PROTECTION ELSEWHERE: THE LEGAL IMPLICATIONS OF REQUIRING REFUGEES TO SEEK PROTECTION IN ANOTHER STATE

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I. INTRODUCTION

In the past few decades, many state parties to the 1951 Convention Relating to the Status of Refugees (the Refugee Convention)[1] have

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1. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 2545 (1954) [hereinafter Refugee Convention]; *supplemented by*

responded to perceived problems with the international regime for refugee protection by adopting measures designed to discourage persons from seeking protection in the developed North. The strategies, though diverse, are all premised on the supposition that certain categories of refugees should not be afforded the opportunity to obtain protection in the territory of the state in which they have sought, or intend to seek, such protection. One of the most discussed and well documented of these measures is the practice of sending a refugee applicant who has reached the territory of a state party to a third country. Under this practice, the state party neither allows the refugee to stay nor returns her to the country of origin; rather, the refugee is transferred to a third country in which it is said she will find protection. The third country is often identified as either the "country of first asylum" (implying that the refugee *has already* found protection in that country) or a "safe third country" (implying that the refugee *could* seek protection in that country). Some states apply these concepts to a situation where a person has only transited briefly through the relevant third state.[2] More recent practices and proposals have suggested that these concepts may even permit the transfer of a refugee to a country to which the refugee has never been.[3]

It might be possible for states to engage in such policies in order to ensure the fair and equitable allocation of protection responsibilities

Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 8791 [hereinafter Refugee Protocol].

2. The most obvious example of this is the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (the Dublin Convention), *opened for signature* June 15, 1990, 30 I.L.M. 425 (1991). This has been replaced by the "Dublin II Regulation" (Council Regulation (EC) No. 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1, 10 [hereinafter Dublin II Regulation]).

3. A well-known example of this is Australia's "Pacific Solution," developed in the wake of the Tampa controversy in 2001. *See* Penelope Mathew, *Australian Refugee Law in the Wake of the Tampa*, 96 AM. J. INT'L L. 661 (2002); Savitri Taylor, *Protection Elsewhere/Nowhere*, 18 INT'L J. REFUGEE L. 283 (2006); *and* Susan Kneebone, *The Pacific Plan: The Provision of 'Effective Protection'?*, 18 INT'L J. REFUGEE L. 696 (2006). The United Kingdom put forward a similar proposal in 2003 whereby asylum seekers arriving in the United Kingdom would be transferred to a transit processing center outside the European Union. For a description and analysis of this proposal, see AMNESTY INT'L, UNLAWFUL AND UNWORKABLE—AMNESTY INTERNATIONAL'S VIEWS ON PROPOSALS FOR EXTRA-TERRITORIAL PROCESSING OF ASYLUM CLAIMS (2003), *available at* http://web.amnesty.org/library/index/engior610042003. *See also* Gregor Noll, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, 5 EUR. J. MIGRATION & L. 303 (2003). For the most radical of these proposals to date, see Alexander Betts, *The Political Economy of Extra-Territorial Processing: Separating "Purchaser" from "Provider" in Asylum Policy* (UNHCR New Issues in Refugee Research, Working Paper No. 91, 2003).

among states, thus potentially benefiting refugees.[4] However, the policies adopted and proposed to date are largely understood as an attempt to minimize state obligations to refugees. This risks circumventing the rights regime set out in the Refugee Convention and other international human rights instruments.[5] For example, in the case of Australia's unilateral transfer of refugees to Nauru under the "Pacific Solution," Susan Kneebone notes that "one objective of the Pacific Strategy was to deny the asylum seekers access to Australia's legal system, which includes the right to independent merits review and rights of judicial review."[6] Additionally, transfer of a refugee to a third state often removes her chance of obtaining refugee status. For example, since recognition practices vary widely even within the "unified" system of the European Union, the United Nations High Commissioner for Refugees (UNHCR) notes that a

4. For example, in its critique of the Dublin II Regulation, the European Council on Refugees and Exiles (ECRE) proposes an alternative system for allocating responsibility based on two criteria: "1) the Member State where the asylum seeker has a family member is responsible, provided he or she agrees with a transfer to that state; or 2) the Member State where the asylum request was first lodged is responsible, unless there are compelling humanitarian considerations to preclude this." Further, ECRE proposes that this alternative system "should contain mechanisms to share responsibility for supporting those Member States that receive disproportionately high numbers of asylum seekers." ECRE, REPORT ON THE APPLICATION OF THE DUBLIN II REGULATION IN EUROPE 171 (2006) [hereinafter ECRE DUBLIN II], *available at* http://www.ecre.org/resources/research_papers_list. Indeed, even under existing criteria, the Dublin II Regulation entitles a refugee in one state to be reunited with family members in another state—an example of a situation in which a transfer may benefit refugees. *Id.* at 165. In that respect, ECRE calls for attention to be given to "how to better enable individuals to themselves invoke the application of the Dublin II Regulation where another state is responsible under the hierarchy of criteria under the Regulation but the host state is failing to request or initiate transfer." *Id.*

5. This is highlighted by the fact that states do not usually measure the "success" of these schemes in terms of protection outcomes for refugees, but rather by reference to falling refugee numbers in their own state, i.e., their deterrent value. This has particularly been the case in Australia. In a recent article, the Assistant High Commissioner for Protection of the UNHCR has noted that the notion of effective protection is

> increasingly being employed, at least in this context [i.e., arguments over whether a particular state is responsible for specific refugees], as a means to limit a particular State's responsibilities towards specific asylum seekers or refugees . . . . There is a real danger in allowing the debate about who is responsible for an asylum seeker to determine the meaning of this term "effective protection." There is clearly an interest on the part of some to define the notion down to a lower rather than higher common denominator, so as to legitimate or facilitate the implementation of restrictive asylum policies.

Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT'L J. REFUGEE L. 510, 528 (2006).

6. Kneebone, *supra* note 3, at 715.

Chechen refugee returned from Austria to Slovakia will see her chances of being recognized as a refugee fall from over eighty percent to zero.[7]

These practices have been controversial precisely because they are understood as an attempt to circumvent state obligations towards refugees. This is particularly so because the idea of requiring a refugee to seek protection elsewhere is not explicitly anchored in the text of the Refugee Convention.[8] Rather, these policies are founded on an implicit authorization—a form of reasoning based on the fact that the Refugee Convention does not provide a positive right to be granted asylum.[9] The key protection in the Refugee Convention is *non-refoulement* (Article 33), the obligation on states not to return a refugee to a place in which he will face the risk of being persecuted.[10] States reason that, as long as they do not violate this prohibition, they are not required to provide protection to refugees who reach their territory, but rather they are free to send refugees to other states, possibly even states that are not parties to the Refugee Convention.

In light of the absence of explicit authority in the Convention, a key initial question is whether protection elsewhere practices are permitted under international law. A second key question is whether, assuming that some kind of transfer is permitted, any constraints operate on states in choosing to send a refugee to another country. It is often suggested that such transfers are permitted provided that a refugee will enjoy "effective protection" in the third country;[11] however, there is little agreement on

7. U.N. HIGH COMM'R FOR REFUGEES, 2005 GLOBAL REFUGEE TRENDS (2006), *available at* http://www.unhcr.org/statistics/. Other consequences sometimes follow from subjection to a protection elsewhere policy. For example, the UNHCR points out that in some States governed by the Dublin regime, "conditions of reception and benefits differ for asylum-seekers in the Dublin II procedure and those in the regular procedure," including access to education and financial assistance. U.N. HIGH COMM'R FOR REFUGEES, THE DUBLIN II REGULATION: A UNHCR DISCUSSION PAPER 51 (2006) [hereinafter UNHCR DUBLIN II].

8. As Symes and Jorro note, the "safe third country" concept is "the largely invented internationally accepted concept of normally applying for asylum in the first safe country of arrival." MARK SYMES & PETER JORRO, ASYLUM LAW AND PRACTICE 513 (2003).

9. There is no "right to asylum" in the Refugee Convention or in international law more generally. Article 14 of the Universal Declaration of Human Rights (which is not binding in any event) provides only that "everyone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 14, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

10. Refugee Convention, *supra* note 1, art. 33.

11. *See e.g.*, U.N. High Comm'r for Refugees, Lisbon Expert Roundtable, Dec. 9–10, 2002, Lisbon, Port., *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Feb. 2003), *available at* http://www.unhcr.org/protect/PROTECTION/3e5f323d7.pdf [hereinafter *Lisbon Conclusions*]. *See also* Council Directive 2004/83/EC, art. 27(1), 2004 O.J. (L 304) (EC). This directive sets out the conditions of safety for the application of the safe third country concept:

> [W]here life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) where the principle

the precise parameters of that concept.[12] In particular, the question of which, if any, human rights protections need to be present in another country before it may be considered to provide effective protection remains unresolved.

In response to the increasing popularity of deflection and responsibility-sharing schemes (both adopted and proposed), a number of attempts have been made to outline the factors that should be taken into account in assessing whether to send refugees to third states. Such guidelines have sometimes been developed by reference to both the Refugee Convention and other international human rights instruments. One striking feature, however, is that few analyses have questioned the legal basis for the practices, assuming instead that, in line with the view of state parties to the Refugee Convention, they are permitted under international

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of *non-refoulement* is respected in accordance with the Refugee Convention; (c) where the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected and (d) if the possibility exists to request refugee status, and if found to be a refugee, to receive protection in accordance with the Refugee Convention.

Id. See also European Comm'n, Commc'n to the Council & European Parliament, *Towards more accessible, equitable and managed systems*, at 5, COM (2003) 315 final (June 3, 2003); European Comm'n, Commc'n to the Council & European Parliament, *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin—"Improving access to Durable Solutions*," at 3, COM (2004) 410 final (June 4, 2004). The Director of Protection at the UNHCR has also provided guidance as to the meaning of this term. For example, in September 2003, at the fifty-fourth meeting of the Executive Committee (ExCom), the Director, Erika Feller, emphasized that, "[i]n UNHCR's view, [effective protection] has to find its base in respect for refugee and human rights law, and it has to be practiced with its humanitarian objectives to the fore, in a manner consistent as much with the spirit as the letter of the refugee protection regime." On October 20, 2004, at the fifty-fifth ExCom meeting, Feller provided more specific guidance as to the meaning of the concept. In terms of state practice, the term "effective protection" is most often employed in the Australian jurisprudence, but has also been employed in other contexts. For example, Cathryn Costello cites a report by the House of Lords Select Committee which noted that while the Refugee Convention does not prohibit the transfer of responsibility for the processing of asylum claims in third countries, such transfer must not take place unless the third country offers "effective protection." Cathryn Costello, *The Asylum Procedures Directive and the Proliferation of Safe Third Country Practices: Deterrence, Deflection and the Dismantling of International Protection?*, 7 EUR. J. MIGRATION & L. 35, 57 (2005).

12. Stephen Legomsky notes the many contexts in which the phrase has been employed but observes that "no comprehensive definition has been advanced." Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE L. 567, 573 (2003). Similarly, Costello argues that "effective protection has the potential of evolving into a meaningful constraint on the use and abuse of FCA [first country of arrival] (and indeed STC [safe third country]) techniques," while acknowledging that "[t]he process whereby it is imbued with meaning is ongoing." Costello, *supra* note 11, at 59.

law.[13] In addition, even those studies or guidelines that have formulated a list of constraints on state action have generally not explored the applicability of provisions beyond Article 33's principle of *non-refoulement*. Such guidelines therefore tend to overlook the potential for the rights regime set out in the Refugee Convention to operate as a constraint on state behavior.[14] Thus, although protection elsewhere practices and policies are now well entrenched in many states, surprisingly little clarity or consensus exists regarding their legality under international law.

In light of this lacuna in respect of such an important issue, the question of states' rights to engage in protection elsewhere practices was identified as the focus of the Fourth Colloquium on Challenges in International Refugee Law and the resulting Michigan Guidelines. This Article sets out the analysis of state responsibility that forms the basis for the Michigan Guidelines on Protection Elsewhere, published in this issue.[15]

States have adopted a wide range of deflection practices and policies, but only a subset of these is the subject of this Article. The Michigan Guidelines' concept of protection elsewhere refers to a situation in which a state or agency acts on the basis that the protection needs of a refugee should be considered or addressed somewhere other than in the territory of the state where the refugee has sought, or intends to seek, protection. This definition includes formal multilateral assignment regimes (for example, the Dublin II Regulation);[16] formal bilateral assignment regimes (for example, the U.S.-Canada Safe Third Country Agreement);[17] formal mandatory extraterritorial processing of claims (for

13. As Maria-Teresa Gil-Bazo explains, one of the concepts—safe third country—"has managed to ground itself so firmly in the discourse of governments, academics and even NGOs that the debate does not address the lawfulness of the practice itself, but rather—seemingly accepting it—focuses on the specific requirements that are to be met for a State to be considered a safe third country." Maria-Teresa Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited*, 18 INT'L J. REFUGEE L. 571, 595 (2006).

14. This is particularly the case when the definition is put forward by states. For example, in 2003 the U.K. government put forward a working definition of "effective protection," focusing principally on primary humanitarian assistance, protection against *refoulement*, and compliance with Article 3 of the European Convention. *See* CABINET OFFICE AND HOME OFFICE FUTURE OF MIGRATION PROJECT, A NEW VISION FOR REFUGEES: FINAL REPORT 14 (2003), *available at* http://www.proasyl.info/texte/europe/union/2003/UK_NewVision.pdf. One exception to this is the very comprehensive and thoughtful paper by Legomsky, *supra* note 12.

15. Colloquium, *The Michigan Guidelines on Protection Elsewhere*, 28 MICH. J. INT'L L. 207 (2007) [hereinafter *Michigan Guidelines*].

16. Dublin II Regulation, *supra* note 2.

17. Agreement for Co-operation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., Dec. 5, 2002, State Dept. No. 05-35, 2004 WL 3269854, *available at* http://www.cic.gc.ca/english/policy/safe-third.html [hereinafter Safe Third Country Agreement].

example, proposals by the United Kingdom for "regional protection areas");[18] and formal unilateral transfer regimes (for example, Australia's invocation of the "safe third country" concept).[19] However, the principles developed in the Michigan Guidelines are not intended to apply to other deterrent policies, such as visa controls and carrier sanctions, which deny access without any effort to assign protective responsibility.

It should be mentioned at the outset that, despite the imperative for clear legal guidance on these issues, some potential problems might be said to arise in examining the topic in the manner adopted by the Michigan Guidelines. One potential danger is that identifying the concept of "protection elsewhere" and assessing the circumstances in which such practices may be permissible as a matter of international law risks legitimizing state efforts to circumvent Convention obligations. However, this position ignores the fact that states have been engaging in such practices for some time. In the absence of any clear legal guidance regarding their authority to engage in such practices, states might assume they are untrammeled by legal constraints or principles in instituting protection elsewhere schemes. In particular, the fact that the Refugee Convention does not explicitly sanction protection elsewhere policies has lent support to the view that such practices exist outside the bounds of the Convention scheme, or that the Convention is only marginally relevant to their legitimacy. As the UN Assistant High Commissioner for Refugees has noted, there are "too many artificial constructs being devised to elude responsibility for supporting and accepting refugees. The end result is to lock people out of the effective protection the Convention's drafters had in mind."[20] Accordingly, the strong view of the Colloquium participants is that states parties to the Refugee Convention cannot engage in practices that conflict with their Refugee Convention obligations, and that any analysis of state responsibility for protection elsewhere practices must be anchored in the Refugee Convention. Other relevant international legal obligations are considered, but the primary focus is on the Convention, the "cornerstone of the international refugee protection regime."[21]

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18. For a description and analysis of this proposal, see AMNESTY INT'L, *supra* note 3. *See also* Noll, *supra* note 3.

19. For an overview, see Mathew, *supra* note 3; Taylor, *supra* note 3; Kneebone, *supra* note 3.

20. Erika Feller, Dir., Dep't of Int'l Prot., UNHCR, Effective Protection in Today's World, Statement to the Fifty-fourth Session of the Executive Committee of UNHCR's Programme (Oct. 1, 2003), *available at* http://www.unhcr.org/admin/ADMIN/42a0554a2.html.

21. Executive Comm. of the High Comm'r's Programme [ExCom], *Conclusion on the Provision on International Protection Including Through Complementary Forms of rotection*, (No. 103 (LVI)—2005), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&id=43576e292.

A second possible objection to the formulation of guidelines on the legality of protection elsewhere is that the term encompasses a number of different practices and policies which may not be amenable to a single analysis. However, whether the specific practice is termed "country of first arrival," "safe third country," or "country which offers effective protection," there is no principled reason why the legal analysis should change. In each case the question is whether a state party to the Refugee Convention can, consistently with its Convention obligations, transfer a refugee to another state.[22] This was also the consensus on the concept of effective protection of the UNHCR Lisbon Expert Roundtable, which concluded that, "[f]rom the point of view of identifying the elements of effective protection in the context of return to third countries, the distinction between the so-called 'safe' third country and the country of first asylum concepts is not relevant."[23]

This Article first questions the legitimacy of protection elsewhere practices. It then considers the circumstances in which the transfer of refugees might take place. It should be emphasized that the Michigan Guidelines set out the minimum requirements and constraints imposed by international law when a state wishes to implement a protection elsewhere policy. In addition, in some instances the Michigan Guidelines engage in "progressive development" of the law by suggesting safeguards that, while not strictly required by international law, should be respected in order to ensure the implementation of such policies in a way that protects and ensures the rights of refugees.

II. THE LEGITIMACY OF PROTECTION ELSEWHERE PRACTICES

A crucial initial question is whether the Refugee Convention authorizes or prohibits protection elsewhere practices. This is an exercise in ascertaining the "ordinary meaning" of the text, "in . . . context, and in the light of [the Convention's] object and purpose."[24] The text of the Refugee Convention does not explicitly authorize such practices.[25] Rather, as alluded to above, it is commonly argued that authorization for such practices is derived from an omission in the Convention text, that is,

22. This is also the position taken by Stephen Legomsky. Legomsky, *supra* note 12, at 570–71.

23. *Lisbon Conclusions*, *supra* note 11, ¶ 10.

24. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (1980) [hereinafter Vienna Convention].

25. Interestingly, a draft document setting out proposals for a reform agenda by the U.K. Cabinet Office and Home Office in February 2003 suggested "an amendment of the 1951 Refugee Convention to allow for the return to safe havens." Noll, *supra* note 3, at 315.

a negative implication is drawn from the limits of the positive obligations actually imposed on state parties. The question thus arises whether this is a legitimate implication.

The Refugee Convention is not silent about the possibility of a person losing an entitlement to protection because she has found protection elsewhere. Indeed, it explicitly provides for this in three situations, none of which provide support for the new regime of protection elsewhere. First, where a person has more than one nationality, he will not satisfy the definition of a refugee if he has "not availed himself of the protection of one of the countries of which he is a national," without "any valid reason."[26] Second, Article 1E of the Convention provides that the Convention "shall not apply" to a person "who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."[27] Finally, even where the Refugee Convention once applied to a refugee, it will cease to apply if he acquires a new nationality and "enjoys the protection of the country of his new nationality."[28]

In each of these three situations, it is assumed that the putative refugee enjoys a level of protection in a third country equivalent to what nationals enjoy in that third country (either because he is a national or because he has acquired the same rights as a national). As emphasized by the decisions of a number of domestic judges, any protection available to a refugee by virtue of one of these situations must be meaningful or effective. For example, in the context of the exclusion based on dual nationality, the Federal Court of Australia has emphasized that it is not sufficient that the country of second nationality will provide mere protection from persecution; rather, "effective nationality" is required which "provides all of the protection and rights to which a national is entitled . . . under customary or conventional international law."[29] Similarly, the Federal Court of Australia

26. Refugee Convention, *supra* note 1, art. 1A(2).

27. *Id.* art. 1E.

28. *Id.* art. 1(C)(3).

29. Lay Kon Tji v. Minister for Immigration and Ethnic Affairs (1998) 158 A.L.R. 681, 691 (Austl.). *See also* Jong Kim Koe v. Minister for Immigration and Multicultural Affairs (MIMA) (1997) 74 F.C.R. 508 (Austl.). The New Zealand Refugee Status Appeals Authority (RSAA) endorsed the Federal Court's decision in *Lay Kon Tji*, including the need for "effective nationality," in *Refugee Appeal No. 71322/99*, ¶ 26 (Sept. 19, 2000). See also *Refugee Appeal No. 2067/94*, at 11 (July 4, 1996), in which the RSAA cited with approval the view of James Hathaway:

> [B]oth scholarly opinion and UNHCR recommendations urge that the only relevant issue is the effectiveness of the new nationality, however it came to be acquired. Specifically, the refugee must be able to enter her new state of citizenship, reside there with protection against deportation or expulsion, and enjoy a reasonable expectation that her basic human rights will be fully respected.

Id.

has held that the rights and obligations afforded the refugee in the country of de facto nationality (that is, where Article 1E applies) "must be the same as those of a national but fall short of a grant of citizenship."[30] For example, the mere grant of Convention rights in the other state will not suffice.[31] The Canadian Federal Court has similarly emphasized the importance of protection that goes well beyond protection from persecution in the context of Article 1E, requiring "clear evidence that a person enjoys all of the rights of a national."[32] In particular, the "most fundamental basic rights associated with nationality of a country" to be afforded the refugee in the third state must include, at a minimum, "the right to return, the right to reside for an unlimited period of time, the right to study, the right to work, and access to basic social services."[33]

By contrast, while the Refugee Convention requires states to ensure a variety of important rights protections for refugees, the protection required is often less than that provided to nationals. For example, in some cases it is equivalent only to what aliens enjoy generally,[34] and in other cases it is equivalent to that enjoyed by those with most favored nation status.[35] Thus, the Refugee Convention explicitly excludes a person from its protection only in situations in which a potential refugee enjoys a *higher level of protection* in a third state. It is noteworthy that recogni-

30. Barzideh v. Minister for Immigration & Ethnic Affairs (1996) 69 F.C.R. 417, 428 (Austl.).

31. *Id.* at 428–29.

32. Canada (Minister of Citizenship & Immigration) v. Choovak, [2002] F.C. 573, ¶ 34 (Can.). *See also* Hassanzadeh v. Canada (Minister of Citizenship & Immigration), [2003] F.C. 1494, ¶ 19 (Can.).

33. *Hassanzadeh*, [2003] F.C. 1494, ¶ 19 (citing LORNE WALDMAN, THE DEFINITION OF CONVENTION REFUGEE § 8.481 (2001)). This ruling has been adopted by a number of Federal Court judgments. *See, e.g.*, *Choovak*, [2002] F.C. 573, ¶ 32. *See also* Shamlou v. Canada (Minister of Citizenship & Immigration), [1995] F.C. 1537, ¶ 36 (Can.); Kanesharan v. Canada (Minister of Citizenship & Immigration), [1996] F.C. 1278, ¶ 11 (Can.); Canada (Minister of Citizenship & Immigration) v. Sartaj, [2006] F.C. 399, ¶ 9 (Can.) (all citing LORNE WALDMAN, 1 IMMIGRATION LAW AND PRACTICE § 8.479 (1992) (loose-leaf). In particular, it has been emphasized that the right to return to and stay in the third country must not be "at the sufferance of the [relevant] government." Choezom v. Canada (Minister of Citizenship and Immigration), [2004] F.C. 1608, ¶ 14 (Can.). This emphasis on social and economic rights is also found in the case law related to the "firm resettlement" provisions in the United States. *See, e.g.*, Sall v. Gonzales, 437 F.3d 229 (2d Cir. 2006); Mussie v. Immigration & Naturalization Serv., 172 F.3d 329 (4th Cir. 1999); Diallo v. Ashcroft, 381 F.3d 687, 693 (7th Cir. 2004); Soleimani v. Immigration & Naturalization Serv., 20 I. & N. Dec. 99 (BIA 1989).

34. Article 7(1) of the Refugee Convention provides that "[e]xcept where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally." Refugee Convention, *supra* note 1, art. 7(1).

35. This is the case with respect to the right to freedom of nonpolitical association and the right to engage in wage-earning employment. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 230–34 (2005). *See also* Nagalingam v. Minister for Immigration, Local Gov't & Ethnic Affairs (1992) 38 F.C.R. 191, 198 (Austl.).

tion as a refugee in a third state does not of itself explicitly exclude a person from the Convention's protection.[36] States invoking the current protection elsewhere concept seek not only to *imply* a further "third country" exception into the Refugee Convention, but to find such an exception applicable even where a person enjoys *less* protection than that afforded by the Refugee Convention. This is because many states consider only Article 33 to be applicable as a constraint on transfer, ignoring the question whether the refugee would enjoy the other rights and entitlements set out in the Convention in that other state. Further, some states find the implied exception applicable even where a person does not have a legal right to enter or reside in the third country.[37]

As a basic principle of interpretation, one might argue that the *expressio unius* principle—the doctrine that the explicit mention of certain exceptions operates so as to exclude others—precludes this line of reasoning. This could be argued to apply *a fortiori* in the context of a human rights treaty, such as the Refugee Convention, since exclusions from protection should in any case be given a narrow interpretation. Indeed, a number of domestic judges have voiced concern regarding the legitimacy of implying an exception into the Refugee Convention in this way.[38] For example, Justice Gray of the Australian Federal Court has suggested that the reasoning on which the "effective protection" doctrine is based in Australian law "appears flawed."[39] He explains:

36. In *Barzideh*, Justice Hill explicitly considered this argument, holding, "[o]f course it is true that a person who is granted de facto citizenship and has rights no less than those of a refugee under the Convention has no need for the grant of refugee status. But that is not to the point. Had the members of the United Nations intended to exclude from refugee status a person who has been granted by the state of residence rights no less than those of refugee status (albeit not all the rights of a national), they could have said so." Barzideh v. Minister for Immigration & Ethnic Affairs (1996) 69 F.C.R. 417, 427 (Austl.). *See also Nagalingam* (1992) 38 F.C.R. at 198 ("The question which requires determination is whether recognition by the host country of a person as a refugee confers upon the refugee the same rights and imposes upon him the same obligations, which are attached to the possession of nationality of that country.").

37. This has been accepted in the Australian case law. *See, e.g.*, V872/00A v. Minister for Immigration & Multicultural Affairs (2002) F.C.R. 185 (Austl.) (unreported judgment).

38. Although not directly concerned with the doctrine of "effective protection," a similar argument appears to have been made by Justice Finkelstein in *Lay Kon Tji* in the context of the exclusion based on dual nationality, discussed above. After surveying the three situations in which "international protection" is not available in the Refugee Convention (i.e., dual nationality, Article 1C(3) and Article 1E), his Honour noted, "[t]hese articles proceed on the assumption that international protection under the Convention will *not be available only when fully effective national protection is available from some other state* although, of course, in the case of Art. 1E de facto protection from that other State will suffice." Lay Kon Tji v. Minister for Immigration and Ethnic Affairs (1998) 158 A.L.R. 681, 691 (Austl.) (emphasis added).

39. NAFG v. Minister for Immigration & Multicultural & Indigenous Affairs (2003) 131 F.C.R. 57, 60 (Austl.) (Gray, J., dissenting).

> Article 33 of the Convention, on which the reasoning rests, does not authorize a country party to the Convention to return a person to whom it otherwise owes protection obligations to any other country. Article 33 imposes a negative obligation . . . .[40]

Similarly, Justice Kirby of the Australian High Court has stated that "[w]ithout clear language in the Convention to support such a course, I would not introduce such relief from Convention 'protection obligations' by a process of implication inimical to the Convention's objectives, terms and practical operation."[41]

However, one may argue that these explicit exceptions do not preclude reliance on an implicit protection elsewhere policy, as such exceptions speak to the *definition* of a refugee, set out in Article 1. They therefore serve the function of delimiting the class of persons to whom the Convention rights regime applies. By contrast, in invoking protection elsewhere policies, states do not generally seek to argue that a person is *excluded* from protection, but that protection can be provided *elsewhere*.[42] In other words, the idea is that a state acknowledges and accepts that it has some protection obligations to a refugee who is within its jurisdiction or territory, but submits that it may fulfill those protection obligations by transferring refugees to another state.

Turning to articles other than Article 1 of the Convention, it is relevant to consider whether Articles 31–33 shed light on a state's authority to institute protection elsewhere practices. Article 31(2) refers to the possibility of a refugee obtaining "admission into another country." This article, however, should be interpreted in its particular context. Article 31(1) prohibits the imposition of penalties on refugees who enter the country or are present unlawfully. Article 31(2) sets out a narrow exception to this prohibition by providing that a state shall not restrict the freedom of movement of such persons except as necessary, but any such "necessary" restrictions apply only until the applicants' "status in the country is regularized or they obtain admission into another country." To the extent that this envisages movement, it indicates a sense of volition on the part of a refugee, who may wish to seek admission into another state. In this context, a state must "allow such refugees a reasonable period and all the necessary facilities to obtain admission into another

40. *Id.*

41. NAGV of 2002 v. Minister for Immigration & Multicultural & Indigenous Affairs (2005) 213 A.L.R. 668, ¶ 93 (Austl.) (Kirby, J.).

42. However, as Taylor points out, the Australian government's position "is that it does not 'owe protection obligations' to persons who would be 'adequately protected in a safe third country.' " *See* Taylor, *supra* note 3, at 283.

country."[43] This article of the Convention therefore neither expressly authorizes nor prohibits protection elsewhere practices.[44]

Article 32 of the Convention proscribes the expulsion of refugees "save on grounds of national security or public order" and requires that due process be afforded an individual refugee prior to expulsion.[45] However, this does not apply until a refugee is "lawfully present" in the territory of the relevant state party.[46] This suggests some flexibility between the point at which Article 33 is activated (explored below) and the point at which a refugee is lawfully present in a state, during which a state is not explicitly constrained from removing a refugee to a third state.

In addition to this textual analysis, it is also relevant to refer to "soft law" developments pertinent to this issue.[47] Emerging state practice has

43. Refugee Convention, *supra* note 1, art. 31(2).

44. Note that the application in Article 31(1) of protection from penalization to refugees who come "directly from a territory where their life or freedom was threatened in the sense of article 1" is sometimes said to impose a duty on refugees to seek refugee status in the first country of arrival (and therefore to support implicitly a protection elsewhere policy which adopts a "first country of arrival" rule). However, this is limited to the specific context—the question whether a refugee can claim exemption from laws that penalize unlawful entry—and does not apply to situations where a refugee has merely transited through third countries. HATHAWAY, *supra* note 35, at 394–98.

45. Refugee Convention, *supra* note 1, art. 32(2). This clause provides:

> The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Id. See also HATHAWAY, *supra* note 35, at 694–95 (describing an individuated assessment prior to expulsion).

46. *Michigan Guidelines*, *supra* note 15, ¶ 5. The Guidelines hold that the concept of "lawful presence" must be defined by the sending state in good faith and in accordance with the requirements of international law. Further, "lawful presence is in any event established not later than such time as a decision is reached on the admissibility of the protection claim." *Id.* S*ee also* Rajendran v. Minister for Immigration & Multicultural Affairs (1998) 86 F.C.R. 526, 530–531 (Austl.) (noting that, "[i]n the present case, Mr. Rajendran . . . now holds a bridging visa. If his application for a [refugee status-based] protection visa is ultimately unsuccessful . . . that visa will cease to have effect at the time stipulated in the relevant Migration regulations . . . whereupon he will both cease to be lawfully in Australia and able to invoke Article 32"); Szoma v. Sec'y of State for Work & Pensions, (2006) 1 A.C. 564, ¶ 29 (U.K.) (explaining that there is no reason why the "lawful presence" requirement for U.K. income support "should be construed as requiring more . . . than that they are at large here pursuant to the express written authority of an immigration officer provided for by the statute").

47. This Section analyzes ExCom Resolutions as "soft law" rather than as subsequent agreement or practice, pursuant to the Vienna Convention, s*upra* note 24. This is because it is questionable whether documents produced by a limited number of state parties could be said to constitute agreement between the parties for the purpose of Article 31(3)(a) of the Vienna Convention. It is also unlikely that such documents could be considered "state practice" for the purposes of Article 31(3)(b). Not all parties to the Convention participate in formulating

led the UNHCR to provide guidance in various forms over the past few decades to states seeking to apply these principles in practice. In the earliest relevant elucidation of these principles, the UNHCR Executive Committee (ExCom) advised states that "[t]he intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account . . . . Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state."[48] While this appeared to allow refugees some choice in the country in which they could seek protection,[49] subsequent ExCom conclusions arguably have moved away from this position.[50] In particular, ExCom 71 recognized

> the advisability of concluding agreements among States directly concerned, in consultation with UNHCR, to provide for the protection of refugees through the adoption of common criteria and related arrangements to determine which State shall be responsible for considering an application for asylum and refugee status and for granting the protection required, and thus avoiding orbit situations.[51]

More specifically, while the UNHCR has set out a range of constraints on the ability of states to transfer refugees to third countries, it "does not object in principle to the notion of designating countries as 'safe third countries.'"[52] Thus, the focus for the UNHCR has not been on the legality of the practice *per se* but rather on what safeguards must be present before a state may transfer refugees to another state.

Executive Committee Conclusions; ExCom is composed of only seventy countries. *See* UNHCR, Executive Committee of the High Commissioner's Programme, http://www.unhcr.org/excom/40111aab4.html).

48. U.N. HIGH COMM'R FOR REFUGEES, A THEMATIC COMPILATION OF EXECUTIVE COMMITTEE CONCLUSIONS 344, 345 (No. 15 (XXX)—1979) (2d ed. 2005), *available at* http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf [hereinafter CONCLUSIONS].

49. The UNCHR qualifies this by saying, "[w]here, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State." *Id.* at 345 (No. 15 (XXX)—1979).

50. *See, e.g.*, ExCom Conclusion No. 15, which provides that "[r]efugees and asylum-seekers who, having found protection in a particular country, should normally not move from that country in an irregular manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country." CONCLUSIONS, *supra* note 48, at 139 (No. 15 (XL)—1989).

51. CONCLUSIONS, *supra* note 48, at 332 (No. 71(k) (XLIV)—1993). *See also id.* at 352 (No. 74(p) (XLV)—1994) (acknowledging "the value of regional harmonization of national policies to ensure that persons who are in need of international protection actually receive it").

52. U.N. High Comm'r for Refugees, *Note on Key Issues of Concern to UNHCR on the Draft Asylum Procedures Directive*, ¶ 1 (March 2004), *available at* http://www.ecre.org/press/UNHCR_concern_directive.DOC.

The analysis of the relevant text of the Refugee Convention thus leads to the conclusion that, as noted in the Guidelines, the 1951 Convention neither expressly authorizes nor prohibits reliance on protection elsewhere policies. Given this conclusion, we must next consider under what conditions and in what situations a state may legitimately rely on this concept.

III. IN WHAT CIRCUMSTANCES MAY A STATE IMPLEMENT A PROTECTION ELSEWHERE POLICY?

Before considering the rights that must be respected in order for a protection elsewhere policy to be implemented in accordance with the Refugee Convention (Parts IV–V below), it is important to consider the circumstances in which such a policy may be effected. The two salient questions in this regard are whether a state may transfer a refugee to the control of a nonstate entity, and whether the state to which the refugee is to be transferred must be a party to the Refugee Convention.

A. *To Whom May a State Transfer Refugees Under a Protection Elsewhere Scheme?*

An initial question is whether the protection of Refugee Convention rights in the third state must be ensured by the state, or whether refugees may be transferred to a third state in which protection will be delivered by nonstate entities, such as ethnic clans or leaders, nongovernmental organizations, or even the UNHCR. It is important to observe that the refugee protection obligations imposed by Articles 2–33 of the Convention are specifically addressed to states.[53] Indeed, the "very structure of the 1951 Convention requires that protection will be provided not by some legally unaccountable entity with de facto control, but rather by a government capable of assuming and being held responsible under international law for its actions."[54] Therefore, a nonstate entity is not capable of delivering Refugee Convention protection in a third state.[55]

53. J.C. Hathaway & M. Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 357, 411 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

54. *Id.* The only exception to this is Article 1D of the Convention, which provides that the Convention does not apply to persons who "at present [are] receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance." Refugee Convention, *supra* note 1, art. 1D. However, this is a very narrow exception to the general approach in the Convention, and in any case it is limited to the delivery of protection by the United Nations (as opposed to other "third parties" such as those with de facto control).

55. It should be noted that a different approach has sometimes been adopted in the context of the question whether a nonstate entity may deliver protection to a person, such that they cannot be said to have a well-founded fear of persecution. For example, the EU Qualification

One exception to this is a situation where a (third) state has delegated to the UNHCR the task of undertaking status determination in that state.[56] In such a case, it may be sufficient for the UNHCR to make such assessments as long as the state in that third country ultimately delivers Convention protection to any transferred refugees.[57] Thus, the Guidelines conclude that "any sharing-out of protection responsibility must take place between and among states."[58]

B. *De Jure and De Facto Compliance with the Refugee Convention*

The second fundamental initial question is whether it is necessary for the third state (to which refugees will be transferred) to be a party to the Refugee Convention. Further, is it necessary for the third state to be a party to precisely the same rights regime as the sending state (for example, is it a requirement that the third state has not entered significant reservations to the refugee rights regime)?[59] If so, is this de jure compliance a sufficient condition to establish the legality of transfer, or is the transferring state additionally obligated to assess whether refugee rights will be delivered *in practice*? Although this issue pertains to all Refugee Convention rights, there might be some differentiation between Article 33 and other articles. This is because some have argued that the rule embodied in Article 33—*non-refoulement*—has now attained the status of customary international law.[60] If this is the case, then arguably every

Directive provides that, in assessing whether persecution is established on the basis that there is no protection against serious harm, protection can be provided by "parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State." Council Directive 2004/83/EC, art. 7(1), 2004 O.J. (L 304) 12, 16 (EC).

56. Legomsky argues that, "[f]rom an effective protection standpoint, it should not matter who provides the refugee status determination as long as all the components of fairness are in place. Thus, a particular third country might delegate the determination to UNHCR." Legomsky, *supra* note 12, at 655.

57. It should be noted that the UNHCR has itself recognized that its presence in a country "cannot be equated with the provision of effective protection. International protection is afforded by States and not by an international organization." U.N. High Comm'r for Refugees, *UNHCR's Views on the Concept of Effective Protection as it Relates to Indonesia* (Dec. 2, 2004), *available at* http://www.unhcr.org.au/pdfs/EFFECT.pdf.

58. *Michigan Guidelines*, *supra* note 15, at 4.

59. This issue has arisen in practice. For example, Taylor notes that while Australia has return agreements with Nauru and Papua New Guinea, Nauru is not a party to the Convention and Papua New Guinea, although a party, "has made significant reservations" (including to Articles 17(1), 21, 22(1), 26, 31, 32, and 34 of the Convention). *See* Savitri Taylor, *The Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Responsibility Sharing*, 6 ASIAN-PAC. L. & POL'Y J. 1, 9 (2005).

60. *See, e.g.*, Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of* Non-Refoulement*: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 89, 163 (Erika Feller et al. eds., 2003). *See also* U.N. High Comm'r for Refugees, Advisory Opinion on the Extraterritorial

"safe third country" is bound by this obligation, regardless of whether it has ratified the Refugee Convention, rendering formal ratification irrelevant. However, not all scholars agree that Article 33 has attained this status. It is therefore necessary to consider whether de jure compliance with the Convention is a prerequisite to a state's receiving refugees transferred from a state party.

Regarding the question of whether accession to the Refugee Convention is a necessary (albeit perhaps not sufficient) condition for consideration as a "safe third country," James Hathaway observes that the Refugee Convention drafters thought "*state parties to the Convention* should be free to share out the duty to protect refugees."[61] The assumption was that "whatever allocation of responsibility might occur would be as among countries all bound by international refugee law, and would lead to full protection of refugee rights in the destination country."[62] However, in practice a number of states, most notably Australia, have recently taken the view that while the third state's accession to the Refugee Convention is a relevant consideration, it is not necessary in order to conclude that the third state will deliver "effective protection" to the transferred refugee.[63]

The UNHCR has similarly taken the view that it is not a prerequisite that a third country be a party to the Refugee Convention.[64] It has expressed strong preference, however, for an approach that emphasizes the importance of this factor.[65] This was also the approach of the Lisbon Expert Roundtable, which concluded that "accession to and compliance with the 1951 Convention and/or 1967 Protocol are essential, *unless* the

Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, at 7 (Jan. 26, 2007), *available at* http://www.unhcr.org/home/RSDLEGAL/45f17a1a4.pdf [hereinafter UNHCR Advisory Opinion].

61. HATHAWAY, *supra* note 35, at 328.

62. *Id.*

63. In Australia, this is so under legislation and in the case law. *See, e.g.*, NAFG v. Minister for Immigration & Multicultural & Indigenous Affairs (MIMA) (2003) 131 F.C.R. 57 (Austl.); Kola v. MIMA (2002) 120 F.C.R. 170 (Austl.); Patto v. MIMA (2000) 106 F.C.R. 119 (Austl.); MIMA v. Al-Sallal (1999) 94 F.C.R. 549 (Austl). Under the Dublin Convention, all other states are parties. However, more recent European proposals appear to envisage that the third state may not be a party to the Convention. Rosemary Byrne and Andrew Shacknove note that "[a]ccession to the 1951 Geneva Convention and incorporation through domestic legislation are not required by many EU States for recognition of a safe country of asylum." Rosemary Byrne & Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185, 200 (1996). The authors provide numerous examples of European governments removing refugee applicants to third countries that are not parties to the Convention. *Id.* at 201 n.60.

64. Legomsky, *supra* note 12, at 658–59 (citing UNHCR views).

65. *Id.*

destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol."[66]

Notwithstanding these concessions that something less than formal ratification may be sufficient, strong arguments support the view that accession should be required in every case in order for a lawful transfer to be made. As Rosemary Byrne and Andrew Shacknove emphasize, "accession matters," as it "represents a binding commitment by a State to respect the provisions of the Convention and to implement those provisions in practice."[67] If a third state is not even obligated as a matter of international law to implement rights to which a refugee is already entitled in the sending state, then it is open to question whether the transfer will result in the protection of refugee rights.[68]

Perhaps the most compelling argument in favor of the requirement of formal accession is that accession to the Refugee Convention involves a commitment by state parties to cooperate with the UNHCR to facilitate its duty "of supervising the application of the provisions of this Convention."[69] In particular, states undertake to "provide [the UNHCR] in the appropriate form with information and statistical data requested concerning . . . the condition of refugees, the implementation of th[e] Convention, and laws, regulations and decrees which are, or may hereafter be, in force relating to refugees."[70] As Stephen Legomsky notes, the fact that a state is a party to the Refugee Convention "gives the UNHCR a degree of leverage that it might not otherwise have"; in particular, "it increases the chance that UNHCR will be able to influence that country's policies, that the country will guarantee asylum seekers access to UNHCR, and that the country will otherwise cooperate with UNHCR in

66. *Lisbon Conclusions*, *supra* note 11, ¶ 15(e) (emphasis added).

67. Byrne & Shacknove, *supra* note 63, at 200. The authors further assert that "[i]n many cases, notably in Asia, governments have, after consideration, declined to accede to the Convention, thereby formally indicating that they do not recognize international obligations for refugee protection." *Id.* Taylor also makes this point, noting that "the fact that a state has chosen *not* to make a formal commitment to act in accordance with the relevant treaty regimes must cast significant doubt on the strength of its political commitment to act in practice in a manner consonant with those regimes." Taylor, *supra* note 3, at 295.

68. Most of the Australian authority supports the view that it is not strictly necessary for the third state to be a signatory to the Convention. *See, e.g.*, *NAFG*, (2003) 131 F.C.R. 57; *Kola*, (2002) 120 F.C.R. 170; *Patto*, (2000) 106 F.C.R. 119; *Al-Sallal*, (1999) 94 F.C.R. 549. There is, however, some support for the opposite view. *See, e.g.*, Al-Sallal v. MIMA (1999) F.C.A. 369, ¶ 34 (Austl.) (unreported judgment) (noting "[i]t appears to me that to speak . . . of the need for there to be effective insurance that there would be no breach of Art. 33(1) by the third country concerned if the person concerned happened to be a refugee necessarily implied that that country would be a party to the Convention. A country could hardly be in breach of Art. 33(1) otherwise," but finding an equivalent binding obligation would suffice). *See also* Sameh v. MIMA (1999) F.C.A. 875 (Austl.) (unreported judgment).

69. Refugee Convention, *supra* note 1, art. 35(1).

70. *Id.* art. 35(2).

its supervisory role."[71] One may add to this that the requirement that a state party furnish UNHCR with the information set out above would result in more cogent assessments of de facto rights delivery to refugees in that country, thereby enabling states wishing to transfer refugees to accurately assess the extent of protection offered in third states.[72] In light of these factors, Legomsky suggests it is arguable that a state "breaches its obligation to facilitate UNHCR's supervisory duties if the state returns an asylum seeker to a state that UNHCR lacks the authority to supervise."[73]

An alternative characterization might be that sending a refugee to a state that is not a party to the Refugee Convention, where the UNHCR has no formal supervisory authority, results in a reduction in refugee protection. Although some nonparty states allow the UNHCR in practice to supervise treatment of refugees, it is arguable that this is not sufficient, as such states are not legally obligated to do so and may thus refuse to cooperate at any time.[74]

An additional but often overlooked point is that accession to the Refugee Convention includes the compulsory obligation to submit to the jurisdiction of the International Court of Justice in relation to "any dispute between parties to the Convention."[75] Although this has never been invoked by any state party, it remains the case that by acceding to the Refugee Convention, parties submit to another important form of potential supervision. By removing a refugee to a state that is not party to the Refugee Convention, a state precludes the possibility of any formal supervision

71. Legomsky, *supra* note 12, at 660.

72. Byrne and Shacknove assert that in most cases, "non-signatories are less likely to have established the administrative structures necessary for status determination and refugee protection." Byrne & Shacknove, *supra* note 63, at 200.

73. Legomsky, *supra* note 12, at 660. It is important to note, however, that Legomsky ultimately concludes that "international law does not flatly prohibit the return of refugees to third countries that are not parties to the 1951 Convention." *Id.* at 661.

74. This is borne out by UNHCR's explanation of the situation in Malaysia. As the UNHCR notes, Malaysia is not a party to the Convention and it has "no constitutional, legislative or administrative provisions dealing with the right to seek asylum or the protection of refugees." Although there is "a considerable degree of cooperation in the protection of refugees between UNHCR and the Malaysian authorities, . . . a consistent implementation of oral agreements and political decisions in form of specific laws, regulations or instructions is still lacking." U.N. High Comm'r for Refugees, *UNHCR's Views on the Concept of Effective Protection as it Relates to Malaysia* (Mar. 31, 2005), *available at* http://www.unhcr.org.au/pdfs/Malaysia.pdf.

75. Refugee Convention, *supra* note 1, art. 38. The jurisdiction is compulsory because Article 42 prohibits reservations to be made to this section. However, this has never been invoked by any state party.

vis-à-vis the delivery of refugee rights,[76] arguably reducing the scope of refugee protection.[77]

Thus, one concern in the "safe third country" context is the importance of ensuring continuing international supervision following transfer. This idea finds support in the jurisprudence of international human rights bodies. It has arisen, for instance, in the context of decisions by the Committee against Torture in considering whether a state party is in violation of its obligation not to send a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[78] In a number of decisions, the Committee has taken into account the fact that the state to which transfer is proposed is not a party to the Convention against Torture in finding that a state party will be in violation of its *non-refoulement* obligation. For example, in *Mutombo v. Switzerland*, the Committee stated, "in view of the fact that Zaire is not a party to the Convention, the author would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection."[79] Although this reasoning, while analogous, does not apply precisely to the Refugee Convention—since neither of the supervisory mechanisms described above provide individual refugees with "the legal possibility of applying" *directly* for protection—the fact remains that transfer to a nonstate party removes the refugee from any formal international supervision.

In light of this analysis, a state wishing to transfer a refugee to another state must ensure that the third state is a party to the Convention.

76. Phuong also refers to the ICJ's jurisdiction as a relevant factor. Catherine Phuong, *The Concept of "Effective Protection" in the Context of Irregular Secondary Movements and Protection in Regions of Origin*, GLOBAL MIGRATION PERSPECTIVES, Apr. 2005, at 1, 4. However, she ultimately concludes that state practice is more important than formal accession.

77. In *Ruhani*, Justice Kirby noted that "Nauru is not a party to the Refugees Convention and Protocol. This fact itself made the removal of the appellant by Australian officials to Nauru a source of potential disadvantage for him." Ruhani v. Dir. of Police (2005) 222 C.L.R. 489, ¶ 68 (Austl.).

78. United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

79. U.N. Comm. against Torture, Commc'n No. 13/1993: Mutombo v. Switzerland, ¶ 9.6, U.N. Doc. CAT/C/12/D/13/1993 (Apr. 27, 1994). *See also* U.N. Comm. against Torture, Commc'n No. 15/1994: Khan v. Canada, ¶ 12.5, U.N. Doc. CAT/C/13/D/15/1994 (Nov. 18, 1994) ("Moreover, the Committee considers that, in view of the fact that Pakistan is not a party to the Convention, the author would not only be in danger of being subjected to torture, in the event of his forced return to Pakistan, but would no longer have the possibility of applying to the Committee for protection."). Conversely, the Committee thought it significant in *Attia v. Sweden* "that Egypt, a State party to the Convention, is directly bound properly to treat prisoners within its jurisdiction, and any failure to do so would be a breach of the Convention." U.N. Comm. against Torture, Commc'n No. 199/2002, ¶ 12.3, U.N. Doc. CAT/C/31/D/199/2002 (Nov. 24, 2003).

The only exception to this is where a state is satisfied that, despite not being a party to the Convention, a third state in fact respects the full range of rights set by the Refugee Convention, including the facilitation of UNHCR supervision. The reference to "in fact" indicates that, regardless of whether a third state is a party to the Refugee Convention, the sending state is under a further obligation to assess whether the third state respects relevant Refugee Convention rights *in practice*. As the Full Federal Court of Australia has noted:

> It is a sad reality of modern times that countries do not always honour human rights, whether enshrined in domestic constitutions or in international treaties to which they are parties. To treat the fact of a country being a party to the Convention as conclusive would be a distortion of the Convention's language and subversive of its underlying purpose.[80]

The approach taken by supervisory bodies in relation to other international human rights treaties also supports this conclusion. For example, in *Alan v. Switzerland*,[81] the Committee against Torture considered Switzerland's argument that it would not be in violation of its *non-refoulement* obligation in returning the applicant to Turkey, since "Turkey is a party to the Convention against Torture and has recognized the Committee's competence . . . to receive and examine individual communications."[82] In rejecting this argument, the Committee explained that it

> regretfully notes, however, that practice of torture is still systematic in Turkey, as attested to in the Committee's findings in its inquiry under article 20 of the Convention. The Committee observes that the main aim and purpose of the Convention is to prevent torture, not to redress torture once it has occurred, and finds that the fact that Turkey is a party to the Convention and has recognized the Committee's competence under article 22, does not, *in the circumstances of the instant case,* constitute a sufficient guarantee for the author's security.[83]

This implies not only that de jure compliance is insufficient but that an individual assessment must be undertaken in each case in order to assess whether the third country is safe for a particular refugee.

80. MIMA v. Al-Sallal, (1999) 94 F.C.R. 549, ¶ 47 (Austl). It should be noted that the court then went on to state that "[t]he converse must logically follow. As a matter of fact, parties may have better effective protection in some countries which are not parties to the Convention . . . than in many which are." *Id.*

81. U.N. Comm. against Torture, Commc'n No. 21/1995, U.N. Doc. CAT/C/16/D/21/1995 (May 8, 1996).

82. *Id.* ¶ 11.5.

83. *Id.* (emphasis added).

IV. RESPECT FOR REFUGEE RIGHTS: NON-REFOULEMENT

We now turn to a consideration of the substantive rights which must be respected in the third state under the Refugee Convention, thereby constraining a state's ability to transfer refugees pursuant to a protection elsewhere policy.

A. *Article 33 of the Refugee Convention*

Article 33's principle of *non-refoulement* requires that, before a state may transfer or remove a refugee to another state, it must ensure that the refugee does not have a well-founded fear of being persecuted for a Convention reason in that third state. This is the least controversial constraint on state choice in this context, since no state has contended that it is not bound to respect Article 33 in effecting a transfer to a third country.[84]

The more complex issue in this context relates to the notion of indirect *refoulement*, that is, the possibility that a third state, while itself safe for a refugee due to a lack of risk of persecution, may in fact return the refugee to her country of origin, in which a well-founded fear of persecution exists. The notion that Article 33 extends to both direct and indirect *refoulement* is not controversial.[85] The prohibition in Article 33 on *refoulement* "in any manner whatsoever" supports the view that states are prohibited from removing a refugee directly to a state of persecution, as well as indirectly to a state that is in turn likely to return the refugee to the state of persecution.[86] As the House of Lords has noted,

84. As Legomsky notes, "[t]his interpretation of Article 33 has not been contested, and UNHCR has specifically embraced it." Legomsky, *supra* note 12, at 633 (citing UNHCR ExCom Conclusion No. 15, CONCLUSIONS, *supra* note 48, at 139 (No. 15 (XL)—1989). See also U.N. High Comm'r for Refugees, Subcomm. of the Whole on Int'l Prot. of the Executive Comm., *Background Note on the Safe Third Country Concept and Refugee Status*, ¶ 13, 42d Sess., U.N. Doc. EC/SCP/68 (July 26, 1991).

85. As Legomsky notes, UNHCR has "repeatedly stressed" that this is so, and "the European Commission, the Council of Europe, and the U.K. House of Lords have all endorsed that proposition, as have commentators." Legomsky, *supra* note 12, at 618. See also SYMES & JORRO, *supra* note 8, at 303–04, for relevant authorities. Even in Australia, which has taken one of the most extreme positions on effective protection, judges have accepted that Article 33 prohibits indirect *refoulement* as well as direct *refoulement*. *See, e.g.*, Thiagarajah Gnanapiragasam v. MIMA (1998) 88 F.C.R. 1 (Austl.) (Weinberg, J.).

86. It should be noted that the drafting history also supports this view. Hathaway explains that in response to a Swedish proposal that indirect *refoulement* be explicitly prohibited, some participants noted that it "was not necessary, since, 'if such expulsion presented a threat of subsequent forcible return to the country of origin, the life and liberty of the refugee in question were endangered' by the removal to the intermediate state." HATHAWAY, *supra* note 35, at 323 (quoting statement by Mr. Larsen of Denmark at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons). As Hathaway explains, "[t]he relevant issue was said to be the *forseeability* of the ultimate consequences of the initial expulsion." *Id.*

> [f]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.[87]

It is more complicated, however, to identify precisely what protecting against indirect *refoulement* requires in practice. In particular, the extent and scope of the inquiry required to be undertaken by the sending state to ensure that a refugee is not at risk of indirect *refoulement* in a third state has proven controversial.

One key issue arises when a third state adopts a different approach to interpreting the refugee definition from that of the sending state. This is particularly important where the third state's interpretation of its Convention obligations is more restrictive. This could result from different interpretations of the substantive elements of the Refugee Convention (for instance, by interpreting the refugee definition more narrowly or by applying the exclusionary provisions more widely),[88] as well as from

87. R (*ex parte* Adan) v. Sec'y of State for the Home Dep't, (2001) 2 W.L.R. 143, 165 (Lord Hobhouse) (Eng.). In an earlier decision, the House of Lords emphasized that, "[t]he one course would effect indirectly, the other directly, the prohibited result, i.e., his return 'to the frontiers of territories where his life or freedom would be threatened.'" R (*ex parte* Bugdaycay) v. Sec'y of State for the Home Dep't, (1987) 2 W.L.R. 606, 620 (Lord Bridge of Harwich) (Eng.), *cited in* HATHAWAY, *supra* note 35, at 323. *See also* Suresh v. Canada, [2002] 1 S.C.R. 3, 35–36 (Can.) ("At least where Canada's participation is a necessary precondition for the deprivation, and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid [responsibility] because the deprivation in question would be effected by someone else's hand . . . . [W]e cannot pretend that Canada is a merely passive participant.").

88. The most obvious example of this phenomenon is the situation pertaining in *Adan*, whereby Germany and France took a more restrictive approach to the scope of Convention protection than the United Kingdom in that they would not recognize refugee claims where the harm feared was by nonstate actors. By contrast, the United Kingdom approach would accept such claims. Lord Hobhouse of Woodborough noted the dramatic difference in outcome produced by this situation: "The evidence in the present case discloses that only 5% of would-be refugees from Algeria are granted asylum if they make their application in France, whereas 80% of such applicants are successful if applying in the United Kingdom." *Adan*, (2001) 2 W.L.R. at 166. Similar concerns have been voiced regarding the recent U.S.-Canada Safe Third Country Agreement, *supra* note 17. For example, a number of scholars have raised concerns that substantive differences in interpretation will result in gender-based claims, which would have been recognized in Canada being rejected in the United States. *See, e.g.*, Sonia Akibo-Betts, *The Canada-US Safe Third Country Agreement: Why the US is Not a Safe Haven for Refugee Women Asserting Gender-Based Claims*, 19 WINDSOR REV. LEGAL & SOC. ISSUES 105 (2005); Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 405–07 (2005). Other differences include a stricter approach in the US to the nexus clause and membership of a particular social group. *See, e.g.*, Lawyers Comm. for Human Rights, *Comments of the Lawyers Committee for Human Rights On the Proposed Safe Third Country Agreement*, July 24, 2002, *available at* http://www.humanrightsfirst.org/refugees/comment_safe_thirdfinal.pdf.

different approaches to evidentiary or procedural matters (for instance, by applying a higher standard of proof in order to find the definition satisfied).[89] In a situation where a third country is likely to take a more restrictive approach to interpretation or procedure, the sending state risks committing indirect *refoulement* by removing a person to that third state.

This issue is complicated by the fact that, unlike with other international human rights treaties, no international adjudicatory body has the authority to formulate authoritative and binding determinations regarding the correct interpretation of the Refugee Convention.[90] As Judge Ress of the European Court of Human Rights (ECHR) noted in the *Bosphorous* case, an indication that another entity or state does not provide "comparable" or "equivalent" protection to that required by the European Convention on Human Rights (European Convention) would be if that entity "were to depart from the interpretation or application of the Convention or the protocols that had already been the subject of well-established ECHR case-law."[91] By contrast, in the case of the Refugee Convention, state parties may adopt a range of interpretations, and the question is whether a departure from the approach of the sending state is sufficient to constitute a finding that the receiving third state is likely to engage in the *refoulement* of refugees.

The correct resolution of this dilemma rests in the sending state's obligation to interpret a treaty "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."[92] The rules of treaty interpretation under international law thus require state parties to derive "an independent meaning . . . without taking colour from the distinctive features of the legal system of any individual contracting state."[93] The lack of a conclusive determination about the Refugee Convention's correct meaning by an international body does not diminish this obligation. Rather, as the House of Lords held in *Adan*, this simply means that:

> In practice it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammeled by notions of its national

89. Legomsky, *supra* note 12, at 635–36.

90. Despite UNHCR's supervisory role pursuant to Article 35 of the Refugee Convention, it is not specifically vested with authority to make such determinations, and although the ICJ could potentially exercise this function, no state has ever invoked Article 38.

91. Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98, 42 Eur. H.R. Rep. 1, para. 3 (2006).

92. Vienna Convention, *supra* note 24, art. 31.

93. R (*ex parte* Adan) v. Sec'y of State for the Home Dep't, (2001) 2 W.L.R. 143, 154 (Lord Steyn) (Eng.).

> legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.[94]

In reaching a conclusion as to the "true autonomous" meaning of the Refugee Convention, domestic courts may consider the jurisprudence of other state parties as well as the views of the UNHCR, represented in the handbook, various guidelines, and ExCom conclusions.[95] However, this does not obviate the requirement that each state must decide on the true and correct interpretation of the Refugee Convention. As the House of Lords has explained, states "cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Convention."[96]

Accordingly, once a state party has formulated its view as to the correct meaning of the Refugee Convention under international law, it must ensure that the state to which it proposes to transfer a refugee does not depart from this interpretation and application of the Convention, such that the third state is likely to reject the claim for refugee status and return a refugee to a state in which she will be persecuted.[97] This would apply both to the substantive definition of "refugee" and to procedural matters.[98] As the UNHCR has emphasized in a recent assessment of the Dublin II Regulation, "the credibility of any mechanism for transfer of responsibility [is] contingent upon the existence of harmonised standards in substantive and procedural areas of asylum."[99]

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94. *Id.*

95. This is especially so given the UNHCR's supervisory responsibility. As Lord Steyn notes in *Adan*, "[u]nder articles 35 and 36 of the Geneva Convention, and under article II of the Protocol of 1967, the UNHCR plays a critical role in the application of the Refugee Convention . . . . It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals." *Id.* at 157.

96. *Id.* at 147 (Lord Slynn of Hadley).

97. As Lord Hobhouse of Woodborough noted in *Adan*, this is because, "[i]n Convention terms, it is a question of the [sending state] performing *its* obligation under article 33." *Id.* at 168 (emphasis in original).

98. This issue does not appear to have been considered closely by the Australian courts in the context of the effective protection principle developed by the courts. However, in *Al-Sallal*, Justice Katz of the Federal Court made it clear that this is the correct approach. After noting that other jurisdictions, including Canada and the United States, appeared to adopt a stricter approach to determining well-founded fear (in terms of the standard of proof required), his Honour noted that "neither Canada nor the United States can be a 'safe third country' for present purposes so far as Australia is concerned. That is because a claimant for refugee status in Australia sent to either of those countries would, if a refugee, be at risk of being refouled by that country, in breach of Art. 33(1) (on its proper construction), to a territory as to which the claimant had a well-founded fear of persecution for a Convention reason." Al-Sallal v. MIMA (1999) F.C.A. 369, ¶ 16 (Austl.) (unreported judgment).

99. UNHCR DUBLIN II, *supra* note 7, 11–12 (citing U.N. High Comm'r for Refugees, *Revisiting the Dublin Convention—Some Reflections by UNHCR in Response to the*

An alternative view, described as "a qualified version" of the above approach, posits that one would "assume that some provisions lend themselves to a single international meaning while others have multiple permissible meanings."[100] Under this approach, a country intending to transfer refugees to a third state "should apply its own more favorable interpretation whenever it regards the particular provision as susceptible to only one true international meaning."[101] By contrast, "if the destination country views both its own interpretation and that of the third country as permissible, then its decision as to which one to follow should be governed by [its] own choice of law rules and any applicable agreements with the third country."[102]

The difficulty with this approach is that it is not clear on what basis a state would decide which Refugee Convention terms properly have only one international meaning and which are open to various interpretations. This is particularly so given that the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties apply to all provisions of all treaties, thus making it difficult to take a differentiated approach to interpretation in accordance with international law. Moreover, it raises the risk that a sending state will simply declare that all relevant provisions are open to multiple interpretations in order to comply with the terms of a cooperation agreement which permit it to return or send refugees to third countries.

The better view, consistent with international law, is that the sending state will not violate Article 33 where the difference in interpretation of the receiving state is at the level of "legal niceties and refinements."[103] As Lord Hobhouse noted in *Adan*:

> It is not to be assumed that a country which has agreed to and adopted the Convention will then act otherwise than in accordance with its obligations under the Convention. It is certainly not to be assumed that this will occur from the existence of differences of emphasis or from differences which can only be discovered by a meticulous comparative examination.[104]

However, where the differences in interpretation are likely to produce different outcomes for refugee applicants, such that a person who would

Commission Staff Working Paper (Jan. 2001), *available at* http://www.unhcr.org/home/RSDLEGAL/ 3ae6b34c0.pdf).

100. Legomsky, *supra* note 12, at 638.

101. *Id.*

102. *Id.* at 638–39.

103. R (*ex parte* Yogatharas) v. Sec'y of State for the Home Dep't, [2002] UKHL 35, ¶ 9, 4 Eng. Rep. 800 (U.K.).

104. R (*ex parte* Adan) v. Sec'y of State for the Home Dep't, (2001) 2 W.L.R. 143, 169 (Eng.).

be considered a refugee in the sending state is unlikely to be considered a refugee in the third state, the sending state is prohibited from returning or transferring a refugee to that third state.[105]

Inherent in this requirement (that in order to transfer a refugee to a third state there must not be any real risk that the third state will engage in *refoulement* of refugees) is the need for the third state to have in place an adjudication procedure properly to assess the claim of those refugees transferred to its territory by the sending state. While the Refugee Convention does not explicitly contain any provisions relating to national status determination procedures, "the principle of good faith in fulfilling treaty obligations requires . . . that States Parties to the Convention institute a procedure which allows for a determination of who is entitled to the guarantees of that treaty."[106] Thus, where the third state does not have in place an adequate status determination system, there is a risk that returning or transferring a refugee to that state would involve indirect *refoulement* contrary to Article 33.[107]

Moreover, it is insufficient for the third state to have in place an adequate determination system if it does not guarantee that a transferred refugee will in fact have access to that system. The UNHCR noted in its recent examination of the Dublin II Regulation that even under that scheme, "the substance of an asylum seeker's claim is not in all cases

105. The Michigan Guidelines conclude that "the sending state must in particular satisfy itself that the receiving state interprets refugee status in a manner that respects the true and autonomous meaning of the refugee definition set by Art. 1 of the Convention." *Michigan Guidelines*, *supra* note 15, ¶ 4.

106. Walter Kalin, *Temporary Protection in the EC: Refugee law, Human Rights, and the Temptations of Pragmatism*, 44 GERMAN Y.B. INT'L L. 202, 221 (Jost Delbruck & Andreas Zimmermann eds., 2001). In *Haitian Centre for Human Rights v. United States*, the Inter-American Commission on Human Rights noted that, "[t]he Commission believes that international law has developed to a level at which there is recognition of a right of a person seeking refuge to a hearing in order to determine whether that person meets the criteria in the Convention." Case No. 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 155 (1997). The UNHCR has consistently insisted that the third country must provide a fair refugee status determination. Legomsky, *supra* note 12, at 654 n.319. *See also* UNHCR Advisory Opinion, *supra* note 60, at 3 ("As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.").

107. For examples of problematic state practices, *see* HATHAWAY, *supra* note 35, at 630–32. This has also been an issue of concern in relation to the U.S.-Canada Safe Third Country Agreement. *See* Macklin, *supra* note 88, at 402–05 (noting that factors such as an expedited removal procedure, a procedural one-year time limit for filing claims, and lack of legal aid for refugee applicants in the United States mean that there is a risk of indirect *refoulement* when refugees are transferred from Canada to the United States). For in-depth discussion of this requirement, see Legomsky, *supra* note 12, at 654–58. This issue was also raised in the context of Australia's "Pacific Solution." Susan Kneebone notes that the procedure on Nauru for processing claims affords "no rights to legal representation, and lawyers have been repeatedly denied access to potential clients." Kneebone, *supra* note 3, at 715.

examined in the responsible State" (the state to which a refugee is transferred),[108] thus clearly giving rise to the possibility of indirect *refoulement*. For example, the UNHCR, NGOs, and scholars have highlighted the problems in returning refugees to Greece under the Dublin system, since many refugees are denied access to an asylum determination procedure when sent there.[109] On this basis, successful challenges to determinations that Greece constitutes a safe third country under the Dublin scheme have been made in Austria, Finland, France, Italy, the Netherlands, Norway, and Sweden.[110] Concerns have also been raised with respect to other states where applicants "may find it difficult or impossible to have their cases re-opened if a decision was made in their absence."[111] In addition, the UNHCR has emphasized the importance of ensuring that an appeal or review is available in the third state against a negative decision in order "to avoid possible serious consequences of incorrect first instance decisions, and to ensure compliance with the principle of *non-refoulement*."[112]

For this reason, in order to avoid the risk of indirect *refoulement*, a state contemplating a protection elsewhere transfer must ensure that any refugee to be transferred to a third state will have the right to enter that state and to apply for protection under the Convention.[113] In particular, every transfer of protection responsibility must be predicated on a commitment by the receiving state to afford the person transferred a meaningful legal and factual opportunity to make his or her claim to protection.[114] The only exception to this is where the third state will in fact respect all Convention rights without the need for recognition of refugee status.

B. *Territorial Scope of Article 33*

The analysis thus far has assumed that the state will act—that is, the relevant transfer or return will be made—*after* a refugee has reached the territory of a state that does not itself wish to provide protection. State practice, however, reveals that an equally important question is whether this analysis changes in a situation where a state wishes to transfer or

108. UNHCR DUBLIN II, *supra* note 7, at 46.

109. *Id. See also* ECRE DUBLIN II, *supra* note 4, at 150–51.

110. UNHCR DUBLIN II, *supra* note 7, at 47; ECRE DUBLIN II, *supra* note 4, at 151.

111. ECRE DUBLIN II, *supra* note 4, at 151 (referring to Belgium, France, Ireland, Italy, the Netherlands, Slovenia, and Spain).

112. *Id.* at 50.

113. *Id.* at 188. In Australia, it has been held that it is not necessary that a person have a right of entry. ECRE has highlighted the dangers in allowing transfers where the receiving state guarantees only that the person will have a right of entry in the receiving state but will not have access to a refugee determination system there.

114. *Michigan Guidelines*, *supra* note 15, ¶ 4.

return a person to a third country *before* the refugee reaches the territory of that state. This usually occurs as a result of a deliberate state policy to circumvent refugee arrivals by taking action outside its territory, for example, by interdicting refugees in international waters or by exercising control over refugees in the territory of another state. The territorial scope of Article 33 is therefore an issue that has become significant and controversial in international law in recent years.

Reference to the text of the Refugee Convention alone clearly suggests that Article 33 applies to state conduct wherever it may be carried out. Unlike most of the other Convention rights discussed below, and unlike some international human rights treaties,[115] Article 33 is not conditioned on a refugee being within the territory of state parties.[116] Rather, Article 33(1) simply provides that "[n]o 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." The "ordinary meaning" of Article 33[117] therefore does not include any territorial restriction; it "limits only where a refugee may be sent 'to,' not where he may be sent from."[118] Further, the terms of the article, including the proscription on *refoulement* carried out "in any manner whatsoever," suggest a wide scope of application. As Justice Blackmun of the U.S. Supreme Court noted in his dissenting opinion in *Sale v. Haitian Centers Council*, "[t]he terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward: that should be the end of the inquiry."[119]

Notwithstanding this admonition, textual arguments have been advanced against the position that Article 33 applies to extraterritorial state conduct. The most notorious of these is embodied in the reasoning of the U.S. Supreme Court majority in *Sale*,[120] which concluded that the word

115. For example, the International Covenant on Civil and Political Rights applies to acts carried out within a state's territory and subject to its jurisdiction. International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

116. *Compare* Refugee Convention, *supra* note 1, arts. 4, 15, 26.

117. Article 31 of the Vienna Convention on the Law of Treaties requires that interpretation begin with the "ordinary meaning, in light of the context, object and purpose." *See* Vienna Convention, *supra* note 24, art. 31.

118. Sale v. Haitian Centers Council, 509 U.S. 155, 190 (1993) (Blackmun J., dissenting).

119. *Id.*

120. It should be noted that while the U.K. Court of Appeal considered *Sale* "wrongly decided" and noted that it "certainly offends one's sense of fairness," in *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2003] 4 Eng. Rep. 247, ¶ 34 (Eng.), the House of Lords endorsed the majority position in *Sale*. R (*ex parte* European Roma Rights Ctr.) v. Immigration Officer at Prague Airport, [2004] UKHL 55, ¶¶ 15–17, 43, 48, 65–72 (U.K.).

"return" has a distinctive legal meaning that is narrower than its common or "ordinary" meaning.[121] This analysis is difficult to defend, given that treaty terms are required to be interpreted according to their ordinary meaning.[122] As noted by Justice Blackmun, the "ordinary meaning" of return is "to bring, send, or put (a person or thing) back to or in a former position."[123] In addition, as the majority itself noted, the French *refouler* (explicitly included in Article 33) means "repulse," "repel," "drive back," and even "expel."[124] None of these understandings of the concepts of return and *refouler* suggest that the action need take place in any particular territorial space.[125]

The second textual argument the majority put forward in *Sale* seeks to limit the scope of Article 33(1) by reading it in the context of Article 33(2).[126] Article 33(2) limits the application of Article 33(1) by exempting from its protection 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."[127] The majority in *Sale* regarded this exemption as necessarily implying a territorial limitation on Article 33(1) on the basis that, if Article 33(1) were read to apply extraterritorially, "no nation could invoke the second paragraph's exception with respect to an alien [outside its territory]: An alien intercepted on the high seas is in no country at all."[128] This argument has also been invoked in support of the view that Article 33 does not apply to decisions on refugee status made in embassies located in third countries.[129] The difficulty with this argument is that it relies on a

121. *Sale*, 509 U.S. at 181 (majority opinion).

122. *See* Vienna Convention, *supra* note 24, art. 31. In addition, the majority's reasoning as to why there is a narrower "legal meaning" in the case of Article 33 is not at all clear.

123. *Sale*, 509 U.S. at 191 (Blackmun, J. dissenting) (citing PHILIP BABOCK GOVE, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1841 (1986)). *See also* HATHAWAY, *supra* note 35, at 337 n.267 (citing the definition from the CONCISE OXFORD DICTIONARY 15.8(a) (9th ed. 1995): "to come or go back . . . [to] bring, put, or send back to the . . . place . . . where originally belonging").

124. Sale v. Haitian Centers Council, 509 U.S. 155, 182 (1993) (majority opinion).

125. This is also the view of the UNHCR in its recent opinion on this question. UNHCR Advisory Opinion, *supra* note 60, at 12–13.

126. Article 31 of the Vienna Convention requires the ordinary meaning to be read "in context," which can arguably include the other provisions of the treaty, especially in the same article. Vienna Convention, *supra* note 24, art. 31.

127. Refugee Convention, *supra* note 1, art. 33(2).

128. *Sale*, 509 U.S. at 180.

129. *See* Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?*, INT'L J. REFUGEE L. 542, 554 (2005).

> An extensive reading of article 33(1) CSR51 would force us to assess the security dimension with regard to a third country (that is, the country in which the embassy is placed) when considering whether a refugee can be denied the benefit of article

narrow exception to a fundamental rule as itself limiting the rule,[130] a form of inverted reasoning inconsistent with the overriding protective and humanitarian purpose of the Refugee Convention and its most important protection embodied in Article 33.[131] Further, the argument ignores the fact that the logical reason for confining the application of Article 33(2) to refugees within territory is that there can be no risk posed by the presence of a refugee such as to justify *refoulement* unless and until the person is within the territory of the state in question.[132]

In addition to these textual arguments, the majority in *Sale* also placed significant weight on the negotiating history of the Refugee Convention, specifically on the views of the Swiss delegate, who assumed that Article 33 would not apply extraterritorially.[133] However, it is questionable whether such "isolated statement[s] of a delegate to the Convention"[134] are persuasive in this regard, particularly in light of the specific decision of the delegates to amend Article 33 "in order to stipulate that the duty of *non-refoulement* prohibits return to the risk of being

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> 33(1) CSR 51. It may very well be that a person threatens the security of that third country, or its community, while not threatening the security of the destination country from whose embassy she seeks protection.

Id.

130. As Justice Blackmun observed in *Sale*, "[n]onreturn is the rule; the sole exception (neither applicable nor invoked here) is that a nation endangered by a refugee's very presence may 'expel or return' him to an unsafe country if it chooses." Sale v. Haitian Centers Council, 509 U.S. 155, 194 (1993) (Blackmun J., dissenting).

131. As the UNHCR submitted in its *amicus curiae* brief in *Sale*, in relation to the U.S. government's arguments:

> [This interpretation] extinguishes the most basic right enshrined in the treaty—the right of non-return—for an entire class of refugees, those who have fled their own countries but have not yet entered the territory of another State. Under [that] reading, the availability of the most fundamental protection afforded refugees turns not on the refugee's need for protection but on his or her own ability to enter clandestinely the territory of another country.

Brief for UNHCR as Amicus Curiae Supporting Respondent, McNary v. Haitian Centers Council, Inc., 506 U.S. 814 (1992), *reprinted in* 6 INT'L J. REFUGEE L. 85, 92 (1994) [hereinafter UNHCR Amicus Brief].

132. HATHAWAY, *supra* note 35, at 336.

133. *Sale*, 509 U.S. at 183–86 (majority opinion).

134. *Id.* at 194 (Blackmun, J., dissenting). In addition, the UNHCR takes the view that the statements by the drafters relied upon by the majority in *Sale*

> were expressions of concern related to a possible obligation to grant asylum to large numbers of arrivals in mass influx situations. In UNHCR's view, these portions of the negotiating history do not warrant the conclusion that the drafters of the 1951 Convention reached consensus about an implicit restriction of the territorial scope of the principle of non-refoulement as provided for in Article 33(1).

UNHCR Advisory Opinion, *supra* note 60, at 13 n.57. On the contrary, the UNHCR points to portions of the drafting history which support the opposite conclusion. *Id.* at 13–15.

persecuted 'in any manner whatsoever,' said to 'refer to various methods by which refugees could be expelled, refused admittance or removed.'"[135]

A more fundamental objection to the Supreme Court's reliance on the drafting history might be that reference to this "supplementary means of interpretation" is only permitted "in order to confirm the meaning resulting from the application of article 31," or when the interpretation according to Article 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."[136] Such supplementary means are not, however, permitted to create an ambiguity.[137] Arguably, the Supreme Court did not first apply the primary rule of interpretation: to interpret the terms in accordance with their ordinary meaning, in their context, and in the light of the treaty's object and purpose. The majority acknowledged that the interpretation it adopted in that case, which permitted interdiction on the high seas, "may even violate the spirit of Article 33,"[138] but it did not further explore the ramifications of that decision in terms of treaty interpretation. By contrast, reference to the humanitarian and human rights purposes of the Refugee Convention could only confirm the conclusion that the ordinary meaning of "return," together with the lack of territorial restriction in Article 33, suggests that the prohibition on *non-refoulement* applies wherever a state acts vis-à-vis refugees.[139]

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135. HATHAWAY, *supra* note 35, at 338.

136. Vienna Convention, *supra* note 24, art. 32.

137. Legomsky highlights the ambiguity created by reference to the drafters' comments in his analysis of the *Sale* decision, noting that "there are at least three possible interpretations of these two delegates' comments." Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT'L J. REFUGEE L. 677, 690–91 (2006). Legomsky notes that the Swiss delegate's comment was one of the two drafters' comments on which the Court relied in *Sale*. However, as he points out, since Switzerland is a landlocked country, the notion that it was concerned to ensure that the Refugee Convention not interfere with the Swiss navy's authority to interdict on the high seas "stretches the Court's fertile imagination too far." *Id.* at 691.

138. Sale v. Haitian Centers Council, 509 U.S. 155, 183 (1993).

139. The leading courts in common law jurisdictions have emphasized the human rights object and purpose of the Refugee Convention, noting that it is understood to have been "written against the background of international human rights law" (Applicant A v. Minister for Immigration & Ethnic Affairs (1996) 190 C.L.R. 225, 296–67 (Austl.); Wang v. MIMA (2000) 105 F.C.R. 548, ¶¶ 74–81 (Austl.); MIMA v. Mohammed (2000) 98 F.C.R. 405, 421 (Austl.)); that the preamble expressly shows "that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms" (Shah v. Sec'y of State for the Home Dep't, (1999) 2 A.C. 629, 639 (Lord Steyn) (U.K.)); and that the Preamble "places the Convention among the international instruments that have as their object and purpose the protection of the equal enjoyment by every person of fundamental rights and freedoms" (*Applicant A*, (1996) 190 C.L.R. at 231–32). In light of the preamble, it has been said that "[n]owhere are considerations of international instruments of human rights more important than in the area of refugees." Premalal v. Minister for Immigration, Local Gov't & Ethnic Affairs (1993) 41 F.C.R. 117, 138 (Austl.). Accordingly, common law courts have repeatedly recognized and reiterated that "[t]his overarching and clear human rights object and purpose is the background

In light of this analysis, the better view is that Article 33 applies to conduct that satisfies the definition of *refoulement*, regardless of where it takes place.[140] In other words, unlike other Refugee Convention rights, which restrict state action only where a specific degree of physical connection with the refugee has been achieved, Article 33 applies whenever a state acts, regardless of the territorial basis for that exercise.

In addition to these arguments as to the specific terms and context of the Refugee Convention, scholars sometimes rely on more general developments in international law in support of the view that the Refugee Convention operates extraterritorially.[141] Contemporary international human rights law has established that a state's responsibility under human rights treaties, while still primarily territorial, may extend to an exercise of extraterritorial jurisdiction. Relevant treaty bodies and, more recently, the International Court of Justice, have confirmed that "international human rights instruments are applicable 'in respect of acts done by a

against which interpretation of individual provisions must take place." Pushpanathan v. Canada (Minister of Citizenship & Immigration), [1998] 1 S.C.R. 982, 1024 (Can.). Lord Hope of Craighead noted in In re *B, R (*ex parte *Hoxha) v. Special Adjudicator* that "[t]he social and humanitarian nature of the problem of refugees was expressly recognised in the preamble to the convention." [2005] UKHL 19, ¶ 6, 4 Eng. Rep. 580 (U.K.). Moreover, the UNHCR Executive Committee has confirmed the "social and humanitarian nature" of the Refugee Convention. For example, in its *Agenda for Protection*, it reaffirmed state parties' commitment to implementing the Refugee Convention obligations "fully and effectively in accordance with the [humanitarian] object and purpose" of the Refugee Convention. U.N. HIGH COMM'R FOR REFUGEES, EXCOM, AGENDA FOR PROTECTION ¶¶ 1–3, (Oct. 2003), *available at* http://www.unhcr.bg/pubs/agenda_protection/en/agenda_for_protection_en.pdf. In terms of the specific issue of *non-refoulement*, the ExCom has noted that "[g]iven the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law." U.N. High Comm'r for Refugees, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, ¶ 23, U.N. Doc. EC/50/SC/CRP.17 (June 9, 2000).

140. It is noteworthy that the UNHCR also endorses this view. UNHCR Amicus Brief, *supra* note 131. In its 2000 ExCom note, the UNHCR stated, "[t]he principle of non-*refoulement* does not imply any geographical limitation. In UNHCR's understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory." U.N. High Comm'r for Refugees, ExCom, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, ¶ 23, U.N. Doc. EC/50/SC/CRP.17 (June 19, 2000). *See also* Haitian Centre for Human Rights v. United States, Case No. 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 157 (1997). The Inter-American Commission on Human Rights' jurisdiction to consider this issue is indirect in that it has jurisdiction to interpret Article XXVII of the American Declaration, which in turn requires that any right to seek asylum must be "in accordance with international agreements," thus requiring consideration of the scope of the Refugee Convention.

141. Note that a treaty is not to be read in a vacuum, but rather must be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties." Vienna Convention, *supra* note 24, art. 31(3)(c).

State in the exercise of its jurisdiction outside its own territory.' "[142] However, while this interpretation has expanded the potential liability of states to encompass acts that occur outside their territory, the requirement that the acts be within state jurisdiction has proven to be a hurdle to establishing state responsibility in some contexts, as jurisdiction requires something more than mere action.[143] Reference to these developments may therefore suggest a similarly restrictive approach to establishing state responsibility in the context of Article 33.[144] The question is whether it is necessary to establish that a state has acted outside territory but within its jurisdiction in order to establish state responsibility under Article 33 of the Refugee Convention.

Reference to the relevant jurisprudence of international human rights courts and tribunals makes clear that the reason jurisdiction must be established in this context is that the relevant treaties explicitly apply only to an exercise of state jurisdiction.[145] Since a state is responsible for acts

142. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19) (summarizing the ICJ's decision in the *Construction of a Wall* case); *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 179 (July 9). This recent affirmation of *Construction of a Wall* is important because some have raised doubts about how far the ICJ actually went in that case. *See, e.g.*, Michael J. Dennis, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 123 (2005) ("Arguably the best reading of the Court's opinion is that is was based only on the view that the West Bank and Gaza were part of the "territory" of Israel for purposes of the application of the Covenant.").

143. As Ralph Wilde notes:

> [The relevant adjudicatory bodies] do not conceive state responsibility simply in terms of the acts of parties, as is the case, for example, in Article 1 of the third Geneva Convention. . . in which contracting parties undertake "to respect and to ensure respect for the present Convention in all circumstances." Instead, responsibility is conceived in a particular context: the State's jurisdiction.

Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739, 795 (2005). *See, e.g.*, Bankovic et al. v. Belgium (2001) 11 B.H.R.C. 435; R (Al-Skeini) v. Sec'y of State for Defence [2005] EWCA (Civ) 1609.

144. Indeed, a number of scholars automatically assume that it is necessary to establish "jurisdiction" in the refugee context. *See, e.g.*, Lauterpacht & Bethlehem, *supra* note 60, at 110. Gregor Noll, however, objects to reliance on these parallel developments as supporting an expansive view of Article 33 on the basis that "human rights treaty law shows significant variations in the precise formulations delimiting the applicability of single instruments," and thus it is "not correct to state that human rights treaty law is applicable *ratione loci* wherever the jurisdiction of a state extends." Noll, *supra* note 129, at 552.

145. Indeed, the cases concerning the application of the European Convention on Human Rights make it clear that that is the reason for referring to this issue. *See, e.g.*, *Al-Skeini*, [2005] EWCA (Civ) 1609, [3]. *See also Construction of a Wall*, in which the ICJ explained:

> The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

that constitute violations of the international obligations of the state,[146] it is necessary to ascertain the scope of any legal obligation in order to assess

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

2004 I.C.J. 136, 178–79.

Further, disagreement amongst commentators as to the legitimacy of the extension of these treaties to extraterritorial acts focuses on the question whether the language of "jurisdiction" found within the treaties allows such an extension. These issues have proved most controversial in the context of the ICCPR, given that it specifically applies to acts carried out within a state's territory *and* subject to its jurisdiction. The Human Rights Committee has essentially read this to apply to acts occurring *either* within territory *or* where a person is within the "power or effective control" of the state party, even if not within territory. *See* U.N. Human Rights Comm. (HRC), *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (ICCPR)*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter *General Comment 31*]. Michael Dennis is particularly critical of the HRC's approach (endorsed by the ICJ in *Construction of a Wall*) on the basis, *inter alia*, that it has "abandoned the literal reading altogether." Dennis, *supra* note 142, at 122. S*ee also* Noll, *supra* note 129, at 563–64. However, as Manfred Nowak points out, "[a]n excessively literal reading" of Article 2(1) would "lead to often absurd results." MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 43 (2d rev. ed. 2005). A similar observation was made by HRC Member Mr. Tomusschat in a concurring opinion in U.N. Human Rights Comm., Commc'n No. R12/52: Burgos v. Uruguay, No. 52/79, U.N. Doc. Supp. No. 40 (A/36/40), at 176 (1981), *cited in* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 90 (Sarah Joseph et al. eds., 2d ed. 2000). For example, Dennis's view that the ICCPR only applies to individuals "both *within* its territory *and* subject to its sovereign authority" (Dennis, *supra* note 142, at 122) would render Article 12(4) nugatory, because nationals prevented from entering their country of nationality would be unable to rely on it since they would not be in the territory of a state party. NOWAK, *supra*, at 43. Thus, Nowak emphasizes that "[a]n interpretation that seeks to take into account the purpose of this awkwardly formulated provision must aim at the *responsibility of States under international law*." *Id.* at 41–42 (emphasis in original). He notes that the HRC has accordingly "sought to correct the wording of this provision by developing case law oriented along the object and purpose of the Covenant and affording increased legal protection." *Id.* at 44. Thus, for example, he notes that when state parties "take *actions on foreign territory* that violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible." *Id.* at 42. It should be noted that Dennis's argument in relation to the International Covenant on Economic, Social, and Cultural Rights is even weaker, because in the absence of any limiting provision in the treaty itself, his only argument is that "[t]he negotiating record does not even suggest that states intended that the substantive obligations in the ICESCR would apply extraterritorially." Dennis, *supra* note 142, at 126.

146. Int'l Law Comm'n, Articles on State Responsibility, art. 2, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) [hereinafter ILC Articles].

state responsibility. Where the relevant legal obligation (under the International Covenant on Civil and Political Rights (ICCPR) or the European Convention) applies only to an exercise of state jurisdiction, then clearly jurisdiction is required to establish state responsibility.[147] However, in the case of a treaty obligation that is not explicitly restricted to acts within the jurisdiction of the state—such as Article 33 of the Refugee Convention—a state commits an internationally wrongful act when conduct consisting of an act or omission "[c]onstitutes a breach of an international obligation of the State."[148] Thus, any conduct amounting to direct or indirect *refoulement* by a state, *wherever carried out*, implicates the international responsibility of that state for a violation of Article 33. On this understanding, there is no further requirement to establish that the act or omission amounting to *refoulement* was carried out within the state's jurisdiction.

However, even if we accept that it is necessary to establish jurisdiction in order to enliven Article 33, reference to the developing human rights jurisprudence on jurisdiction suggests that most extraterritorial acts relevant to the refugee context will fall within its ambit. The consistent view under human rights law is that a state exercises jurisdiction when it wields "effective control" over territory *or* persons.[149] Ralph Wilde characterizes the two relevant contexts as "spatial" and "personal" jurisdiction.[150] As to the first, Wilde explains that jurisdiction "amounts to asserting control over a particular territorial space."[151] As explained by the ECHR in the *Bankovic* case, this can occur where a state, "through the effective control of the relevant territory and its inhabitants abroad,

147. There is variation in the specific scope of the key international human rights treaties, but they almost all make some reference to this issue. For example, while the ICCPR applies to persons "within [a state party's] territory and subject to its jurisdiction," ICCPR, *supra* note 115, art. 2(1), the Convention on the Rights of the Child applies to each child "within [a state party's] jurisdiction," Convention on the Rights of the Child, art. 2(1), Nov. 20, 1989), 1577 U.N.T.S. 43 [hereinafter CRC], and the ECHR applies to "jurisdiction," European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1 Nov. 4, 1950, 213 U.N.T.S. 222, *amended by* Protocol No. 11, May 11, 1994, 155 E.T.S. 1. The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains no specific territorial or jurisdictional limitation. ICESCR, Dec. 19, 1966, 993 U.N.T.S. 3.

148. ILC Articles, *supra* note 146, art. 2(b).

149. *See, e.g.*, *HRC General Comment 31*, *supra* note 145, ¶ 10 ("[A] State party must respect and ensure the rights laid down in the Covenant to *anyone* within the power or effective control of that State party, even if not situated within the territory of the State Party.") (emphasis added). Lauterpacht and Bethlehem, after reviewing the authorities, conclude even more broadly that there is a "general proposition that persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs." Lauterpacht & Bethlehem, *supra* note 60, at 111.

150. *See generally* Wilde, *supra* note 143.

151. *Id.* at 798.

as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory exercises all or some of the public powers normally to be exercised by that Government."[152] In refugee law, this type of jurisdiction may be exercised, for example, when one state permits another state to operate some kind of extraterritorial processing center (possibly including detention) on its territory.[153] On this basis, it could be argued that Australia's obligation to respect Article 33 clearly pertained to its involvement in the confinement and processing of refugee claimants in Nauru.[154]

The second context in which a state can be said to exercise extraterritorial jurisdiction is where, regardless of whether the area "in which the control is exercised is itself under the State's control,"[155] there is a relationship of "power . . . control/effective control . . . or authority between the State and the individual, quite apart from a relationship of control operating with respect to the territory in which the acts take place."[156]

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152. Bankovic et. al v. Belgium, 2001-XII Eur. Ct. H.R. 333, para. 71 (Grand Chamber, Admissibility Decision), *quoted by* Wilde, *supra* note 143, at 800.

153. Of course this would depend on the degree of control exercised by the relevant state. Noll, *supra* note 3, at 326.

154. The Memorandum of Understanding signed by Australia with Nauru obliged Australia to "ensure that each person will be processed and have departed Nauru within as short a time as is reasonably possible, and that no persons will be left behind in Nauru." Ruhani v. Dir. of Police (2005) 222 C.L.R. 489, ¶ 49 (Austl.). Australian immigration officials therefore determined refugee applications in Nauru. *See also* Kneebone, *supra* note 3, at 709–15. Moreover, under the terms of the Memorandum of Understanding,

> [Australia undertook] to provide the facilities in Nauru in which detainees such as the appellant were housed. It undertook to provide security personnel for such facilities, as well as health and medical services. Pursuant to these undertakings, the Australian Protective Service stationed approximately twenty-three officers in Nauru. They supported the Nauru Police Force and were appointed reserve officers of that force.

Ruhani (2005) 222 C.L.R. 489, ¶ 51.

155. *Bankovic*, 2001–XII Eur. Ct. H.R. 333, para. 71, *quoted in* Wilde, *supra* note 143, at 800.

156. Wilde, *supra* note 143, at 802 n.141. One example is provided by the decision of the ECHR in *Öcalan v. Turkey*. The Court noted:

> [T]he applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State . . . even though in this instance Turkey exercised its authority outside its territory.

Öcalan v. Turkey, App. No. 46221/99, 2003 Eur. Ct. H.R. 125, para. 93 (Grand Chamber, Judgment on the Merits) (cited in Wilde, *supra* note 143, at 803). In *Construction of a Wall*, the ICJ affirmed the HRC jurisprudence on point: "[t]he constant practice of the Human Rights Committee is consistent with this [extraterritorial application of the ICCPR]." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory

The rationale for establishing jurisdiction and thus state responsibility on this basis is explained by the ECHR in *Issa and Others v. Turkey*:

> A State may also be held accountable for violation of the Convention rights and freedoms of *persons* who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State . . . . Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.[157]

In refugee law, it could therefore be argued that any time a state seizes the power or authority over a refugee to determine her destination,[158]

Opinion, 2004 I.C.J. 136, 179 (July 9). Thus, the Committee has found the Covenant applicable where the state exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina. See U.N. Human Rights Comm., Commc'n No. R.12/52: Burgos v. Uruguay, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981); U.N. Human Rights Comm., Commc'n No. R.13/56: Lilian Celiberti de Casariego v. Uruguay, U.N. Doc. Supp. No. 40 (A/36/40) at 185 (1981). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany. U.N. Human Rights Comm., Commc'n No. 106/1981: Montero v. Uruguay, ¶ 109, U.N. Doc. Supp. No. 40 (A/38/40) at 186 (1983).

157. Issa and Others v. Turkey, 2004 Eur. Ct. H.R. 629, paras. 71–72 (footnotes omitted and emphasis added). This echoes similar pronouncements by the Human Rights Committee. As the HRC noted in *De Lopez v. Uruguay*, "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." U.N. Human Rights Comm., Case no. 52/1979, De Lopez v. Uruguay, ¶ 12.3, U.N. Doc. CCPR/C/OR/1 (1985). In a concurring opinion, Committee Member Tomuschat concluded: "[n]ever was it envisaged, however, to grant States parties unfettered discretionary power to carry out willful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, *despite the wording of article 2(1)*, the events which took place outside Uruguay come within the purview of the Covenant." *Id.* at 560 (emphasis added). Indeed, the Inter-American Commission on Human Rights has explained that the notion that the Commission's jurisdiction will under certain circumstances be exercised "over acts with an extra-territorial locus will not only be consistent with, *but required by, the norms which pertain* [in the American Declaration on the Rights and Duties of Man 1948]." Coard et al. v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 37 (1999) (emphasis added). Similarly, in *Construction of a Wall*, the ICJ noted:

> The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

2004 I.C.J. at 179.

158. One example is where the state seeks to return a person to his country of origin or to a third country that may in turn remove him to his country of origin.

whether this occurs on the high seas or in the territory of another state, Article 33 is implicated.[159]

C. *The Scope of State Responsibility Pursuant to Article 33*

In addition to its responsibility for expulsions or returns carried out directly, whether within territory or extraterritorially, a state is responsible for violations of Article 33 that are attributable to it under international law.[160] The most obvious conduct attributable to a state is that carried out by "any State organ," whether the organ "exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State."[161] It is irrelevant that the state organ may have acted in excess of authority or in contravention of its instructions.[162] Thus, where a state, for example, sends its immigration department officials to another state to process refugee claims or to otherwise exercise authority over refugee claimants, it is responsible for any violations of Article 33 committed by such officials.[163]

159. By contrast, Noll argues that "a high degree of sovereign control" is "inherently demanded" by the terms "expel or return (refouler)." Thus, he argues, "the terms 'expel' and 'refouler' in article 33 CSR suggest a direct sovereign relationship between the removing agent and the territory from which removal takes place." Noll, *supra* note 129, at 555. However, this is inconsistent with the settled view that a state may exercise personal jurisdiction, absent territorial sovereignty, as outlined above. Moreover, it is directly refuted by the decision of the U.K. Court of Appeal in *"B" v. Sec'y of State for Foreign & Commonwealth Affairs*. [2004] EWCA (Civ) 1344, (Eng.), *available at* http://www.hmcourts-service.gov.uk/judgmentsfiles/j2837/b-v-secretaryofstate.htm, in which the Court of Appeal considered whether the United Kingdom's jurisdiction under the European Convention was enlivened by the decision of its consular staff in Melbourne not to grant the applicants protection under the constructive *non-refoulement* aspect of Article 3 of the European Convention on Human Rights. The Court noted that the ECHR in *WM v. Denmark* had held that the acts of the Danish Ambassador in that case "constituted an exercise of authority over the applicant to an extent sufficient to bring him within the jurisdiction of the Danish authorities." *"B" v. Sec'y of State*, [2004] EWCA (Civ) at [64]. Although the actions of the British staff in *"B" v. Secretary of State* indicated less control over the applicants than had been the case in *WM*, the Court of Appeal was "content to assume (without reaching a positive conclusion on the point) that while in the consulate the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1 [of the European Convention]." *Id.* at [66] (Lord Phillips of Worth Matravers MR). The key point is that there was no question that the actions of the consular staff were capable of amounting to an exercise of jurisdiction; rather, the issue was whether the facts in that case gave rise to a finding of effective control.

160. *Michigan Guidelines*, *supra* note 15, ¶ 7.

161. ILC Articles, *supra* note 146, art. 4(1). *See generally* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 94 (2002).

162. CRAWFORD, *supra* note 161, at 106.

163. An example is the practice of Australia in sending its immigration officials to determine refugee status claims on Nauru. *See* Kneebone, *supra* note 3, at 715.

A state is also responsible for the conduct of a person or entity which is not an organ of the state, but which is empowered by the law of that state to exercise elements of governmental authority.[164] In the refugee context, this could apply to acts amounting to *refoulement* carried out by private or state-owned airlines that may have delegated to them powers in relation to immigration,[165] or to private security firms contracted to operate refugee detention facilities (inside or outside the state) or facilitate the removal of refugee claimants.[166] Conduct of private persons or entities is also attributable to the state where a person or group of persons is in fact acting on the instructions of, or under the direction or control of, a state in carrying out the conduct.[167]

Where two or more states act collectively with regard to refugees, they may be jointly responsible for the same internationally wrongful act. The responsibility of each state may be invoked and is not "diminished or reduced by the fact that one or more other States are also responsible for the same act."[168] Thus, for example, where two or more states enter into an agreement to participate jointly in the processing of refugee claims, they are each responsible for violations of Article 33 carried out pursuant to that agreement.[169] In addition, the conduct of "an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."[170] This may be especially relevant

164. ILC Articles, *supra* note 146, art. 5. CRAWFORD, *supra* note 161, at 100.

165. CRAWFORD, *supra* note 161, at 100.

166. The ILC Commentary provides an example of private security firms in the context of this article. CRAWFORD, *supra* note 161, at 100. Lauterpacht and Bethlehem similarly note that the responsibility of states under Article 33 extends to "circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc.) or other persons act on behalf of a Contracting State or in exercise of governmental activity of that State." Lauterpacht & Bethlehem, *supra* note 60, at 87. In such situations, as Hathaway notes, "an act which would amount to an exercise of extraterritorial jurisdiction is no less so because it is committed by an entity (for example, a private corporation) under contract with a government than if committed directly by officials of the state party itself." HATHAWAY, *supra* note 35, at 340. A relevant example is the situation in Nauru, whereby Kneebone explains that, "[c]amp security was managed by a private company, Chubb Protection Services, based on a protocol signed by Nauru Police Force, the IOM and Australian Protectorate Service (APS)." Kneebone, *supra* note 3, at 709.

167. ILC Articles, *supra* note 146, art. 8. For an analysis of the meaning of "direction or control," see CRAWFORD, *supra* note 161, at 110–13. This could pertain to Australia's agreement with Nauru, since "the Australian government funded and directed the Pacific 'protection' centres . . . ." Kneebone, *supra* note 3, at 710. However, a final conclusion on this point would involve closer analysis.

168. ILC Articles, *supra* note 146, art. 47. CRAWFORD, *supra* note 161, at 272.

169. Noll notes that this may be the case in proposals of the U.K. and Danish government regarding "Transit Processing Centres" or "Protection Zones." Noll, *supra* note 3, at 326.

170. ILC Articles, *supra* note 146, art. 6.

where the officials in a transit country exercise authority over refugees on behalf of another state (for example, the state to which the refugees were intending to travel).[171] In such circumstances, the fact that the transit country is not a party to the Refugee Convention is not relevant to the responsibility of the destination state party. Where the destination state is a party to the Convention, it is responsible for acts in violation of Article 33 that are committed by the organs of the transit state acting at its disposal.[172]

Apart from conduct that is attributable to the state under international law, a state may be responsible for the commission of an internationally wrongful act where it "aids or assists another State in the commission of an internationally wrongful act by the latter."[173] It is necessary to establish that the state "does so with knowledge of the circumstances of the internationally wrongful act," and that "the act would be internationally wrongful if committed by that State."[174] Thus, where one state party to the Refugee Convention knowingly assists another state party to return refugees to a state in which they fear persecution, the first state may be responsible for the violation of Article 33 of the Convention, even if the act amounting to *refoulement* was not itself carried out by that state.[175]

V. RESPECT FOR REFUGEE RIGHTS BEYOND ARTICLE 33

Although states seeking to invoke the protection elsewhere concept—and many scholars critiquing the practice—frequently focus on Article 33 as the only "protection obligation" that must be respected in the third state before removal is permitted, the Refugee Convention in fact imposes a range of other obligations on state parties. A number of commentators, including some scholars and domestic law judges, have expressed the view that a state may only send a refugee to a third state

171. HATHAWAY, *supra* note 35, at 340.

172. This is especially important in the context of recent "protection elsewhere" policies instituted by Australia, in which agreements have been made with transit countries such as Indonesia which are not parties to the Convention. Savitri Taylor notes that under the "regional cooperation arrangement," which Australia entered into in 2000, "asylum seekers are prevented by Indonesian authorities from leaving Indonesia but are provided accommodation, food and emergency medical care by IOM (at Australia's expense)." Taylor, *supra* note 3, at 295. In order to assess whether Indonesian officials could be said to be acting "at the disposal" of Australia, one would need to take into account this Memorandum of Understanding (not a public document) and its implementation. *See generally id.*

173. ILC Articles, *supra* note 146, art. 16.

174. *Id.*

175. An example would be where State A finances State B's interdiction program, but does not itself carry out the returns.

where she will be granted protection "comparable" or "equivalent" to that to which she is entitled in the first state, including *all* obligations imposed by the Refugee Convention.[176] However, the legal basis for re-

176. Such views can be found in some individual judgments in the Australian case law on "effective protection." *See, e.g.*, Al-Rahal v. MIMA (2001) 100 F.C.R. 73, 78 (Austl.) (Lee, J., dissenting) (noting that the Refugee Convention affords refugees a range of rights in addition to *non-refoulment*). He then stated, "as far as the operation of the Treaty is concerned under international law, *equivalent protection to that required of a Contracting State* under the Treaty must be secured to an applicant in a third country before it can be said that person is not a refugee requiring consideration under the Treaty." *Id.* at 89 (emphasis added). In *WAGH v. MIMA* (2003) 131 F.C.R. 269, Judge Lee noted:

> It may be consonant with the terms of the Convention, or with international law, for Australia to provide that protection obligations under the Convention do not arise in respect of a refugee in Australia where that person has an established right to enter and reside in a country that has accepted that person as a person to whom protection is to be provided, *equivalent to that required of a Contracting State under the Convention*. However, it is the Minister's submission that [the domestic legislation] contemplates that a refugee within the territory of Australia is liable to be removed from Australia to another country without recognition by that country of that person's need for protection. Such a construction would purport to transfer to the other country Australia's duties and responsibilities under the Convention in respect of a refugee in its territory and would not meet Australia's obligations under international law and, in particular, as a Contracting State under the Convention.

Id. at 278–79 (emphasis added). Also significant is the fact that the High Court of Australia recognized in *NAGV of 2002 v. Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 213 A.L.R. 668 (Austl.), that a range of refugee rights beyond Article 33 are pertinent to the "safe third country" concept in Australian domestic law. The judgment explained that "there is a range of requirements imposed upon Contracting States with respect to refugees some of which can fairly be characterised as 'protection obligations.' Free access to courts of law (Art. 16(1)), temporary admission to refugee seamen (Art. 11), and the measure of religious freedom provided by Art. 4 are examples." *Id.* ¶ 31. In *Ammur v. France*, the European Court of Human Rights noted, in considering an argument that the respondent government did not deprive the applicants of their liberty when detaining them in the international zone of the Paris-Orly Airport (thus preventing them from making a refugee claim), that

> [t]he mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, this possibility becomes theoretical if no other country *offering protection comparable to the protection they expect to find in the country where they are seeking asylum* is inclined or prepared to take them in.

1996-III Eur. Ct. H.R. 827, 850 (emphasis added). *See also* Jens Vedsted-Hansen, *Non-admission policies and the right to protection: refugees' choice versus states' exclusion?*, *in* REFUGEE RIGHTS AND REALITIES 269, 279 (Frances Nicholson & Patrick Twomey eds., 1999). Vedsted-Hansen argues that:

> Taking into account the content and structure of the Geneva Convention, as well as the declaratory nature of the determination of refugee status, it must follow that, in order to be considered an adequate country of first asylum, the relevant state has to provide refugee protection of a *quality*, and at a *level*, in conformity with the protection scheme laid down in the Convention.

quiring such comparable or equivalent protection in the third state has not always been clearly articulated.[177] This Part therefore considers the basis for imposing constraints on state parties beyond Article 33 of the Refugee Convention. The primary focus is on the full range of rights set out in the Refugee Convention, but other international legal obligations will also be examined briefly.

It is important to note at the outset that the following analysis assesses the legitimacy of state action in transferring refugees to a third state by reference to the international obligations of the *sending state*. A preliminary question might arise as to whether there is any basis for also constraining a state wishing to transfer refugees to a third state by reference to the international obligations of the *third state*. In other words, should the sending state be prohibited from sending refugees to a third state where it is likely that the third state will violate its international obligations in its treatment of such refugees (even if the sending state is not itself bound by the relevant obligations)?

The general position in international law is that each state is responsible for its own wrongful conduct, so the notion of holding a state accountable for the internationally wrongful conduct of another state is exceptional.[178] In such "exceptional cases," one state "should assume responsibility for the internationally wrongful conduct of another."[179] Of the possible bases for such responsibility outlined in the International Law Commission's Articles on State Responsibility, the only relevant provision is the "aid and assist" doctrine encapsulated in Article 16 of the Articles, which provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) The act would be internationally wrongful if committed by that State.[180]

Id. See also Gil-Bazo, *supra* note 13, at 599 ("[T]he transfer of responsibility from a State to another State, even admitting that such State be a 'safe third country,' raises issues of State responsibility to fulfill *all* the obligations towards refugees under international refugee and human rights law that have been engaged by its exercise of jurisdiction.").

177. As Legomsky rightly notes, "[h]ow the various Convention rights should affect the formulation of criteria for the return of asylum seekers to third countries is probably the single most difficult issue addressed [in his paper]." Legomsky, *supra* note 12, at 640.

178. CRAWFORD, *supra* note 161, at 145.

179. *Id.* at 146.

180. ILC Articles, *supra* note 146, art. 16.

Although this doctrine provides a mechanism for holding one state responsible for the actions of another, it is important to note that it only applies where the aiding/assisting state is *itself* bound by the relevant international legal obligation.[181] This is because of the basic principle that "a State is not bound by obligations of another State,"[182] and thus, "a State is free to act for itself in a way which is inconsistent with obligations of another State."[183] Since Article 16 only applies where both the sending (aiding/assisting) state *and* the destination state are parties to the Refugee Convention or other relevant human rights instruments, it does not provide an additional basis for assessing the responsibility of a state that wishes to transfer refugees from its jurisdiction to a third state. For this reason, the international legal obligations of the sending state should always provide the basis for assessing constraints on that state's actions in this context.[184] Accordingly, the remainder of this Part now considers the basis for holding the sending state accountable pursuant to its own

181. *Id.* art. 16(b).

182. CRAWFORD, *supra* note 161, at 149; *see also* Vienna Convention, *supra* note 24, arts. 34–35.

183. CRAWFORD, *supra* note 161, at 149.

184. For this reason, the Michigan Guidelines do not adopt the "complicity principle," developed by Legomsky, as the fact that this principle relies on Article 16 of the ILC Articles and the terminology of "complicity" implies that one is concerned with the assessment of the sending state's responsibility by reference to the *obligations of the destination state*. *Michigan Guidelines*, *supra* note 15. According to the "aid and assist" doctrine, a state is accountable in international law if it aids or assists another state in the commission of *an unlawful act by the latter*, implying that an essential step in ascertaining liability is to assess whether the *third state* has violated an international obligation to which it is subject. This is made clear in the ILC Commentary to Article 16. CRAWFORD, *supra* note 161, at 148–51. Legomsky supports this approach, explaining that the first state is responsible because "[t]he delivery of the refugee into the hands of the second state has obviously facilitated the latter state's violation of international law." Legomsky, *supra* note 12, at 621. Since Article 13 of the ILC Articles provides that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs," it would be necessary to establish that the third state is a party to relevant human rights agreements, including the Refugee Convention. Thus, according to the complicity principle, we would first assess whether the third state is likely to be in violation of an international obligation to which it is subject and then determine whether the first state has knowingly aided or assisted in that violation by sending a refugee to that state.

However there is a problem with assessing state responsibility for transfer decisions on this basis: if, in order to establish complicity, it is first necessary to establish that in failing to uphold human rights obligations the third state will itself be in violation of an international obligation, then the "sending state" can circumvent liability by ensuring that it transfers refugees to a state which is not a party to the Refugee Convention or any other international human rights treaty. This is because, according to the International Law Commission, "[t]he wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter." CRAWFORD, *supra* note 161, at 151. If the destination state is not bound by relevant international agreements, the sending state cannot be responsible for "aiding and assisting" that state.

obligations for treatment the refugee applicant will encounter in the third state.

A. *Refugee Convention*

Although, as mentioned above, states often assert that Article 33 is the only relevant constraint on their ability to transfer refugees under a protection elsewhere policy, the Convention imposes a number of other important human rights obligations on states.[185] Some of these obligations apply as soon as the refugee is within the territory of a contracting state (and some even prior to that stage, as discussed above).[186] This is so even if state agencies have not yet determined that the applicant satisfies the refugee definition, since it is well established that recognition of refugee status is declaratory only.[187] As soon as a refugee is within the territory of a state, the state incurs obligations to that refugee under Article 3 (nondiscrimination), Article 4 (religion), Article 13 (movable and immovable property), Article 16(1) (access to the courts), Article 20 (rationing), Article 22 (education), Article 25 (administrative assistance), Article 27 (identity papers), Article 29 (fiscal charges), Article 31(1) (nonpenalization for illegal entry or presence), Article 31(2) (freedom from constraints on movement unless shown to be necessary and justifiable), Article 33 (protection against *refoulement*) and Article 34 (consideration

185. Moreover, as Judge Lee of the Australian Federal Court has noted,

> The Convention does not provide that the incurring of obligations to a refugee to whom the Convention applies is at the option or discretion of a Contracting State and nor does it provide that a Contracting State will not incur obligations to a refugee under the Convention if the refugee has had, or has, the opportunity to seek protection from another country or Contracting State.

WAGH v. MIMA (2003) 131 F.C.R. 269, 276.

186. *See supra* Sections IV.B and IV.C.

187. This is clear from the terms of the definition. Rather than providing that a refugee is a person *recognized* to meet the definition, it merely provides that a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." Refugee Convention, *supra* note 1, art. 1A(2). The declaratory nature of the definition is made clear in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 28, U.N. Doc. HCR/IP/Eng/REV.1 (revised 1992) (1979). It has also been reiterated in UNHCR ExCom Conclusion No. 6, which emphasizes "the fundamental importance of the principle of *non-refoulement* . . . of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees." (XXVIII) "Non-refoulement," ¶ (c) (1977), *cited in* UNHCR Advisory Opinion, *supra* note 60, at 2–3 n.9.

for naturalization).[188] As a refugee's connection with a state strengthens, that state incurs further obligations.[189]

The question is whether a state party can remove a refugee to whom obligations have been incurred under the Refugee Convention to a third state in which all or some of these rights will not be respected, because the other state is not a party to the Refugee Convention, because it has entered reservations with respect to some specific rights or because, despite being a party to the Convention, it does not in fact respect them.[190] The basic question, therefore, is whether a state party to a human rights treaty (such as the Refugee Convention) can transfer its obligations to another state and thereby avoid liability under the treaty.

The answer is that a state cannot "contract out" of its international legal obligations or transfer responsibility for such obligations to another state. In particular, removal or transfer of a *person* from the territory or jurisdiction of one state to another does not also transfer *legal obligations* to that other state. This was made clear by the ECHR in its decision in *TI v. United Kingdom*, a case concerning the United Kingdom's intention to transfer a Sri Lankan man to Germany under the Dublin Convention, when there was a real risk that Germany would subsequently return him to Sri Lanka contrary to Article 3 of the European Convention. The Court found "that the indirect removal . . . to an intermediary country which is also a Contracting State does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel him, exposed to treatment contrary to Article 3 of the Convention."[191] The Court continued:

> Where States establish international organizations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[192]

188. HATHAWAY, *supra* note 35, at 160–73.

189. *See generally id.* at 657–905. For example, once a refugee is "lawfully present" (a status different from merely being present), he acquires protection from expulsion, freedom of residence and internal movement, and the right to self-employment. Refugee Convention, *supra* note 1, arts. 32, 31, 18 (respectively). Further, once a refugee is "lawfully staying," he acquires further rights, including the right to wage-earning employment. *Id.* art. 17.

190. *See supra* Section III.B for consideration of the question of whether formal accession is required.

191. T.I. v. The United Kingdom, 2000-III Eur. Ct. H.R. 435, 456–57.

192. *Id.* (citing Waite & Kennedy v. Germany, 1999-I Eur. Ct. H.R. 393, 410).

Accordingly, even where the United Kingdom transferred a person to Germany, the transfer did not extinguish its obligation to ensure that the removal would not result in a violation of Article 3 of the European Convention.[193]

This reasoning applies *a fortiori* to the Refugee Convention. In contrast to general international human rights treaties,[194] the Refugee Convention's purpose is to impose obligations on states regarding a specific group of persons in special need of protection.[195] While the

193. See also Section V.B for the jurisprudence regarding other articles of the European Convention and other treaties. Importantly, it is clear in this context that the focus remains on the sending state's obligations. It is clear that a state is in violation of *its own* primary obligation under relevant human rights treaties if it removes a person to another country in which she will be subjected to treatment which amounts to a violation of the relevant treaty provision. This is illustrated in the judgment in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989)—one of the earliest ECHR judgments on point. In that case, the United Kingdom was held responsible for treatment to be carried out in a state *not party* to the ECHR. However, by extraditing Soering to that country, the United Kingdom was held in breach of Article 3 of the European Convention (to which it was a party). This has also been made clear in other decisions by the ECHR. *See, e.g.*, Cruz Varas v. Sweden, App. No. 15576/89, 14 Eur. H.R. Rep. 1, ¶ 69 (1991). The European Commission on Human Rights explains:

> Although the establishment of such responsibility involves an assessment of conditions in the requesting country against the standards of Article 3, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

Id. This is also Crawford's understanding. S*ee* CRAWFORD, *supra* note 161, at 145 ("In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached *its own international obligations*.") (emphasis added). Crawford then goes on to discuss the *Soering* analysis as an example of this point. This was also made clear from the earliest HRC decision on point, *Kindler v. Canada*, in which the HRC explained, "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, *the State party itself may be in violation of the Covenant*." U.N. Human Rights Comm., Commc'n No. 470/91, ¶ 6.2, U.N. Doc. CCPR/C/48/D/470/1991 (Nov. 11, 1993) (emphasis added).

194. The Refugee Convention can be distinguished from other human rights treaties, in respect of which only a small number of obligations have clearly been held to restrain expulsion and deportation. *See infra* Section V.B.

195. The Preamble of the Refugee Convention notes that "it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement . . . ." Refugee Convention, *supra* note 1, pmbl. A similar point was made recently by the UNHCR's Assistant High Commissioner for Protection, Erika Feller, who noted, "[a]s the purpose of the Convention is to provide its protection to refugees, reference to the rights it sets out to ensure that such protection is accorded would seem to be the necessary place to start [in defining 'effective protection']." Feller, *supra* note 5, at 529. She explains, "[a]s to what constitutes such

Convention does not impose obligations on states to deliver rights to refugees in the abstract, state parties have assumed obligations to deliver rights to refugees with whom they have a connection, in some cases based on mere physical presence. If it were possible to circumvent the considerable range of obligations imposed on state parties by simply transferring a refugee to another state, this would defeat the *raison d'être* of the Convention.[196] Accordingly, a good faith application of Convention obligations requires that, in order to transfer a refugee to another state in accordance with the Refugee Convention, a state is under an obligation to ensure that the refugee will enjoy the rights to which she is entitled under the Convention scheme. This includes all Convention rights to which she is entitled at the time of transfer.[197] In addition, "[h]e or she must also acquire in the receiving state such additional rights as are mandated by the requirements of the Convention."[198]

The Michigan Guidelines adopt the view that respect for all Convention rights in the receiving state is required. However, it is important to consider an alternative position, put forward by Legomsky, which introduces the possibility of differentiating between Refugee Convention rights (and indeed, other international human rights obligations) in assessing which rights should constrain state behavior. Relying on the jurisprudence of international bodies such as the Human Rights Committee and the ECHR—in which it is established that substantive protections such as the right to be free from torture and degrading treatment impose *non-refoulement* obligations on state parties—together with Article 16 of the Articles on State Responsibility, Legomsky developed the following "complicity principle":

> [N]o country may return a refugee or asylum seeker to a third country knowing that the third country will do *anything* to that

quality [effective] protection, the Convention regime can certainly be interpreted to require of States parties that any attempt to ascertain the availability of such protection should be informed by the rights set out in the Convention and Protocol, together with other international human rights instruments." *Id.*

196. This is also distinguishable from general human rights obligations, since the object and purpose of general human rights treaties is to ensure the protection of rights to all those within a state party's territory or jurisdiction, rather than only to a specific group such as refugees. *See, e.g.*, ICCPR, *supra* note 115, art. 2(1).

197. In ascertaining which obligations the sending state has incurred with respect to a particular refugee, reference must be made to the refugee's connection with that state. For example, once a refugee is on the territory of a state, that state incurs a number of obligations immediately, including the obligation to respect freedom of religion, access to the courts, access to education, and freedom from constraints on movement unless shown to be necessary and justifiable. *See supra* notes 188–189. On this analysis, in order legitimately to transfer a refugee to a third state, the sending state would need to ensure that these obligations would be upheld in that third state.

198. *Michigan Guidelines*, *supra* note 15, ¶ 8.

> person that the sending country would not have been permitted to do itself—regardless whether the third country is a party to the 1951 Convention or to any other human rights conventions.[199]

In ascertaining whether a state has *knowingly* transferred a person to a state in which his or her rights will be violated, Legomsky suggests the possibility of prescribing a "variable standard of proof,"[200] such that "[t]he more important the particular right, the more confident the [sending] country should have to be before it is permitted to effect a return."[201] Legomsky suggests that this approach may be particularly attractive in order to "temper extreme applications of the complicity principle."[202] Thus, all the rights in the Refugee Convention (and other human rights treaties) must be respected in the third state in order for a transfer to be effected,[203] "but since the range of protected rights is so vast," in applying the complicity principle, the "probability and the seriousness of the violation are appropriately considered."[204] In this model, the possible method of differentiation between rights is introduced by way of a procedural device.[205]

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199. Legomsky, *supra* note 12, at 620 (emphasis in original). "[N]o state may knowingly assist another state to do what international law would forbid the first state from doing on its own. Otherwise, the first state would be an accomplice to the misdeed committed by the second state." *Id.* at 619–20.

200. *Id.* at 623.

201. *Id.*

202. *Id.* at 624. Legomsky explains:

> To many observers, an unadorned version of the complicity principle will have logical appeal but pragmatic limitations . . . . [T]he spectrum of refugee rights under the 1951 Convention and other human rights agreements is vast. Some of those rights, all will agree, are fundamental. Others are more minor. One might balk at an international norm that prohibits return to a third country solely because that country will violate a minor right.

Id. at 624. He also outlines the significant practical concerns with an approach which included all Convention rights. *Id.* at 641–42.

203. As Legomsky notes, either all of the articles are relevant or only some of them are, but if it is the latter, there is no principled method of deciding which are relevant. Thus, all rights are relevant, but a variable standard of proof applies. *See* R (*ex parte* Ullah) v. Special Adjudicator, [2004] UKHL 26, 3 Eng. Rep. 785 (Eng.) (illustrating comparable issues in ECHR and Human Rights Committee jurisprudence).

204. Legomsky, *supra* note 12, at 626.

205. This is in contrast to the approach of the House of Lords in *Ullah*, in which their Lordships took the view that while all rights in the European Convention could potentially be invoked, it is necessary to establish a "flagrant" or "gross" violation when the rights to be invoked are "qualified rights." *See Ullah*, [2004] UKHL 26, ¶¶ 24–25. This is said to be required because "it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state." *Id.* ¶ 24 (adopting the decision of the

The difficulty with this approach is that it begs the question of how one determines which rights are "fundamental" or "most serious," and which are only "minor." Legomsky provides some insight into possibilities for making this assessment.[206] One approach might be to "assume that those particular Convention rights which extend to all refugees tend generally to be the ones that the state parties regarded as the most fundamental; otherwise, they would have been reserved for selected subcategories of refugees."[207] However, it is not clear that this approach withstands scrutiny. For example, this category includes rights which might well be regarded as more "fundamental," such as *non-refoulement* (Article 33), as well as those possibly considered less so, such as rights to movable and immovable property (Article 13).[208] Indeed, the Refugee Convention's drafting history suggests different rationales for omitting particular "attachment" requirements in relation to the various rights in this category. In the case of property rights, for example, the drafters considered but rejected higher levels of attachment "because they wished to ensure that refugees could claim property rights even in a state party where they were not physically present (on the same basis as other non-resident aliens)."[209] By contrast, the right to elementary education on the same basis as nationals was not subjected to any attachment requirement in order to reflect the " 'urgent need' for, and compulsory nature of, access by all to the most basic forms of education in line with the formula of the Universal Declaration of Human Rights."[210]

Another possible approach Legomsky suggests for ascertaining a hierarchy between Refugee Convention rights is to classify them "according to whether they are reservable or non-reservable,"[211] the argument being that the fact that the drafters consciously distinguished reservable from non-reservable rights "is compelling evidence that the drafters regarded some Convention rights as more fundamental than others."[212] However, as Legomsky acknowledges, "even some of the reservable rights are keenly

Immigration Appeal Tribunal in *Devaseelan v. Sec'y of State for the Home Dep't*, [2003] Imm. A.R. 1, ¶ 111 (Eng.)).

206. Although it should be noted that this is developed in relation to an alternative to "a strict application of the complicity principle," such that only fundamental rights would be subject to the complicity principle, leaving out altogether rights deemed less important. Legomsky, *supra* note 12, at 643.

207. *Id.* at 643.

208. It is noteworthy that the right to property, while found in the Universal Declaration of Human Rights, was not ultimately codified into either the ICCPR or ICESCR.

209. HATHAWAY, *supra* note 35, at 162.

210. *Id.*

211. Legomsky, *supra* note 12, at 644. Article 42.1 of the Convention permits states to make reservations to some (but not all) articles at the time of signature, ratification, or accession.

212. *Id.* at 644.

important."[213] Indeed, rather than reflecting a normative hierarchy, Legomsky notes that allowing for the option of entering reservations may have been a practical measure to enable states to become parties to the Refugee Convention immediately, "rather than have to wait until they had amended any of their laws that conflicted with the Convention."[214] It may therefore be dangerous to assume that the fact that some rights are reservable indicates that they are normatively less important.

A third possible method Legomsky suggests is to distinguish between rights according to whether they are derogable or nonderogable. However, this notion is not relevant to the Refugee Convention, as no rights therein are specifically made nonderogable or ineligible for suspension even in times of national emergency.[215] In any event, relying on derogability as a measure of normative importance is also fraught with complexity.[216]

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213. *Id.* at 645.

214. *Id.* As the Human Rights Committee has explained in relation to the ICCPR, "[t]he possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant none the less to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant." U.N. Human Rights Comm., *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) [hereinafter *General Comment 24*].

215. Rather, Article 9 of the Refugee Convention provides that a state may take provisional measures "which it considers to be essential to the national security in the case of a particular person" in "time of war or other grave and exceptional circumstances." Refugee Convention, *supra* note 1, art. 9.

216. Legomsky applies a similar notion of core, or fundamental rights in the context of other human rights instruments. Although he ultimately concludes that "international law prohibits a destination country from knowingly returning asylum seekers to a third country that will violate rights guaranteed by universal or regional human rights agreements to which the destination country is a party," he suggests that the degree of certainty required by the word "knowingly" once again "should vary inversely with the importance of the right." Legomsky, *supra* note 12, at 651–52. Again, the difficulty is in ascertaining the relative importance of different rights. One possibility Legomsky considers is to assess the importance of rights by reference to derogability. Since he considers the rights in the ICESCR "more in the nature of aspirations," he concludes that it is those non-derogable rights in the ICCPR which would be considered most fundamental. This is said to have a number of advantages, including that such non-derogable rights are recognized by the world community "as having particular importance; otherwise they would be derogable." *Id.* at 649–50. However, the value of this approach is open to question in light of the Human Rights Committee's cautionary note:

> [N]ot all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example,

Since no principled method has been advanced for distinguishing between different types of obligations under the Refugee Convention, the Guidelines conclude that any transfer must be preceded by a good faith empirical assessment that refugees will in practice enjoy the rights set by Articles 2–34 of the Convention in the receiving state.[217]

The final point to address in this Section is the question of how one measures or assesses whether the receiving state will in fact deliver Convention protection. It is important here to recognize that Convention rights are, apart from a few exceptions, generally not framed in absolute terms; rather, they are required to be implemented at different relative levels. For example, in some cases a refugee will be entitled to the same level of protection as nationals, while in other cases a refugee is entitled only to the level enjoyed by aliens in that state.[218] With respect to rights that are unqualified, for example *non-refoulement* (Article 33), nondiscrimination (Article 3), and nonpenalization (Article 31), assessing whether the third state will comply with these rights is a matter of assessing compliance in absolute terms.[219] However, for those rights defined by reference to another group (aliens, most favored nationals, or nationals), the sending state must ensure that refugees will be guaranteed

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freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law.

General Comment No. 24, *supra* note 214, ¶ 10. *See also* U.N. Human Rights Comm., *General Comment No. 29: State of Emergency (Article 4)*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 1994) ("However it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18)"). Moreover, although it is certainly true that the obligations in the ICESCR are subject to progressive realization, and thus allow for considerations such as resource constraints to justify failure to comply, all rights in the ICESCR are non-derogable. This has been explained on the basis that derogation of ICESCR rights would not be appropriate or justified even in a public emergency. MAGDALENA SEPULVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 277–92 (2003). In addition, the Committee on Economic, Social, and Cultural Rights has begun to define core obligations with respect to individual rights which are immediately binding, and from which no derogation is permitted. For example, in relation to the right to health, the Committee has set out the core minimum obligations of State parties pursuant to Article 12 of the ICESCR, emphasizing that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, *which are non-derogable*." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 47, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (emphasis added). In light of this analysis, it is clear that, at a minimum, the core obligations in the ICESCR would need to be considered in any assessment of which rights are most fundamental.

217. *Michigan Guidelines*, *supra* note 15, ¶ 3.

218. HATHAWAY, *supra* note 35, at 228–37.

219. Note, however, the logistical difficulties raised by Legomsky, *supra* note 12.

rights in the receiving state by reference to the rights enjoyed by others in the receiving state.

B. *Respect for Other International Human Rights Obligations*

Most state parties to the Refugee Convention are also parties to other major international human rights treaties, and are thus also constrained by *non-refoulement* principles derived from such treaties.[220] Such *non-refoulement* obligations prevent a state from sending a person to any other state in which the person will face a violation of at least some of the rights protected in the relevant treaty. International humanitarian law may also constrain a state's ability to remove or transfer a refugee pursuant to a protection elsewhere scheme;[221] however, the focus in this Part is on international human rights law, given that its applicability to removals

220. *Compare* Office of the High Comm'r for Human Rights (OCHR), http://www.ohchr.org/english/countrIes/ratification/4.htm4 (list of countries participating in the ICCPR), *and* OCHR, http://www.ochr.org/English/countries/ratification/3.htm (list of countries participating in the ICESCR), *with* UNHCR, http://www.unhcr.ch/html/menu3/b/treaty2ref.htm (list of countries participating the Refugee Convention). Only twelve state parties to the Refugee Convention have not also acceded to the ICCPR, and of those twelve, four have at least signed the ICCPR. Similarly, there are 152 state parties to the ICESCR. Only fifteen state parties to the Refugee Convention have not also acceded to the ICESCR, and of those fifteen, five had at least signed the ICESCR (Belize, Kazakhstan, Sao Tome and Principe, South Africa, and the United States).

221. For example, in *Orelien*, the Canadian Federal Court of Appeal accepted that to return the applicants in that case to Haiti "would violate Canada's obligations under the Fourth Geneva Convention, the Second Protocol and a customary norm of international law prohibiting the forcible repatriation of foreign nationals who have fled generalized violence and other threats to their lives and security arising out of internal armed conflict within their state of nationality." Orelien v. Canada (Minister of Employment & Immigration), [1992] 1 F.C. 592, 608. As to customary international law, others have argued that there now exists a norm which "prohibits a state from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence and other threats to their lives and security caused by internal armed conflict within their own state." Deborah Perluss & Joan F. Harman, *Temporary Refuge: Emergence of a Customary Norm,* 26 VA. J. INT'L L. 551, 554 (1986). *See also* Charles W. Cookson II, *In Re Santos: Extending the Right of Non-Return to Refugees of Civil Wars*, 7 AM. U. J. INT'L L. & POL'Y 145, 146 (1991). The European Union Minimum Standards Directive applies its regime of subsidiary protection to situations where there is a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict." Council Directive 2004/83/EC, Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, art. 15(c), 2004 O.J. (L 304) 12 (EC). Jane McAdam explains that this provision "reflects the existence of consistent, albeit varied, State practice of granting some form of complementary protection to persons fleeing the indiscriminate effects of armed conflict or generalized violence without a specific link to Convention grounds." Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT'L J. REFUGEE L. 461, 479–80 (2005).

of persons from territory is very well established, and it is also most pertinent to transfers under protection elsewhere policies.[222]

In some cases, the relevant *non-refoulement* obligation is explicitly outlined in the treaty; for example, Article 3 of the Convention against Torture provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[223] In other treaties, the *non-refoulement* obligation has been implied from the obligation to protect specific rights. For example, the Human Rights Committee has outlined in a number of decisions the basis for an "implied *non-refoulement*" doctrine in the ICCPR. Most recently, it noted in General Comment 31 on the Nature of General Obligations:

> Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[224]

The Committee on the Rights of the Child has similarly explained:

> Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious

222. This is because it is much more likely that a state will attempt to transfer a refugee under a protection elsewhere scheme to a state in which there are concerns as to compliance with the general international human rights instruments than a state in which an armed conflict exists.

223. Convention against Torture, *supra* note 78, art. 3.

224. *General Comment No. 31*, *supra* note 145, ¶ 12.

> consequences for children of the insufficient provision of food or health services.[225]

This general principle finds support in similar developments with regional human rights treaties, most importantly the European Convention.[226]

While the general principle is not open to question, the more complex and less settled question is whether this constraint operates with respect to all or only a subset of treaty rights. On the one hand, the manner in which the principle is framed in some HRC jurisprudence suggests the possibility that the principle may apply to all rights. For example, in *Ng v. Canada*, the HRC held that "[i]f a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that *his or her rights under the Covenant* will be violated in another jurisdiction, the State party may itself be in violation of the Covenant."[227] The unqualified manner in which this principle is stated could support an argument that it applies to all rights in the ICCPR (and other relevant treaties).[228] Similarly, the Committee on the Rights of the Child explicitly stated in the above General Comment that the analysis is "by no means limited to" the specific articles mentioned.

On the other hand, the reference to a "real risk of irreparable harm" and the mention of specific articles in the General Comments (although not listed exhaustively) may suggest this analysis is applicable only in limited circumstances.[229] Notwithstanding the continuing uncertainty

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225. Comm. on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

226. *See supra* note 139.

227. U.N. Human Rights Comm., Commc'n No. 469/1991: Ng v. Canada, ¶ 14.2, U.N. Doc. CCPR/C/49/D/469/1991 (Nov. 5, 1993) (emphasis added). *See also* U.N. Human Rights Comm., Commc'n No. 470/1991: Kindler v. Canada, U.N. Doc. CCPR/C/48/D/470/1991 (July 30, 1993).

228. Indeed, in *R* (ex parte *Ullah) v. Special Adjudicator*, Lord Bingham of Cornhill interpreted the Human Rights Committee jurisprudence on point in a similar way—as potentially applying to all rights protected in the ICCPR. [2004] UKHL 26, ¶ 23, 3 Eng. Rep. 785 (U.K.). Ruma Mandal notes that the Human Rights Committee has "hinted that uncertainty about the permanency of residence of foreign husbands, and thus the risk of their deportation, could constitute a violation of the Covenant's provision on right to family life." U.N. High Comm'r for Refugees, Legal and Protection Policy Research Series, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, ¶ 59, U.N. Doc. PPLA/2005/02 (June 2005) (prepared by Ruma Mandal) (citing U.N. Human Rights Comm., Commc'n No. R.9/35: Aumeeruddy-Cziffra v. Mauritius, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (Apr. 9, 1981)).

229. The ECHR has not definitively stated whether the "implied *non-refoulement*" principle is capable of applying to all or only a subset of Convention rights. The ECHR has most often relied on Article 3 in such cases, declining to adjudicate other articles in this context on the basis that it is unnecessary where an Article 3 claim is successful. However, the ECHR has made reference to the possibility that other articles may be engaged in this context. For a summary of the relevant ECHR jurisprudence, see *Ullah*, [2004] UKHL 26, ¶¶ 9–20. In *Ullah*,

about the true scope of the implied non-*refoulement* principle, we can at least conclude definitively that state parties to the key international human rights treaties must, at a minimum, take into account the risk of torture and cruel, inhuman, or degrading treatment,[230] violations of the right to life, and, in the case of children, liberty,[231] in any third state to which it proposes to transfer refugees.

VI. SAFEGUARDS

The final Part of this Article sets out important procedural guarantees pertaining to the circumstances in which a sending state may transfer a refugee to a third state. While some references have been made above to the need for a state contemplating a protection elsewhere transfer to ensure that procedural guarantees are in place in the receiving state,[232] this Part considers those procedural safeguards in detail.

A. *The Need for an Empirical Assessment and the Ability to Challenge a Decision to Transfer*

Some protection elsewhere schemes instituted or proposed to date have not required an assessment of the particular circumstances of individual refugees; rather, transfers have been made based on blanket determinations that a third country is "safe" for all refugees.[233] The question is whether this determination is satisfactory or whether a state must engage in individual assessments. A related question is whether an indi-

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the House of Lords concluded that the principle potentially applies to all rights in the European Convention. The House of Lords surveyed the existing jurisprudence of the European Court of Human Rights, noting that articles other than Article 3 have been contemplated by that Court as possibly relevant to the non-*refoulement* analysis. Accordingly, the House of Lords held that the Court of Appeal's ruling that, "except for Article 3, articles of the European Convention can never be engaged in immigration decisions to expel an alien was wrong." *Id.* ¶ 49 (Lord Steyn). As Lord Steyn noted, while many of the rights contained in the European Convention are "qualified guarantees," "subject to derogation," they are nonetheless "of great importance," such that to reject the possibility of such rights being engaged in the context of return would result in "an impoverished view of the role of a human rights convention." *Ullah*, [2004] UKHL 26, ¶¶ 42–43. *See also* Noll, *supra* note 129, at 568 (arguing that *non-refoulement* applies to all rights).

230. *See* Convention against Torture, *supra* note 78, art. 3; ICCPR, *supra* note 115, art. 6; CRC, *supra* note 147, art. 37.

231. CRC, *supra* note 147, art. 37.

232. *See supra* notes 106–114 and accompanying text.

233. For example, Article 36 of Council Directive 2005/85, Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13 (EC), allows refugees "to be sent with no risk assessment whatever to states that are bound by both the Refugee Convention and the European Convention on human rights, which are adjudged to observe their provisions, and which operate a formal asylum procedure." HATHAWAY, *supra* note 35, at 295.

vidual refugee should be afforded the ability to challenge a decision to transfer him to another country, including the right to appeal such decision.

It is not sufficient to declare that a certain country or region is automatically "safe" or that it will necessarily provide Convention protection to all refugees. Even in the context of a regionalized formal arrangement wherein it is assumed that all member states provide comparable protection, such as that embodied in the Dublin scheme, domestic courts have prevented transfers based on a finding that a particular refugee's rights will not be protected in another state.[234] This highlights the importance of a state's inquiry into particular circumstances vis-à-vis individual refugees, which involves allowing individual refugees the opportunity to present evidence that may indicate specific concerns about the availability of protection in a third country.[235] As Legomsky observes, since the potential consequences of an incorrect decision in this context are as drastic as in the determination of the substance of a refugee claim, the same safeguards should be available in both contexts.[236] Further, Legomsky notes that these safeguards are required as a practical matter since, in each of these settings, "questions of empirical fact, predictions, characterizations of predicted events and legal interpretation issues can all arise and can all prove difficult."[237] Situations involving refugee claims by children highlight the importance of this principle. A recent review of the Dublin II Regulation has revealed that in some cases children have been transferred under that scheme to other member states "before an age assessment has been carried out to verify whether or not they are children,"[238] which is a vital question in assessing the likelihood that an applicant's rights will be respected in the receiving state. Accordingly, the Michigan Guidelines adopt the view of the House of Lords that a

234. *See supra* notes 108–110 and accompanying text.

235. For example, concerns have been expressed about the ability of women refugees to obtain protection in the United States under the U.S.-Canada Agreement. *See* Akibo-Betts, *supra* note 88; Macklin, *supra* note 88. Further, the Dublin experience makes it clear that an agreement is not sufficient; rather, a refugee must be able to argue that in his individual case a transfer should not be permitted. This is clear from the case law to date, in which a number of courts have found that refugees cannot be transferred to other member states under the Dublin II Regulation. For example, ECRE explains that in 2002, the Austrian Independent Asylum Review Board "ruled that an applicant could not be transferred to Italy according to the Dublin Convention on the grounds that Italy was not deemed safe for Turkish Kurds because there would be a danger of chain refoulement to Turkey." ECRE DUBLIN II, *supra* note 4, at 14 (internal citation omitted).

236. Legomsky, *supra* note 12, at 670. *See generally* Reinhard Marx, *Non-refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 INT'L J. REFUGEE L. 383, 404–45 (1995).

237. Legomsky, *supra* note 12, at 670.

238. ECRE DUBLIN II, *supra* note 4, at 157.

state is under a duty "to inform [itself] of the facts and monitor the decisions made by a third country in order to satisfy [itself] that the third country will not send the applicant to another country otherwise than in accordance with the convention."[239] The sending state must also ensure that an applicant's Convention rights, in addition to Article 33, will be respected in the destination country.

In light of these factors, questions arise regarding the acceptability of an expedited or summary procedure, in which procedural safeguards are compromised in order to achieve efficiency. The House of Lords considered this issue in the *Yogathas* case, in which Lord Hutton noted the

> tension between the need to make use of an accelerated procedure to enable the arrangements under the Dublin Convention to operate effectively and the duty to recognize the human rights of a person who, once he is in the United Kingdom, is entitled to the protection given by [relevant human rights guarantees].[240]

However, such concerns regarding efficiency were held not to obviate the need for the court to subject the decision to transfer a refugee "to a rigorous examination."[241] Where an accelerated procedure is employed in making transfer decisions under a protection elsewhere scheme, fundamental procedural guarantees, such as due process, procedural fairness (including the right to hear the evidence to be relied upon in an adverse decision[242]), and the right to legal counsel,[243] must be

239. R (*ex parte* Yogathas) v. Sec'y of State for the Home Dept, [2002] UKHL 36, ¶ 9, 4 Eng. Rep. 800 (Eng.) (Lord Bingham of Cornhill). This is also the approach in the Australian case law, despite its representing one of the least protective approaches to "safe third countries." *See, e.g.*, Al Toubi v. MIMA (2001) F.C.A. 1381, ¶ 32.

240. *Yogathas*, [2002] UKHL 36, ¶ 74. Note also language in the opinions of Lord Hutton, *id.* ¶ 72 ("[T]he European Court on occasion considers a case in considerable detail before holding that the applicant's complaint is manifestly ill founded . . . ."), Lord Bingham of Cornhill, *id.* ¶ 14 ("[T]he Home Secretary must carefully consider the allegation, the grounds on which it is made and any material relied on to support it."), and Lord Hope of Craighead, *id.* ¶ 58 (balancing the use of accelerated removal procedures with refugee protections under the Geneva Conventions and the ECHR "places a special responsibility on the court in its examination of the decision making process . . . . [T]he basis of the decision must surely call for the most anxious scrutiny").

241. *Id.* ¶ 74.

242. In the United Kingdom, it "is incumbent on an adjudicator to make available to the parties any evidence as to the safety of the third country upon which he relies in his determination." SYMES & JORRO, *supra* note 8, at 539, *citing* Gnavavarathan v. A Special Adjudicator, [1995] Imm. A.R. 64 (A.C.), and R (*ex parte* Kamalraj) v. A Special Adjudicator, [1995] Imm. A.R. 288 (Q.B.).

243. In *R (L) v. Sec'y of State for the Home Dep't*, (2003) EWCA (Civ) 25 (A.C.), the U.K. Court of Appeal emphasized that a preliminary hearing to assess whether a country is safe must be fair and include access to legal counsel. *Id.* ¶¶ 30, 38 (cited in HATHAWAY, *supra* note 35, at 334). Further, the procedure must give "careful consideration to the facts of the

respected.[244] International standards for procedural fairness must be complied with, particularly Article 14 of the ICCPR, which provides that in the determination of "rights and obligations in a suit at law," "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[245]

Another important issue that arises in this context is which party—the individual refugee or the sending state—carries the burden of establishing whether a third state is able to deliver the requisite protection. The UNHCR has made it clear that, since the country in which a person seeks refugee protection has the primary responsibility for considering the claim, that country has the burden of proving that it would be safe to transfer responsibility to a third country.[246] Indeed, as established above, once a refugee is within a state's jurisdiction or territory, the state incurs obligations as a matter of international law. Since the state retains ultimate responsibility for any action in violation of such obligations, the onus rests on the state to ensure such violations do not occur.[247] It is arguable that this is also required for practical reasons, since a refugee cannot be expected to have access to relevant information to establish that a third country, to which she may never have been, is incapable of providing Convention protection. As noted by the European Council on Refugees and Exiles, a refugee cannot "be expected to know how to access the protection system, be familiar with relevant national and international legal standards, or be familiar with the language of the third country."[248]

It is possible to argue that cessation determinations provide analogous guidance, since they involve a similar question of whether protection continues to be necessary in a particular case. In that context,

individual case." *L v. Sec'y of State*, EWCA (Civ) 25, ¶ 45. *See generally* HATHAWAY, *supra* note 35, at 333–35.

244. *Michigan Guidelines*, *supra* note 15, ¶ 12.

245. ICCPR, *supra* note 115, art. 14.

246. U.N. High Comm'r for Refugees, Observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status, ¶ 36, *available at* http://www.unhcr.org/protect/PROTECTION/43662adf0.pdf.

247. A similar argument is made in EUROPEAN COUNCIL ON REFUGEES AND EXILES, GUARDING REFUGEE PROTECTION STANDARDS IN REGIONS OF ORIGIN 29 (2005), *available at* http://www.ecre.org/publications/ECRE%20WF%20protreg_Dec%202005.pdf. However, a contrary position was taken by the House of Lords in *Yogathas*, in which Lord Hutton noted that "[t]he onus rests on the person alleging that his removal from the United Kingdom would constitute a breach of Article 3 by the United Kingdom to show substantial grounds for believing that he would face a real risk of being subjected to treatment contrary to Article 3." R (*ex parte* Yogathas) v. Sec'y of State for the Home Dept, [2002] UKHL 36, ¶ 61, 4 Eng. Rep. 800.

248. EUROPEAN COUNCIL ON REFUGEES AND EXILES, *supra* note 247, at 29.

courts have emphasized that the state has "an evidential burden . . . to establish that the [refugee] could safely be returned home."[249]

Legomsky has suggested, alternatively, that it may be permissible for the sending country to "shift to the applicant the burden of identifying any particular Convention provisions that he or she believes the third country will violate, as well as the burden of producing some evidence of the prospective violations."[250] However, once these burdens are satisfied, the sending state would retain "the ultimate burden of proving that the third country will not violate those provisions."[251] It is important to underline the fact that any such procedural device cannot remove the sending state's ultimate responsibility under international law to ensure that any transfer is undertaken in accordance with its obligations under both the Refugee Convention and other international human rights instruments.

The second procedural requirement is closely related to the first: not only are adequate first instance procedures critical, but they must also include sufficient opportunity for review or appeal. Since the onus remains on the state to ensure that it does not violate its international obligations by transferring refugees to a third state, the state must also provide for an opportunity for a refugee to contest the validity of a transfer decision.[252] This is particularly important where the initial decision was made by a government official, in order to ensure that a refugee's rights will be determined by an "independent and impartial tribunal established by law."[253] The potentially serious consequences of returning or sending a refugee to a country in which she may be subjected to indirect

249. R (*ex parte* Hoxha) v. Sec'y of State for the Home Dep't, [2005] UKHL 19, ¶ 66, 4 Eng. Rep. 580 (U.K.) (Lord Brown of Eaton-under-Heywood). *See also* U.N. High Comm'r for Refugees, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and 6 of the 1951 Convention Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/03 (Feb. 10, 2003) ("The burden rests on the country of asylum to demonstrate that there has been a fundamental, stable and durable change in the country of origin and that invocation of art. 1C(5) or (6) is appropriate.").

250. Legomsky, *supra* note 12, at 674.

251. *Id.*

252. A similar analysis was adopted by the Austrian Constitutional Court in a 2004 decision holding that the "complete exclusion of suspensive effect" of transfer decisions pending appeal was in conflict with the Austrian Constitution. In that case, the Court "referred to the ECHR admissibility decision *T.I. v UK*, which confirmed that the state deciding that another Dublin state is competent remains responsible for guaranteeing that Art[icle] 3 ECHR is not violated." ECRE DUBLIN II, *supra* note 4, at 15 (internal citation omitted). *See also* UNHCR DUBLIN II, *supra* note 7, at 50 ("[T]he applicants should nonetheless be given access to an appeal or review procedure" in order to "avoid possible serious consequences of incorrect first instance decisions.").

253. ICCPR, *supra* note 115, art. 14.

refoulement underscores the need for this procedure.[254] For this reason, the Michigan Guidelines conclude that determination procedures should afford an effective remedy "bearing in mind the nature of the rights alleged to be at risk in the receiving state."[255]

A recent UNHCR paper assessing the Dublin II Regulation has highlighted the difficulties that arise when a state does not allow for suspension of an order to transfer pending appeal, when the decision to transfer is overturned on appeal.[256] It concludes that in order for a remedy to be effective, "it must be possible for an applicant to request suspensive effect" pending any appeal or review of a decision to transfer.[257]

B. *The Need for Transfer to be Undertaken Pursuant to a Written Agreement*

Some of the key concerns about the implementation of protection elsewhere policies relate to the lack of any formal arrangement between sending and receiving states,[258] the fact that transfers are made to states that are not parties to the Refugee Convention, and the fact that no facility to supervise and monitor the treatment of transferred refugees may be in place in the receiving state. In light of the threat to refugee rights inherent in such schemes and the exceptional nature of protection elsewhere policies, the Michigan Guidelines recommend that transfer under a protection elsewhere policy should only take place pursuant to a written agreement between the states in question.[259] At a minimum, such an agreement should stipulate the duty of the receiving state to respect the refugee status of persons defined by Article 1 of the Convention; provide transferred refugees the rights in Articles 2–34 of the Convention; ensure

254. The UNHCR empahsizes this point in its review of the Dublin II regulation: "[t]he right to an effective remedy is indeed important, as Dublin II decisions may have serious consequences for the outcome of a person's asylum claim, in view of the continued divergence in the asylum practice of the participating States." UNHCR DUBLIN II, *supra* note 7, at 20.

255. *Michigan Guidelines*, *supra* note 15, ¶ 12.

256. UNHCR DUBLIN II, *supra* note 7, at 19–20. The UNHCR explains that in one case, the refugee was required to pay the costs of transfer back to the sending state (Austria, from Poland).

257. *Id.* at 20. ECRE makes a similar argument, noting that without automatic suspensive effect of transfer decisions, "the effect of an appeal is rendered meaningless." ECRE DUBLIN II, *supra* note 4, at 166. *See also* Legomsky, *supra* note 12, at 672 (arguing that a state must ensure that a transfer decision is not implemented "until the entire determination process, including appeal, has been completed").

258. This is particularly the case in the unilateral transfers effected by Australia, especially where a refugee has no legal right to be admitted to the transferred state. *See* HATHAWAY, *supra* note 35, at 331.

259. In this regard, UNHCR's Model Co-operation Agreement provides a useful template for the "establishment and operation of a representative presence in the territory of states." MARJOLEINE ZIECK, UNHCR'S WORLDWIDE PRESENCE IN THE FIELD: A LEGAL ANALYSIS OF UNHCR'S COOPERATION AGREEMENTS 5 (2006).

the right and ability of transferred refugees to notify UNHCR of any alleged breach of the responsibilities of the receiving state; grant UNHCR the right to be present in the receiving state and to enjoy unhindered access to transferred refugees in order to monitor compliance with the receiving state's responsibilities towards them;[260] and "abide by a procedure (whether established by the agreement or otherwise) for the settlement of any disagreement arising out of interpretation or implementation of the agreement."[261] This would constitute a "best practice" implementation of a protection elsewhere policy.

C. *Obligation to Undertake Post-Transfer Monitoring*

Whether a transfer is undertaken pursuant to a written agreement, as recommended above, or simply according to an informal arrangement between the sending and receiving states, the obligation of the sending state does not end once a refugee has been transferred. Rather, a sending state remains under an obligation to monitor, on an ongoing basis, the extent to which the receiving state respects the requirements of Articles 1–34 of the Refugee Convention in its treatment of transferred refugees. It is not sufficient for a state to rely on formal or informal assurances regarding the receiving state's intention to uphold its international obligations pursuant to the Refugee Convention, human rights treaties, or formal agreements. Rather, where the sending state intends to continue to transfer refugees to the third state, it must undertake a good faith empirical assessment of whether rights are being respected in the receiving state.

The Human Rights Committee takes a similar view of the implied *non-refoulement* provisions in the ICCPR. As it has explained:

> When a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion.[262]

This is vital because where a sending state has actual or constructive knowledge of significant violations of Articles 1–34 of the Refugee Convention by the receiving state,[263] it can no longer in good faith assert

260. *See* ZIECK, *supra* note 259, at 337 (citing Article III, ¶ 4 of the Model Co-operation Agreement).

261. *Michigan Guidelines*, *supra* note 15, ¶ 16.

262. U.N. Human Rights Comm., *Concluding Observations: Sweden*, ¶ 79(12)(b), U.N. Doc. A/57/40, 57, vol. I (2002), *cited in* HATHAWAY, *supra* note 35, at 333 n.249.

263. It must be acknowledged that very minor violations of Convention rights will not necessarily disentitle a state from relying on a transfer agreement.

that transfers can be made in accordance with the Convention. In such a case, the sending state is "disentitled from effecting any further transfers to that state under a protection elsewhere policy unless and until there is clear evidence that the breach has ceased."[264]

Where a state transfers a refugee pursuant to a protection elsewhere arrangement in good faith (with no actual or constructive knowledge that the third state will not respect the refugee's rights), and the third state in fact violates the refugee's rights, the sending state is not under a legal obligation to receive such refugees back into its territory and give them Convention protection.[265] At most one might argue that a refugee who has not been afforded protection in a state to which she has been transferred has a legitimate expectation that the original state in which she sought protection will readmit her and deliver the Convention rights to which she is entitled.[266] However, notwithstanding the fact that there is no strict legal obligation to do so, the sending state should consider facilitating "the return and readmission of the refugee in question to its territory, and ensure respect for her rights there in line with the requirements of the Convention."[267]

VII. CONCLUSION

In recent years, many state parties to the Refugee Convention have instituted a variety of schemes to assign protective responsibility over refugees to other states. These schemes, while potentially offering opportunities for the genuine and fair allocation of protection responsibility, have in practice raised serious concerns regarding respect for refugee rights. Against this background, this Article considered the legality of protection elsewhere schemes, focusing in particular on the constraints imposed on such schemes by the Refugee Convention.

264. *Michigan Guidelines*, *supra* note 15, ¶ 15.

265. The sending state may, however, seek reparation from the receiving state where the receiving state has violated an agreement and therefore committed an internationally wrongful act. In this regard it should be noted that the notion of "injury" is not confined to material damage. *See, e.g.*, Rainbow Warrior (N.Z. v. Fr.), 20 R.I.A.A. 217, 267 (1990), *cited in* CRAWFORD, *supra* note 161, at 203 (holding that France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage . . . of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well"). This type of damage could well be relevant in the context of transfer agreements, although it does little to benefit refugees directly.

266. This argument could possibly be made in domestic law systems, such as the United Kingdom and Australia.

267. *Michigan Guidelines*, *supra* note 15, ¶ 14.

An analysis of the text of the Convention revealed that protection elsewhere schemes are not prohibited by the Refugee Convention. Accordingly, it is possible for a state, in compliance with its Convention obligations, to assign protective responsibility over a refugee within its territory or jurisdiction to another state. However, as set out in this Article and the accompanying Michigan Guidelines, the circumstances in which a state may lawfully assign responsibility to another state are closely circumscribed by the obligations set out in the Refugee Convention. Most importantly, a state contemplating a transfer pursuant to a protection elsewhere policy must ensure that the state to which the refugee will be transferred will in fact respect the rights set by Articles 2–34 of the Refugee Convention. Further, in assessing this question, a sending state must allow a refugee the opportunity to contest the legality of the proposed transfer before it is effected.

The Convention therefore imposes significant restrictions on the ability of states to effect protection elsewhere policies. Indeed, given the stringent requirements of international law, it is likely that protection elsewhere schemes can be lawfully implemented only in very exceptional circumstances. The analysis in this Article suggests that many of the protection elsewhere schemes currently in operation do not comply with international law. It is imperative that states therefore revise existing policies and practices in order fully to uphold their obligations under the Refugee Convention.