."); BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 119 (1992) ("Stop the Forced Repatriation of Haitian Refugees—Reverse Bush Administration's policy, and oppose repatriation"); *see also 'I Intend to Look Beyond Partisanship . . . to Help Guide Our Nation'*, WASH. POST, Nov. 13, 1992, at A10 ("I'm going to change the policy.").
2. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
3. As a party to the Protocol, the United States has agreed to abide by Articles 2 through 34 of the Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. At pre-

this? That question is now before the United States Supreme Court.[4] Regarding United States obligations under the Protocol, the United States government claims that the United States may seize refugees and return them to a country of persecution, as long as such refugees are not within United States borders. This Article examines the Convention Relating to the Status of Refugees (Convention) and the Protocol in light of that claim.

First, to understand why the Protocol is central to the United States government's claim, I briefly present the workings of United States statutory law insofar as that law concerns refugees. Essentially, if refugees reach our borders, the United States cannot return them to a country of persecution. This the United States government recognizes.[5] As to the high seas, the United States asserts that neither our domestic statutes nor the Protocol apply. Since our domestic statutes are consistent with the obligations the United States undertook in ratifying the Protocol, this Article focuses on the Protocol: if the Protocol applies to refugees on the high seas, so does our statutory law.

Second, I describe the history of the United States interdiction policy towards Haitians and the executive branch positions concerning the application of the Protocol on the high seas. At the inception of the interdiction program, the Reagan Administration asserted that the United States would abide by its obligations under the Protocol not to return interdicted refugees to Haiti. Once litigation challenging the interdiction program ensued, however, the executive branch argued, at least in court, that our Protocol obligations do not apply on the high seas.

Finally, I analyze the scope of the convention and Protocol with respect to their core protection: the obligation undertaken by contracting States not to return refugees to countries of persecution. From an examination of the terms of the *nonrefoulement* obligation, it is clear that contracting States cannot seize refugees on the high seas and deliver them into the hands of their persecutors. Thus, it is inappropriate to look to the negotiating history of the Convention to interpret the *nonrefoulement* obligation. But even if it were appropriate, that history does not clarify or resolve any textual ambiguities. In short, by turning back refugees interdicted on the high seas directly to a country of persecution, the United States is violating the *nonrefoulement* obligation.

The conclusion that the obligation applies to refugees on the high seas does not mean that the United States must admit a single refugee

---

sent, 115 countries are parties to either the Convention or the Protocol, or both.

4. Haitian Ctrs. Council v. McNary, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992) (No. 92-344).

5. *See* Brief for Petitioners at 30-31, McNary v. Haitian Ctrs. Council, *cert. granted*, 113 S. Ct. 52 (1992) (No. 92-344).

to its territory. It simply means that the United States cannot reach out beyond its shores to return refugees to a country of persecution. Several commentators have confused these two different obligations. But the power to refuse admission does not include or in any way authorize the power to return a refugee to a country of persecution. Contracting States may attempt to find other nations to accept refugees, or do nothing—the Convention does not obligate contracting states to admit refugees. But it does flatly prohibit their return to a country of persecution.

Most importantly, the position advanced by the United States government—that any party to the Convention or the Protocol is free to evade the *nonrefoulement* obligation by seizing refugees before they enter that party's territory and returning them to their persecutors, all under an agreement with those very persecutors[6]—is wholly inconsistent with the humanitarian purpose of, and protections provided by, the Convention and Protocol. Neither the text, structure, nor negotiating history of the Convention provide any support whatsoever for such a depraved interpretation of Article 33.

II. UNITED STATES STATUTORY LAW REGARDING REFUGEES

Those fleeing persecution who are fortunate enough to make their way to the United States border, as well as those who enter United States territory, can apply for two kinds of protection. Pursuant to the Refugee Act of 1980 (Refugee Act),[7] the Attorney General is obligated not to return to a country of persecution a *bona fide* refugee who demonstrates that his life or freedom would be threatened there. Technically, this is called "withholding of deportation."[8] A refugee who receives only this form of protection is not admitted into the United States for potentially permanent residence, however, the Attorney General may, in his discretion, grant asylum to that refugee.[9] Asylum is a refugee's first step towards permanent residence.

Whether at the border or already within the United States, all refugees who apply for recognition of their special status are considered to be applying for both forms of protection. Congress required that fair and adequate procedures be employed in the determination of refugee status and asylum in accordance with the humanitarian intent of the

---

6. *See* Agreement Between the United States of America and Haiti, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10,241.

7. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (1988)).

8. INA § 243(h), 8 U.S.C. § 1253(h) (1988).

9. INA § 208, 8 U.S.C. § 1158 (1988). To qualify for the discretionary grant of asylum, the refugee must demonstrate a "well-founded fear" of persecution. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Withholding of deportation is mandatory upon the higher showing of a "clear probability" of persecution. INS v. Stevic, 467 U.S. 407 (1984).

Refugee Act.[10] Today these include a full-fledged hearing before an immigration judge with representation by counsel (*pro bono* or at the refugee's expense) as well as administrative and judicial appeals.[11]

The United States provides these procedures and protections in accordance with its obligations under the Protocol.[12] The central obligation—that of non-return or *nonrefoulement*—is found in Article 33 of the Convention. Withholding of deportation is the domestic law equivalent of the *nonrefoulement* principle. Once someone fleeing persecution is determined to be a refugee, that person cannot be returned to any territory where he or she would be persecuted. The Attorney General can follow any of the following courses of action: (1) admit the refugee into the United States; (2) temporarily detain him and keep him separated from the public; or (3) find another country to provide refuge. But she cannot return the refugee to the persecuting country.

So much is clear under our statutory law once a refugee reaches our shores, but what if the United States stops people on the high seas? The Supreme Court is considering that question in *McNary* both with respect to our immigration statutes and the Protocol.[13] The analysis here focuses only on the question in relation to the Protocol. It is axiomatic that, in passing the Refugee Act, Congress amended the text of existing statutes to make them consistent with our Protocol obligations.[14] Thus, if the Protocol applies to refugees on the high seas, then the Refugee Act does as well. Even if that were not the case, the self-executing *nonrefoulement* provision of the Protocol applies independently as the law of the land.[15]

III. UNITED STATES INTERDICTION POLICY

The United States has directed its force outside its borders against citizens of one country—and only one country—in an effort to stop those fleeing their homeland from reaching the United States border. The United States has been interdicting Haitians for over a decade based on a 1981 agreement reached between "Baby Doc" Duvalier and President Reagan.[16]

Three phases of the United States interdiction policy towards Hai-

10. *See* INA § 208, 8 U.S.C. § 1158 (1988).
11. *See* 8 C.F.R. § 208 (1992).
12. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).
13. *See* 969 F.2d at 1366-67. In support of its holding that the withholding of deportation statute applies to all aliens, including those on the high seas, the Second Circuit found that the Protocol applies to refugees on the high seas. Thus, the direct issue as presented to the Supreme Court concerns the Protocol to the extent that it informs the interpretation of the INA.
14. *Cardoza-Fonseca*, 480 U.S. at 436-37.
15. On the self-executing nature of the *nonrefoulement* provision and its independent application as the law of the land, see Carlos Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39 (1993).
16. *See* Agreement Between the United States of America and Haiti, *supra* note 6.

tians can be identified. During the first phase, the Reagan Executive Order authorizing the policy stated that refugees were not to be returned to Haiti. To enforce what the order itself called "the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland,"[17] Immigration and Naturalization Service (INS) officers interviewed Haitians aboard Coast Guard cutters. In practice, the INS officers determined that only eleven of the almost 23,000 Haitians interviewed had plausible refugee claims.[18] Those eleven Haitians were brought to the United States to pursue their claims within the framework of the domestic asylum system, where they were entitled to hearings and other due process protections afforded to those refugees who reach our shores.

Phase II began with the exodus of Haitians following the military coup of September 1991 that ousted President Jean-Bertrand Aristide from power. The policy maintained during this part of the Bush Administration was not to return refugees. During the initial exodus, the INS officers continued to interview Haitians on the cutters. However, the number of those fleeing increased such that the cutters were ordered to bring all interdicted Haitians to the United States Naval base at Guantánamo Bay for interviews.

In order to interview the Haitians held at Guantánamo, the INS dispatched a significant number of its asylum corp specialists to the naval base. Reportedly better versed than cutter interviewers on Haitian political affairs and able to hold slightly longer interviews in a somewhat improved setting, the INS specialists determined that approximately 10,300 of some 36,600 had plausible refugee claims and should be brought to the United States to apply for asylum.[19]

Phase III started when President Bush issued a new executive order on May 23, 1992, the so-called Kennebunkport Order, authorizing the Coast Guard to return all Haitians found on the high seas, regardless of refugee status. The Kennebunkport Order eliminated the "strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." Instead, the new order provided that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." Grace did not abound; all Haitians have been returned under the new order.

---

17. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), reprinted in 8 U.S.C. § 1182 app. at 1259 (1988).

18. *Haitian Advocates Challenge U.S. Repatriation of Haitian Refugees in Court*, AILA MONTHLY MAILING (Am. Immigr. Lawyers Assoc., Washington, D.C.), Jan. 1992, at 30.

19. 69 INTERPRETER RELEASES 1066 (1992).

IV. THE UNITED STATES LEGAL POSITIONS

The United States government has argued to the Supreme Court that the obligation of the United States not to return refugees to a country of persecution under Article 33 does not apply on the high seas. That was not always the position of the executive branch.

Well before the creation of the Haitian interdiction program, U.N. Ambassador Clarence Clyde Ferguson, Jr., stated the United States view on the scope of Article 33 in light of the forced return of Vietnamese boat people:

> It is difficult to overemphasize the significance . . . in making certain that no refugee is required to return to any country where he would face persecution. . . . Article 33 of the Convention contains an *unequivocal* prohibition upon contracting states against the *refoulement* of refugees 'in any manner whatsoever' . . . . My government joins with the [U.N.] High Commissioner [for Refugees] in condemning the inhumane practice of *refoulement*.[20]

In 1981, the Office of Legal Counsel (OLC) at the Department of Justice opined on the legality of the proposed interdiction of Haitian flag vessels with respect to United States obligations under the Protocol. OLC took the position that "[i]ndividuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims" under the Protocol.[21]

The Office of the Attorney General confirmed this interpretation in a November 13, 1981 letter to the ranking minority member of the Senate Judiciary Committee, Edward M. Kennedy.[22] The letter states emphatically:

> [T]he United States will not return persons to a country of persecution. Immigration and Naturalization Service officers will be stationed on board the Coast Guard vessel to carry out our obligations under the United Nations Convention and Protocol Relating to the Status of Refugees. . . .
>
> The INS officers have been directed to be constantly watchful, as they speak to each individual, for any indication that a person may qualify as a refugee under the U.N. Convention and Protocol. . . . If an interview suggests that a legitimate claim to refugee status exists, the person involved will be removed from the inter-

---

20. Statement on Nov. 25, 1974 to the Third Committee of the U.N. General Assembly, *reprinted in* A. ROVINE, OFFICE OF LEGAL ADVISOR, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1974, at 111 (1975) (emphasis added).

21. 5 Op. Off. Legal Counsel 242, 248 (1981).

22. *United States as a Country of Mass First Asylum: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 208-09 (1981) [hereinafter *Mass Asylum Hearing*].

> dicted vessel, and his or her passage to the United States will be arranged. Upon reaching the United States, a formal application for asylum may be made. These procedures fully comply with our responsibilities under the U.N. Convention and Protocol.
>
> Persons already within or at the borders of this country apply for asylum under the U.S. immigration laws. . . . Aliens who have not reached our borders (such as those on board interdicted vessels) are not protected by our immigration laws, but rather only by the U.N. Convention and Protocol.[23]

Both the Acting INS Commissioner and the Assistant Secretary of State for Inter-American Affairs testified to the same position regarding the applicability of the Protocol on the high seas at the inception of the interdiction program.[24]

But once litigation ensued, the Executive changed its views, at least in court.[25] In 1985, the Department of Justice argued to the D.C. Circuit in *Haitian Refugee Center v. Gracey*[26] that the Protocol does not obligate the United States to refrain from any action regarding refugees outside the territory of the United States. That view was followed again in exchanges between the Legal Adviser of the Department of State and OLC in December 1991, amidst the Phase II challenge to the interdiction program before the Eleventh Circuit.[27]

V. THE SCOPE OF ARTICLE 33

The U.N. Refugee Convention does not require contracting states to admit *bona fide* refugees. But its core protection, found in Article 33, ensures that a refugee will not be placed in the hands of a persecuting government:

---

23. *Id.* The last paragraph is quoted above for its relevance regarding the scope of Article 33. The view that our domestic law is not in accord with our international obligations under the Protocol is contradicted by the Refugee Act.

24. *See Id.* at 4 (Statement by Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, regarding the Haitian interdiction program: "I would like to also underscore that we intend fully to carry out our obligations under the U.N. Protocol on the status of refugees"); *id.* at 20 (Statement by Doris Meissner, Acting INS Commissioner: "procedures would be established to comply with our international obligations relating to refugees"); *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 21-22 (1981) (Statement by Doris Meissner, Acting INS Commissioner: in interviewing interdicted Haitians, "[t]he INS officer's responsibility on the ship is to insure that we are in compliance with the U.N. protocol . . . . ").

25. After the Executive branch changed its views in court, the Deputy Commissioner of the INS, James Buck, testified that in administering the interdiction program, the INS had "strictly observ[ed] our international obligations concerning those who are genuinely fleeing persecution in their homeland." *Haitian Detention and Interdiction: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 28 (1989).

26. 809 F.2d 794 (D.C. Cir. 1987).

27. Haitian Refugee Ctr. v. Baker, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992).

Article 33.-Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

No reservations to Article 33 are allowed.[28]

Does Article 33 protect refugees on the high seas? To answer that question, we first examine the text of the article.

A. *The Terms of Article 33*

Unless the terms of an international agreement are ambiguous or obscure, or lead to an unreasonable result, the ordinary meaning of the text controls.[29]

Paragraph 1 of Article 33 sets forth the *nonrefoulement* prohibition in broad terms. Notably, the only geographic reference therein concerns the place *to* which the refugee cannot be returned. No explicit mention is made as to the place *from* which the obligation not to return arises.

This is hardly surprising. First, the very definition of refugee set forth in the Convention imposes only one geographic requirement for individuals to qualify for protection:

[T]he term 'refugee' shall apply to any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion,

---

28. Convention, *supra* note 3, at art. 42.

29. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 32, 1155 U.N.T.S. 331. Although the United States has signed but not ratified the Vienna Convention, the Department of State, in submitting this treaty for ratification to the Senate, stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. EXEC. DOC. L., 92d Cong., 1st Sess. 1 (1971). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, introductory note to part III (1987) ("The Department of State has on various occasions stated that it regards particular articles of the Convention as codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative." (citing, *inter alia*, cases applying art. 31)).

In addition to applying the Vienna Convention regarding the primacy of the ordinary meaning of treaty terms, U.S. courts also use principles analogous to those that guide courts in construing statutes to the same effect. *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) ("We must thus be governed by the [treaty] text"); United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties' ").

> nationality, membership of a particular social group or political opinion, is *outside the country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being *outside the country of his former habitual residence* as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[30]

As in Article 33, the refugee is defined in connection with the country of persecution. The only geographic requirement that qualifies a person as a refugee is that he be outside that country.[31]

Second, when defining who is a refugee and what protection such a person must be accorded, the nations that drafted Article 33 in 1950 and 1951 focused on the needs of refugees based particularly on the Western European experience during and following the Second World War. As the terms of the provision indicate, the drafters assumed that the refugees would be either within the country of refuge or at the country of refuge's border. The notion that a contracting state would reach beyond its territory to seize and return refugees to authorities who would persecute them was unimaginable. To suggest that such conduct is not prohibited by Article 33 would mean that the drafters deviously carved out a loophole so contracting states could avoid the *nonrefoulement* obligation.

This certainly was not the case. The Convention aimed to protect refugees in one fundamental way: to prevent them from being placed in the hands of persecutors. Moreover, the framework of State power as understood then and today argues strongly against the notion that a State could do on the high seas what it could not do in its own territory. If a State lacks the power to return a refugee who is present within its territory, where the State's jurisdiction is otherwise plenary, *a fortiori* it lacks the authority to reach beyond its territory, where its jurisdiction is more tenuous, and return a refugee to a persecuting nation.

Indeed, the United States' authority to exercise jurisdiction over Haitians on the high seas is based in part on an agreement with Haiti.[32] It is simply ludicrous to suggest that the drafters of Article 33

---

30. Convention, *supra* note 3, at art. 1(A) (emphasis added).

31. *See also* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 28 (1979)[hereinafter HANDBOOK]. The UNHCR Handbook counsels that a person is a refugee "as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined." The Handbook is based on UNHCR's experience, the practice of States in determining refugee status, and the literature devoted to the subject over the years. "[T]he Handbook provides significant guidance in construing the Protocol . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes." INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

32. *See supra* note 6.

intended to permit parties to return to the persecuting state refugees over whom they obtained jurisdiction on the basis of an agreement with the persecuting state. Such conduct virtually amounts to aiding and abetting the persecution from which it is the purpose of Article 33 to protect the refugee.

The fact that no mention at all is made in Article 33(1) or the refugee definition as to where outside the country of persecution a refugee presently is located takes on greater significance in the context of the numerous Convention provisions that explicitly limit obligations and correlative rights to a refugee's presence in the country of refuge. Not surprisingly, these provisions generally concern matters that would only occur within the territory of the country of refuge: general obligations of the refugee (Article 2), freedom of religion (Article 4), right of association (Article 15), employment (Articles 17 through 19), housing (Article 21), public relief (Article 23), employment benefits and social security (Article 24), freedom of movement (Article 26), identity papers (Article 27), and travel documents (Article 28). The Convention's explicit and consistent use of terms to indicate geographic limitation reinforces the understanding that the *nonrefoulement* obligation, where no such language is found, applies with respect to all refugees, whether within or outside of the country of refuge.

While the *nonrefoulement* obligation found in paragraph 1 of Article 33 does not contain any explicit geographic limitation, it is necessary to examine the two terms of Article 33 that do have geographic references to determine if they restrict the obligation in such a manner.

In forbidding contracting states from "expelling" or "returning" refugees to countries of persecution, Article 33 appears to have three situations in mind. First, refugees might be lawfully within the territory of a country of refuge. Second, they could be there unlawfully. Third, they could be outside the territory of the contracting state.

Article 32, entitled "Expulsion," appears to be the best source of the meaning of the term "expel" in Article 33. It provides special protections regarding the expulsion of refugees lawfully within a contracting state's territory.[33] Not all refugees are entitled to the special protections guaranteed to those legally within a country of refuge. In short, when Article 33 prohibits the *expulsion* of refugees to countries of persecution, that obligation relates to those refugees legally within a country of refuge.

The other two categories of refugees—those unlawfully within a

---

33. Article 32(1) prohibits the expulsion of such refugees to any country (persecuting or not), except on grounds of national security or public order. Under Article 32(2), fair procedures ensuring due process are required when the exceptions are invoked. Finally, pursuant to Article 32(3), the refugee must be allowed a reasonable period of time to seek admission into another country if the exceptions are invoked and fairly applied.

State's territory and those outside it—are referenced by the French term for return, *refouler*.[34] As Professor Goodwin-Gill has explained, the general meaning of *refouler* is:

> to drive back or to repel, as of an enemy who fails to breach one's defences. In the context of immigration control in continental Europe, *refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers.[35]

The 1933 Convention relating to the International Status of Refugees, for example, required in Article 3 that contracting parties undertake not to remove resident refugees or keep such refugees from their territory, "by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)," unless dictated by reasons of national security or public order.[36]

A similar usage of *refouler* concerning immigrants dates back to 1846:

> Faire reculer, refluer (des personnes). . . . *Refouler des immigrants, des indésirables, à la frontière.*[37]

This usage continues today in the immigration context:

> La décision du président Bush d'ordonner à la garde cotière americaine de *refouler* les boat-people haitiens vers leur île pour tenter de mettre fin à un véritable exode a suscité . . . "la suprise et l' inquiétude" du haut-commissaire des Nations unies pour les refugiés.[38]

---

34. The English and French texts of the Convention are equally authentic. *See* Convention, *supra* note 3, at 184. *Refouler* is found in both.

35. GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 69 (1983).

36. Oct. 28, 1933, 159 L.N.T.S. 205 (official text in French); GOODWIN-GILL, *supra* note 35, at 70. We know that *refouler* had the same meaning at the time Article 33 was written because the French delegate to the Convention's drafting committee explained that "[i]n France and Belgium . . . *refoulement* meant either deportation as a police measure or *non-admittance at the frontier*." *Ad Hoc Committee on Statelessness and Related Problems*, U.N. ESCOR, 21st mtg. at 4-5, U.N. Doc. E/AC.32/SR.21 (1950) (emphasis added). The Belgian delegate "agreed with that explanation," leading the British delegate to "conclude[] from the discussion that the notion of 'refoulement' could apply to . . . refugees seeking admission." *Id.* at 5. While *refoulement* refers in part to non-admittance at the frontier, the *non*refoulement obligation found in Article 33 does not impose an admission requirement, which would make it an asylum provision. Rather, the obligation is that a refugee shall not be returned *to a country of persecution*. The focus of Article 33 is on the consequences to the refugee of expulsion or return.

37. This translates as: "To drive back or to repel. *To drive back immigrants, undesirables, at the border.*" (italics in original) LE PETIT ROBERT: DICTIONNAIRE ALPHABÉTIQUE & ANALOGIQUE DE LA LANGUE FRANÇAISE 1492 ¶ 3 (1973).

38. Jean-Michel Caroit, *HAITI: en dépit des mesures prises par les Etats-Unis*, l éxode continue [HAITI: Despite Measure taken by the United States, the Exodus Continues] LE MONDE, May 29, 1992, at 4 (emphasis added). President Bush's decision to order the U.S. Coast Guard to

> [L] es Etats-Unis ont decidé de *refouler* directement les refugiés recueillis par la garde cotière.[39]

This understanding of *refouler* is fully consistent with the equally authoritative English word "return" in Article 33. Standing without the limiting geographic terms found in other Convention articles and in the context of a broadly worded prohibition, the word "return" only references the place *to* which refugees cannot be sent. Its plain meaning does not limit in any way the place *from* which the refugee cannot be turned back.

From the above analysis, two conclusions can be drawn. First, the meaning of the terms "expel" and *refouler* is clear. Second, neither these nor any other terms of Article 33(1) limit the *nonrefoulement* obligation to refugees within a contracting state's territory.[40]

One further textual aspect of Article 33 requires examination. While the general prohibition of Article 33(1) does not contain any explicit or

---

return the Haitian boat people to their island in order to put an end to a true exodus "suprised and troubled" the United Nations High commissioner for Refugees. *Id.* (translation). Respondents cite this and the following example from a French newspaper to demonstrate the ordinary meeting of *refouler*. *See* Respondents' Brief at 16 n.24. McNary v. Haitian Ctrs. Council, *cert. granted*, 113 S. Ct. 52 (1992) (No. 92-344).

39. *BULLETIN Le bourbier haitien* [Bulletin The Haitian Quagmire], LE MONDE, June 1, 1992. (emphasis added) (The United States decided to directly *return* the refugees picked up by the Coast Guard).

40. Several commentators disagree with this understanding of Article 33 based on the notion that since the Convention does not require states to admit refugees, it does not extend its central protection to the unadmitted. But the latter does not follow from the former: the power to refuse admission does not include or in any way authorize the power to return a refugee to a country of persecution. *Nonrefoulement* does not obligate a state to permit refugees to enter. States can turn refugees away, as long as those refused entry are not returned to a country of persecution. For commentators confusing the power to admit with the power to return, see II GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 94 (1972) (in a chapter entitled "A Right to be Granted Asylum," stating in a conclusory fashion that Article 33 "may only be invoked in respect of persons who are already present—lawfully or unlawfully—in the territory of a Contracting State," and then observing that Article 33 "does not obligate the Contracting States to *admit* any person who has not already set foot on their respective territories.") (emphasis added); N. ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 162-63 (1953) (same flaw, even though author observes that "there was agreement in the Ad Hoc Committee that 'refoulement,' existing in Belgium and France and unknown elsewhere, means either deportation as a police measure or non-admission at the frontier,"); Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 HAGUE ACADEMY OF INT'L LAW 287, 318 (1976) (on whether the *nonrefoulement* obligation applies to refugees who present themselves at the frontier, states, "It is intentional that the Convention fails to mention *asylum* as a right which the contracting States would undertake to grant to a refugee who, presenting himself at their frontiers, seeks the benefit of it.") (emphasis added); Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1126-27 (1980) (describes Article 33 as "the Protocol's basic *asylum* provision" and observes, "This *right of asylum* . . . does not extend to refugees outside the contracting country's borders.") (emphasis added); Kay Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857, 861-62 (1986) ("The plain language of the 1951 Refugee Convention demonstrates a reluctance of states to enter into far-reaching obligations to grant admission to, as opposed to non-return of, refugees. . . . The coverage of *nonrefoulement*, based on these standards, is limited to those who have already entered state territory, either lawfully or unlawfully.").

implicit geographic limitations, the narrow exceptions to this core protection found in paragraph two of the article refer only to those refugees within the country of refuge's territory.

As a general matter, the territorial reference in Article 33(2) is perfectly consistent with the above understanding of Article 33(1): the former concerns a subset (those within the country of refuge) of the latter (refugees both within and outside of a country of refuge). Specifically, the geographic limitation regarding the criminal exception (conviction by a final judgment of a particularly serious crime) is best understood when viewed together with the one relating to the criminal exclusion ground found in Article 1(F)(b). There, a person is excluded from the protection of the Convention altogether if "there are serious reasons for considering" that he has committed "a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[41] Since serious crimes committed outside the country prior to admission are already grounds for excluding a refugee from the protection of Article 33, it would be redundant to repeat them in that Article. Instead, the exceptions stated in Article 33 concern events that arise following entry into a country of refuge that endanger the community or national security.

Substantively, then, Article 33(2) is logically limited to refugees within the country of refuge. Moreover, and perhaps most importantly, this limitation is textually restricted to the second subparagraph of Article 33. To read it into the first subparagraph is to rewrite the text.

In sum, the proposition that the *nonrefoulement* obligation applies to refugees wherever they are outside the country of persecution is fully supported by the terms and structure of Article 33.

B. *The Negotiating History of Article 33*

Even though the language of Article 33 is clear, at least two federal judges as well as the Solicitor General of the United States have relied on an excerpt from the negotiating history to read a geographic limitation into Article 33(1).[42]

The negotiating history of the Convention begins with the convening of an Ad Hoc Committee consisting of representatives of thirteen governments to consider the desirability of preparing a new convention regarding the international status of refugees and stateless persons.[43] Pre-

41. Convention, *supra* note 3, at art. 1(F)(b).

42. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 840-41 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part); *McNary*, 969 F.2d at 1377-79 (Walker, J., dissenting); Brief for Petitioners at 42-43, McNary v. Haitian Ctrs. Council, *cert. granted*, 113 S. Ct. 52 (1992) (No. 92-344).

43. On the procedural history presented in this and the following paragraph, *see* ROBINSON, *supra* note 40, at 4-5.

vious international agreements did not address the situation of the numerous refugees produced by the Second World War, so following a study by the Secretary General, the U.N. Economic and Social Council (Council) appointed the Ad Hoc Committee. On January 16, 1950, the Ad Hoc Committee convened in Lake Success, New York, and completed its initial work on February 16, 1950, with the adoption of a Draft Convention relating to the Status of Refugees and a Protocol thereto relating to the Status of Stateless Persons. Following discussions of the draft within the Council and among governments, the Ad Hoc Committee met in Geneva from August 14 to August 25, 1950, and prepared a revised draft.

This draft was submitted to the General Assembly, which convened a conference of plenipotentiaries in Geneva from July 2 to July 25, 1951, to complete the drafting. This final drafting provided an opportunity for more governments to participate. Twenty-six states were represented by delegates and two governments by observers. The Conference adopted the Convention by a vote of twenty-four to none.

The prohibition on returning refugees to a country of persecution was as far as the Convention drafters went with respect to the immediate protection provided to refugees in flight. The Ad Hoc Committee considered, but rejected, a chapter requiring the admission of refugees into a contracting state.[44] However, that decision did not in any way restrict the application of the *nonrefoulement* obligation. In discussing the latter obligation in relation to the Ad Hoc Committee's decision not to impose an admission obligation, which would amount to asylum, then-U.S. delegate Louis Henkin stated:

> It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier . . . . [W]hatever the case might be . . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.[45]

---

44. *Summary Record of the Seventh Meeting of the Ad Hoc Committee on Statelessness and Related Problems, held Jan 23, 1950*, 1st. Sess. at 13, U.N. Doc. E/AC.32/SR.7 (1950).

45. *Summary Record of the Twentieth Meeting of the Ad Hoc Committee on Statelessness and Related Problems, held Feb. 1, 1950*, 1st Sess. at 11-12, U.N. Doc. E/AC.32/SR.20 (1950). In a December 15, 1992 affidavit submitted by respondents in *McNary* [hereinafter Henkin Affidavit], now-Professor Henkin states:

> George Warren attended the Conference of Plenipotentiaries as the U.S. delegate at the July 11 and 25, 1951 sessions, but he and I had no disagreement regarding this point. My

Speaking immediately after Mr. Henkin, the Israeli delegate fully concurred with the U.S. position:

> The *[nonrefoulement]* article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance, and must grant to all refugees the *[nonrefoulement]* guarantees. . . .
>
> The Committee had already settled the humanitarian question of sending any refugee whatever back to a territory where his life or liberty might be in danger.[46]

Apparently, there was some concern "that the right of *nonrefoulement* should not become a vehicle for requiring the admission of massive numbers of migrants."[47] During the 1951 conference, the Dutch representative expressed his government's view that "the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by Article 33:"

> Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word 'expulsion' related to a refugee already admitted into a country, whereas the word 'return' (*'refoulement'*) related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.
>
> He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.
>
> At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.
>
> In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass mi-

---

> statement the previous year, cited [above], continued as the official position of the United States government with regard to the meaning of Article 33. Mr. Warren took no action to rescind that interpretation or to support any other interpretation.

Henkin Affidavit ¶ 9.

46. *Summary Record of the Twentieth Meeting of the Ad Hoc Committee on Statelessness and Related Problems, held Feb. 1, 1950*, *supra* note 45, at 12-13.

47. *See* Henkin Affidavit, *supra* note 45, at ¶ 7.

> grations was not covered by article 33.
> There being no objection, the PRESIDENT [of the Conference] *ruled* that the interpretation given by the Netherlands representative should be placed on record.[48]

The content and form of these minutes raise more questions than they answer, as discussed below. But most importantly, mass migration has no bearing on the issue of where a refugee must be in order to trigger the *nonrefoulement* obligation of Article 33. As the Dutch delegate indicated, those involved in a mass migration may cross or attempt to cross borders, so that they may be inside the territory of a country of refuge or outside those borders. The mass migration concern is simply not one about a refugee's location in relation to a country of refuge, but rather focuses on the *number* of refugees that may have crossed or are attempting to cross the border.

Moreover, the Dutch delegate's interpretation certainly does not suggest that a contracting state remains free *beyond its borders* to seize refugees and place them back in the hands of their persecutors. Such collaboration with persecuting authorities was a heinous act that the drafters regarded as contrary to the purpose of the Convention.[49]

That, however, is *the* issue in *McNary*. As the Second Circuit observed, whatever the Dutch delegate meant by his interpretaion, collaboration was not part of his message:

> He may well have meant only that his country would be free to close its borders in the face of a threat of mass migration, leaving fleeing refugees the opportunity to make their way (by land or air) to some other haven. But his concern not to accept 'any legal obligations,' even if shared by others considering the treaty, would not have meant that his country could go beyond the negative act of closing its border and take the affirmative steps of seizing refugees approaching the border and forcibly carrying them back to the custody of those from whom they are fleeing.[50]

If the mass migration interpretation of Article 33 relates to a contracting State's ability to prevent mass migrations *into* a country, that is, admission,[51] then the interpretation may simply mean that Article

---

48. *Summary Record of the Thirty-fifth Meeting of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held July 25, 1951*, at 21, U.N. Doc. A/CONF.2/SR 35 (1951).

49. *See, e.g., Summary Record of the Fortieth Meeting of the Ad Hoc Committee, held Aug. 22, 1950*, 2d Sess. at 33, U.N. Doc. E/AC.32/SR.40 (1950) (Statement of French Delegate, Mr. Juvigny: "any possibility, even in exceptional circumstances, of a genuine refugee . . . being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purpose of the Convention.").

50. *McNary*, 969 F.2d. at 1366.

51. *See* P. Weis, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT'L L. 92, 123-24 (1969) (observing that the negotiating history does not completely clarify the mean-

33 would not obligate a party to let in (across frontiers) mass movements of refugees.[52] As previously discussed,[53] the power to refuse admission is not to be confused with the power to return a refugee to a country of persecution. While the Convention does not limit a contracting state's power to refuse admission, it does generally remove that State's power to return refugees to countries of persecution.

Even if the meaning of the Dutch delegate's interpretation were clear, the form of the minutes raises doubts as to the existence of an agreement concerning this interpretation. The minutes simply state that the Dutch interpretation was to be placed on record. They do not state that the twenty-six delegates, or even a majority of them, "agreed" to or "adopted" the interpretation, as was the practice.[54]

The fact that no objections were raised does not, in the politeness of international negotiations and in the absence of the interpretation being "agreed" to or "adopted,"[55] indicate that an agreement had been reached.[56] Indeed, the United States and Israeli delegates expressed a contrary view earlier in the negotiations.[57]

In sum, even if the terms of the treaty were to raise serious doubts as to the applicability of the *nonrefoulement* obligation outside a contracting state's territory, which I do not believe they do, the negotiating history of the Convention does not answer such doubts. The only evidence from the negotiating history offered as proof that Article 33 does not apply on the high seas[58] concerns mass migration, but that issue

---

ing of "return," and that "[a]s regards the question of *admission*, it was stated that the Article involved no obligations in the case of mass migration of refugees across frontiers or of attempted mass migrations.") (emphasis added).

52. Respondents argue that this is what the Dutch interpretation means. Respondents' Brief at 27, McNary v. Haitian Ctrs. Council, *cert. granted*, 113 S. Ct. 52 (1992) (No. 92-344).

53. *See supra* note 40 and accompanying text.

54. *See, e.g., Summary Record of the Thirty-Fifth Meeting of the Conference of Plenipotentiaries*, *supra* note 48, at 33-34 ("It was . . . agreed" to adopt Article 45 as interpreted by the President). The Office of the United Nations High Commissioner for Refugees (UNHCR) views the fact that the Dutch delegate's comments were merely placed on the record rather than "agreed" to or "adopted" as "a tacit acknowledgement that the views he expressed did not enjoy sufficient support to alter the actual language of the treaty. . . .The process of placing comments on the record did not reflect agreement with such comments, only that they were recorded and preserved." Brief of the Office of the UNHCR as *Amicus Curiae* in Support of Respondents at 26-27, McNary v. Haitian Ctrs. Council, *cert. granted* 113 S. Ct. 52 (1992) (No. 92-344).

55. Agreements reached by the delegates were always "adopted," "agreed" to, or "approved", including those indicating no objection. *Summary Record of the Second Meeting of the Ad Hoc Committee, held Jan. 17, 1950*, 1st Sess. at 4, U.N. Doc. E/AC.32/SR.2 (1950); *Summary Record of the Eighth Meeting of the Ad Hoc Committee, held Jan. 23, 1950*, 1st Sess. at 7, U.N. Doc. E/AC.32/SR.8 (1950); *Summary Record of the Eleventh Meeting of the Ad Hoc Committee, held Jan. 25, 1950*, 1st Sess. at 11, U.N. Doc. E/AC.32/SR.11 (1950).

56. The history of mass movements of refugees in Europe indicates that some governments did not share the concerns of small countries. France, for example, admitted 400,000 refugees from Spain in just ten days in 1939. Kiss, *Répertoire de la pratique française en droit international public* (1966) iv. 433-35, as cited in GOODWIN-GILL, *supra* note 35, at 71.

57. *See supra* notes 45-46 and accompanying text.

58. *See* Petitioners' Brief at 42-43, McNary v. Haitian Ctrs. Council, *cert. granted* 113 S. Ct. 52 (1992) (No. 92-344); *McNary*, 969 F.2d at 1377-79 (Walker, J., dissenting); Haitian Refugee

does not bear on *where* refugees must be to qualify for protection. The Dutch interpretation of Article 33 may simply relate to a contracting state's power to refuse admission to refugees. But that in no way restricts the *nonrefoulement* obligation. Even if the Dutch interpretation were relevant to the issue of where Article 33 is applicable, the form of the minutes leaves considerable doubt as to the existence of any agreement on the interpretation. As such, the negotiating history is not authoritative for purposes of restricting the scope of Article 33.[59] It surely cannot be relied on exclusively, as Judge Edwards did in *Gracey*. Above all, there is certainly no suggestion in the negotiating history that any government "sought to reserve the right to reach out beyond its borders, seize potential refugees, and return them into the hands of their oppressors."[60]

VI. CONCLUSION

The *nonrefoulement* obligation was so fundamental a protection that the drafters did not permit contracting states to make reservations to Article 33. The terms of the obligation do not restrict its application to refugees within a country of refuge, which the drafters did not hesitate to do when appropriate. Because the meaning of Article 33's terms is clear—as it was to the United States government when the Haitian interdiction program was created—resort to the negotiating history of the Convention is inappropriate. Even if the terms of Article 33 were ambiguous, the negotiating history does not resolve any ambiguity, and the less restrictive construction is preferred.

What is most outrageous about the United States position regarding Article 33 is that it proffers a nefarious reading of the Convention. There is simply no way that the drafters could have created and the ratifiers adopted an instrument that would allow a contracting state to reach out onto the high seas and, in collusion with a persecuting regime, physically return refugees to that regime. As one commentator has observed:

> If we are to accept the government's theory, then the President would have the legitimate power—under both federal law and international law—to deploy the U.S. Coast Guard to track down refugees on the high seas and forcibly repatriate them to *certain*

Ctr. v. Gracey, 809 F.2d. 794, 840 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part).

59. *See* Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." (citations omitted)).

60. Henkin Affidavit *supra* note 45, at ¶ 7.

persecution or death in the country from which they fled.[61]

That the United States has summarily returned refugees to their persecutors is a moral shame. That the nation's highest lawyers have attempted to secure this end by making a "cruel hoax"[62] of the Convention's most fundamental protection represents a cynical disrespect for the rule of law, just as the United States hopes to lead the way into the "new world order."

---

61. David J. Scheffer, *The Supreme Court Considers the Kennebunkport Order*, 55 INT'L PRAC. NOTEBOOK 5 (1992).

62. These are the words of District Court Judge Johnson quoted in *McNary*, 969 F.2d at 1353. He called the government's actions, involving the return of "refugees to the jaws of political persecution, terror, death and uncertainty when [the U.S.] has contracted not to do so," "unconscionable" and "particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement." *Id.*; Petitioners' Appendix at 167a, McNary v. Haitian Ctrs. Council, *cert. granted*, 113 S. Ct. 52 (1992) (No. 92-344) (footnote citing U.S. criticism of Great Britain for its forcible repatriation of Vietnamese boat people omitted).