No. 25-5

IN THE

Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, *et al.*,

Petitioners,

v.

AL OTRO LADO, A CALIFORNIA CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* GLOBAL STRATEGIC LITIGATION COUNCIL, *ET AL.* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Amici are scholars and organizations with expertise on domestic, international, and comparative refugee law, and submit this brief in support of Respondents out of a shared commitment to the recognition and implementation of the *non-refoulement* obligations contained in Article 33(1) of the Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (Refugee Convention).

The **Global Strategic Litigation Council** (**GSLC**) is an organization seeking to protect and advance the rights of refugees and migrants. The Council unites and supports a global coalition of over 650 NGOs, refugee leaders, lawyers, advocates, and academics, and its members are a diverse group of individual and organizational experts in international law on refugee rights, forced displacement, nationality and statelessness. GSLC scholars and experts include: Raza Husain KC and Eleanor Mitchell, Matrix Chambers; Will Bordell and Grant Kynaston, Blackstone Chambers; Jessie Ingle and Sophie Bird, Brick Court Chambers; Professor Cathryn Costello, Full Professor of Global Refugee and Migration Law, University College Dublin, Visiting Professor, University of Oxford; and Leah Zamore, Senior Fellow at the Zolberg Institute on Migration & Mobility.

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1. Pursuant to Rule 37.6, Counsel affirms that they authored the brief in whole with contributions from amici, no party's counsel authored this brief in whole or in part, and no person or entity–other than amici, their members, or their counsel–contributed monetarily to its preparation or submission.

Additional amici include over 100 organizations and scholars with expertise in international refugee rights. They are listed in Appendix A.

SUMMARY OF THE ARGUMENT

The principle of *non-refoulement*, as enshrined in Article 33(1) of the Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (Refugee Convention), is a "fundamental principle" of international refugee law, and is an established principle of customary international law. Exec. Comm. of the High Commissioner's Programme, *Note on Non-Refoulement*, EC/SCP/2 (1977). It provides that a State party to the Refugee Convention and/or the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (1967 Protocol[2]), shall not "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 principle is so fundamental that the Refugee Convention permits no reservations from or derogations to Article 33. *See* Refugee Convention art. 42(1).

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2. The 1967 Protocol incorporates arts.2-34 of the Convention and removes art.1's original geographic and temporal limitations, making its protection obligations applicable to refugees without restriction: *see* Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol*, *in* The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary 1521-1522 (Andreas Zimmerman, Terje Einarsen & Franziska Herrmann eds., 2d ed. 2024).

The United States (U.S.) has repeatedly acknowledged and affirmed that it is bound by the principle of *non-refoulement*. It acceded to the 1967 Protocol in 1968 and codified the obligation of *non-refoulement* as withholding of removal in the Refugee Act of 1980. *See* 8 U.S.C. § 1231(b)(3); *see also INS v. Aguirre-Aguirre,* 526 U.S. 415, 427 (1999) (recognizing that the purpose of the Refugee Act was to "implement the principles agreed to in the 1967 Protocol"). The U.S. further assumed its obligation of *non-refoulement* through ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (UNCAT). UNCAT explicitly prohibits *refoulement* where there are substantial grounds for believing an individual would be in danger of torture.

The prohibition of *refoulement* applies at the border and therefore prohibits State border practices such as turnbacks that compel or induce return to territories where life or freedom would be threatened. This is demonstrated by (i) the ordinary meaning of Article 33(1), read in context and in consideration of the object and purpose of the Refugee Convention and 1967 Protocol; (ii) U.S. and international jurisprudence, including this Court's decision in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 (1993), as well as legal opinions of United Nations High Commissioner for Refugees (UNHCR) and leading academic commentary; and (iii) the wider legal context, including relevant rules of international law applicable in relations between the parties to the Refugee Convention and 1967 Protocol. To avoid violating *non-refoulement,* States parties must afford asylum seekers at the border a fair and effective process for assessing the risks they may face upon return and the resulting protections due under international law.

The U.S. policy of turnbacks at the border, without providing a meaningful assessment of risk, operates in direct contravention of its *non-refoulement* obligations.

ARGUMENT

Refugee Convention art. 33(1) provides:

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

As a party to the 1967 Protocol, the U.S. is bound to "comply with the substantive provisions of Articles 2 through 34 of the Refugee Convention." *INS v. Stevic*, 467 U.S. 407, 416 (1984). This includes Article 33(1). Moreover, Congress passed the Refugee Act of 1980, amending the Immigration and Nationality Act (INA) to "conform the language of that section to the Convention," recognizing "that U.S. statutory law clearly reflects our legal obligations under international agreements." H. Rep. No. 608, 96th Cong. 1st Sess. 17-18 (1979).

The U.S. is similarly bound to the principle of *non-refoulement* as a party to UNCAT: "[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." UNCAT art. 3(1). The U.S. ratified UNCAT in 1994, and Congress passed legislation directing the implementation of UNCAT in 1998. *See* Foreign Affairs

Reform and Restructuring Act (FARRA). Pub. L. 105-277, Div., G., Title XXII. § 2242, 112 Stat. 2681-822 (codified as note to 8 U.S.C. § 1231); *see also* 8 C.F.R. §§ 208.16–208.18 (implementing regulations).

Under the U.S. Constitution's Supremacy Clause, treaties "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2, and the U.S. must act consistently with the obligations established in treaties to which it is a party, including treaties that are not "self-executing". Restatement (Fourth) of Foreign Relations Law §§ 301(3), 310 n.12 (Am. Law Inst. 2018). Even in the absence of implementing legislation, treaties "bind the United States as a matter of international law," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004), and courts appropriately take treaty obligations into account in construing federal law. *See Chew Heong v. United States*, 112 U.S. 536, 548–50 (1884). The Supreme Court long ago established that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The U.S.'s *non-refoulement* obligations "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (VCLT). "Context" includes the text and internal logic of the treaty as a whole, including its preamble, together with any relevant rules of international law that apply in the relations between the States parties. VCLT arts. 31(2), 31(3)(c).

Applying these authoritative interpretative rules, the "one true meaning"[3] of Article 33(1) of the Refugee Convention and related international legal obligations is clear and universally accepted: the *refoulement* prohibition applies at the border.

I. Refugee Convention Article 33(1) applies to turnbacks at the border based on its ordinary meaning, construed in context, and in light of the object and purpose of the Refugee Convention.

The ordinary meaning of Article 33(1), taking account of its context, and the object and purpose of the Convention, is settled: the obligation of *non-refoulement* applies within the territory and jurisdiction of a State, which includes a State's borders.

First, as a matter of treaty text, Article 33(1)'s prohibition of *non-refoulement* unequivocally encompasses rejection at the border. 'Expulsion' constitutes "a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State." Int'l L. Comm'n, Draft Articles on the Expulsion of Aliens, art. 2, UN Doc. A/69/10 (2014).[4] By contrast, 'return' is

3. *R, ex parte Adan v. Sec'y of State for the Home Dep't* [2000] UKHL 67 (Lord Steyn) ("[T]he Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the VCLT] and without taking colour from distinctive features of the legal system of any individual contracting state..... [The courts] must search... for the true autonomous and international meaning of the treaty. And there can only be one true meaning.").

4. Walter Kälin, Martina Caroni & Lukas Heim, *Administrative Measures: Article 33, para. 1 1951 Convention*, ¶93, *in* The 1951 Convention Relating to the Status of Refugees

the Convention's residual category, capturing all other measures that turn back or force an individual to leave the expelling State.

The French term '*refouler*' was deliberately included alongside 'return' in the English version of Article 33(1) to invoke "a notion in French and Belgian administrative law related to measures bringing a person back to the frontier of a neighbouring State, indicating that 'return' must be understood in a broad sense."[5] '*Refouler*' means "to drive back or to repel," in this context covering "summary refusal of admission of those without valid papers."[6]

The Court unanimously endorsed this interpretation of Article 33(1) in *Sale v. Haitian Ctrs. Council, Inc.,* 509

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and its 1967 Protocol: A Commentary 1521 (Andreas Zimmerman, Terje Einarsen & Franziska Herrmann eds., 2d ed. 2024).

5. *Id.* at ¶95; *see also* Jane McAdam and Emma Dunlop, *Interpretation of the 1951 Convention*,¶115, *in* The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (Andreas Zimmerman, Terje Einarsen & Franziska Herrmann eds., 2d ed. 2024) ("[T]he French term '*refouler*' was incorporated in Art. 33 precisely to convey a particular meaning that could not be encapsulated by a single English word."); Penelope Mathew, *Non-refoulement in* The Oxford Handbook of International Refugee Law, 908 (Cathryn Costello, Michelle Foster, and Jane McAdam eds., 2021) ("[T] he ordinary meaning of the term *refoulement* in French, and 'return' in English, encompass action taken at the border"); C.W Wouters, International Legal Standards for the Protection from Refoulement 50-51 (2009) ("The word *refouler*… must be interpreted as describing any (police) conduct which results in the summary removal of aliens or the refusal to allow them to enter the State's territory."); Guy Goodwin-Gill & Jane McAdam, The Refugee in International Law 311 (4th ed. 2021).

6. Goodwin-Gill & McAdam, *supra* note 6, at 241.

U.S. 155, 178 (1993). While holding that INA §243(h)(1) and Refugee Convention art. 33(1) did not limit Presidential power to order the repatriation of Haitians intercepted in international waters, the Court affirmed "the term 'return ("*refouler*")' refers to the exclusion of aliens who are … 'on the threshold of initial entry'." *Id.* at 180. The Court further recognized that relevant translations of both '*refoule*' and 'return' imply that "'return' means a defensive act of resistance or exclusion at the border." *Id.* at 181-182. As Justice Blackmun noted in his dissent, the Court unanimously and correctly concluded, "the [Refugee] Convention *does* apply to refugees who have reached the border." *Id.* at 196 (Blackmun, J., dissenting) (emphasis in original).

Second, the application of Article 33(1) to turnbacks at the border is supported by the inclusion of the phrase "*in any manner whatsoever*," a broad formulation not conditioned by any express spatial, procedural, or jurisdictional limitation. This language recognizes that the form, mechanism, or label which a State applies when it effectuates return is legally irrelevant: when return gives rise to a real risk to life or freedom for a Convention reason, it is prohibited.[7]

Third, the structure of the Refugee Convention affirms this reading. Article 32 regulates 'expulsion' separately,

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7. *See* Vincent Chetail, International Migration Law 187 (2019) (the specific legal character of the acts prohibited by art.33(1) is "not relevant, whether it is labelled deportation, extradition, non-admission at the border, maritime interception, transfer, or rendition."); Wouters, *supra* note 6, at 50; James C. Hathaway, The Rights of Refugees Under International Law 357-359 (2d ed. 2021); Goodwin-Gill & McAdam, *supra* note 6, at 310.

with the deliberately wider term 'refoulement' being chosen in Article 33, to include rejection at the frontier of a wider class of persons. Article 33(1) also lacks language limiting its applicability to persons formally admitted to, or present in, the interior of a State. In context, this silence is legally significant. When the drafters sought to limit the scope of specific provisions in the Convention, they did so expressly. For example, the Convention applies limited qualifications to the protections afforded to individuals "within [States parties'] territories" (arts. 4 and 27), those "lawfully in their territory" (arts. 18, 26 and 32), and those "lawfully staying in their territory" (arts. 15, 17, 19, 21, 23, 24 and 28). That Article 33(1) uses the wider term '*refouler*' and lacks any modifier requiring entry or lawful presence reaffirms its application at the border.[8]

Fourth, the object and purpose of the Refugee Convention and the 1967 Protocol compel the same conclusion. As the Preamble makes clear, the Convention was adopted to extend the protection of the international community to refugees and to secure for refugees the widest possible exercise of their fundamental rights. *See* Refugee Convention pmbl. (acknowledging efforts to "assure refugees the widest possible exercise of these

8. *See* Wouters, *supra* note 6, at 49; Hathaway, *supra*, note 8, at 181-183; Goodwin-Gill & McAdam, *supra* note 6, at 310-311. This is consistent with the approach to the interpretation of domestic legislation described in *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

fundamental rights and freedoms").[9] The prohibition of *refoulement* is the Convention's central protection.

An interpretation of Article 33(1) that permits turnbacks at the border could allow for the denial of the critical protection of *non-refoulement* when it is most urgently needed, permitting States to circumvent their obligations by refusing to consider a claim of asylum or withholding at their borders.[10] The case of the MS St. Louis, a ship bearing 937 passengers, mostly Jewish persons fleeing persecution in Germany in May 1939, provides illustrative historical context. The ship sailed from Hamburg to Havana, only to be denied entry by Cuba, the United States, and Canada. With no way to disembark, the Jewish people on board were forced – by means of turnback rather than post-entry expulsion – to

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9. The United Kingdom (U.K.) Supreme Court has repeatedly held that the Convention is to be given *"generous and purposive interpretation"*, not a narrow or restricted one, "bearing in mind its humanitarian objects and the broad aims reflected in its preamble." *S.T. (Eritrea) v. Sec'y of State for the Home Dep't*, [2012] UKSC 12, [2012] 2 A.C. 135, ¶ 30. Kälin, Caroni & Heim, *supra* note 5, at ¶ 107, 1525 (noting that an interpretation encompassing rejection at the border "is consistent with the object and purpose of the 1951 Convention and its humanitarian character"); Wouters, *supra* note 6, at 35 ("The object and purpose of the Convention is the protection of the fundamental (human) rights of people who are no longer protected by their own country."); Hathaway, *supra* note 8, at 140-141; Goodwin-Gill & McAdam, *supra* note 6, at 6.

10. As Judge Pinto de Albuquerque noted in his concurring opinion in *Hirsi Jamaa & Others v. Italy*, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012) ("A State cannot evade its treaty obligations in respect of refugees by using the device of changing the place of determination of their status.")

return to Europe, where many died at the hands of the Third Reich.[11] It was in the immediate aftermath of this and other tragedies arising from World War II that the Refugee Convention was drafted.

To allow for the exclusion of persons at the border from Article 33(1) protections would produce a result incompatible with the purpose identified above and contrary to the duty to interpret and perform the Refugee Convention and 1967 Protocol in good faith. VCLT arts. 26 ("*pacta sunt servanda*") and 31(1).

Fifth, this interpretation of Article 33(1) is further supported by the general conception of States' jurisdiction in international law. Under settled international legal principles, a State exercises jurisdiction not only within its territory, including at its borders, but anywhere the State exercises *"effective control."*[12] Border checkpoints and ports of entry are archetypal places where State

11. Sarah A. Ogilvie & Scott Miller, Refuge Denied: The St. Louis Passengers and the Holocaust (2006).

12. According to the UN Committee Against Torture's interpretation of article 3 of UNCAT, *non-refoulement* obligations apply to "any area under its control or authority." U.N. Comm. Against Torture, General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶ 10, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018); U.N. Comm. Against Torture, General Comment No. 2 on the Implementation of Article 2 by States Parties, ¶ 16, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); *see also* U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (interpreting Article 2 of the ICCPR and holding that persons "subject to [States parties'] jurisdiction" includes "anyone within [their] power or effective control.").

officials exercise both territorial jurisdiction and effective control over persons.

To illustrate, the European Court of Human Rights (ECtHR) has found in relation to checkpoints located at Poland's border and operated by the Polish Border Guard that "the presumption of the jurisdiction of the Polish State applies to all actions taken with respect to the applicants presenting themselves at those checkpoints." *M.K. & Others v. Poland*, App. Nos. 40503/17, 42902/17 & 43643/17, ¶129-132, 174-186, 204-2 (Eur. Ct. H.R. Jul. 23, 2020); *see also D.A. & Others v. Poland*, App. No. 51246/17, ¶¶33-34, 64, 69, 79, 81-84 (Eur. Ct. H.R. Nov. 22, 2021) (confirming that Poland's refusal to consider applications for international protection made by asylum-seekers at the border, denial of entry, and return to Belarus, violated Poland's *non-refoulement* obligations, as well as the prohibition on collective expulsion); *N.D. & N.T. v. Spain*, App. Nos. 8675/15 & 8679/15, ¶ ¶ 107, 178 (Eur. Ct. H.R. Feb. 13, 2020) (noting that the prohibition on *refoulement* "includes the protection of asylum-seekers in cases of both non-admission and rejection at the border."). These and other cases, see *infra* Sec. III, recognize that States plainly exercise effective control (and jurisdiction) over individuals who present at their borders, even when they have been stopped before physically entering the country.[13] As Professor Kälin has noted in the specific context of Article 33(1) of the Refugee Convention, "a refugee who has approached a border guard at the frontier of the country of refuge is under the effective power and control of the country of refuge."[14]

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13. Kälin, Caroni & Heim, *supra* note 5, at 1525, ¶106.

14. *Id.*; *see also id.* at ¶ 90, 1519; Hathaway, *supra* note 8, at 384 (determining whether an asylum seeker is subject to the jurisdiction

Sixth, while recourse to the *travaux préparatoires* to the Refugee Convention is unnecessary, the drafting history – consulted as a supplementary means of interpretation pursuant to Article 32 of the VCLT[15] – confirms that the Convention drafters intended Article 33(1) to apply to turnbacks at the border. At the outset of the drafting process, the U.N. Secretary-General explained: "The turning back of a refugee to the frontier of the country where his life or liberty is threatened . . . would be tantamount to delivering him into the hand of his persecutors." Ad Hoc Committee on Statelessness and Related Problems, *Status of Refugees and Stateless Persons – Memorandum by the Secretary General, Comments on Article 24 of the preliminary draft*, ¶ 3, U.N. Document E/AC.32/2 (Jan. 3, 1950).

At the First Session in February 1950, the U.S. representative noted:

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of a particular State depends principally upon whether they are "subject to that State party's effective authority and control."); Goodwin-Gill & McAdam, *supra* note 6, at 308 (explaining States are bound by the principle of *non-refoulement* "where States assert jurisdiction."); Mathew, *supra* note 6, at 909; Wouters, *supra* note 6, at 53.

15. *Travaux préparatoires* may be used to confirm the meaning derived from VCLT art. 31 analysis, resolve ambiguity, or avoid absurdity. Where Article 31 produces a clear interpretation, the International Court of Justice has declined to refer to the *travaux préparatoires* because "it is not necessary" to do so. *The Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 1994 I.C.J. Rep. 6, ¶ 55 (Feb. 3, 1994); *see also Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)*, Judgment, 1995 I.C.J. Rep. 6, ¶¶ 40-41 (Feb. 15, 1995).

> Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier . . . the problem was more or less the same. Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened.

Ad Hoc Committee on Statelessness and Related Problems, *First Session: Summary Record of the Twentieth Meeting*, ¶¶ 54-55 (Statement of Mr. Henkin of the United States), U.N. Doc. E/AC.32/SR.20 (Feb. 1, 1950). No attendee at the First Session contradicted these views, and the next day, Belgium and the U.S. co-sponsored draft language undertaking "not to expel or in any way [return] refugees." Ad Hoc Committee on Statelessness and Related Problems, *Proposal by the United States and Belgium*, 1, U.N. Doc. E/AC.32/L.25 (Feb. 2, 1950). The Belgian representative explained that the words "in any way" ensured that the Article "referred to various methods by which refugees could be expelled, *refused admittance* or removed." Ad Hoc Committee on Statelessness and Related Problems, *First Session: Summary Record of the Twenty-Second Meeting*, ¶ 109 (Statement of Mr. Cuvelier of Belgium), U.N. Doc. E/AC.32/SR.22 (Feb. 2, 1950) (emphasis added). The Working Group later produced a new draft including the words "in any manner whatsoever," which remained in the final text.[16]

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16. In his commentary on the *travaux préparatoires*, Dr. Weis noted: the "question arises whether the provision applied to non-admittance at the frontier and to extradition" and concludes, "[t]he words 'in any manner whatsoever' would seem to indicate that this is the case." Dr. Paul Weis, *The Refugee Convention 1951: The Travaux Preparatoires Analysed with a Commentary by Dr Paul Weis,* Article 33 (1995).

During the Conference of Plenipotentiaries, the Swiss and Dutch representatives expressed concerns about the scope of the *non-refoulement* obligation especially in situations of "extraordinary influx" or "mass migration." *See* Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Sixteenth Meeting*, 6 (Statement of Mr. Zutter of Switzerland), U.N. Doc. A/CONF.2/SR.16 (Jul. 11, 1951); *see* also *Summary Record of the Thirty-Fifth Meeting*, 21 (Statement of Baron van Boetzelaer of the Netherlands), U.N. Doc. A/CONF.2/SR.35 (Dec. 3, 1951). None of those interventions were directed at redefining the border itself as a space outside State territory or jurisdiction. In any event, no amendment incorporating a territorial or mass-influx qualifier was adopted. The operative text described above remained unchanged.

In sum, a good-faith interpretation of the ordinary meaning of Article 33(1), read in context, and in light of the object and purpose of the Refugee Convention and 1967 Protocol, yields only one conclusion: the principle of *non-refoulement* constrains State conduct at the border.

II. Judicial opinions, UNHCR, and academic commentary all confirm that Article 33(1) applies at the border.

The application of the principle of *non-refoulement* at the border is further supported by the jurisprudence and commentary interpreting Article 33(1).

First, Courts applying Article 33(1) have consistently concluded that it applies to non-rejection at the border. As noted, this Court concluded in *Sale*, "the Convention *does* apply to refugees who have reached the border," in large part based on the ordinary meaning of Article 33(1).

Sale, 509 U.S. at 196 (Blackmun, J., dissenting) (noting the majority's agreement with this statement) (emphasis added).

The U.K. House of Lords has also recognized the applicability of *non-refoulement* at State borders, describing a "general acceptance of the principle that a person who leaves the state of his nationality and who applies to the authorities of another state for asylum, *whether at the frontier of the second state or from within it*, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claims to have a well-founded fear." *R (European Roma Rights Centre) v. Immigration Officer, Prague Airport*, ¶ 26 [2004] UKHL 55, [2005] 2 A.C. 1 (emphasis added). The High Court of Kenya has held that "[t]he prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including . . . non-admission at the border . . . This is evident from the wording of Article 33(1) . . . which refers to expulsion or return (*refoulement*) 'in any manner whatsoever.'" *Kenya National Commission on Human Rights v. Attorney General*, ¶ 18, Constitutional Petition No. 227 of 2016, Ken. HC, Feb. 9, 2017. The Supreme Court of Appeal of South Africa has also treated Article 33(1) as having the same scope as the *non-refoulement* provision in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which expressly applies to rejection at the border. *Abdi v. Minister of Home Affairs* 2011 (3) SA 37 (SCA) (Feb. 15, 2011) ¶ 22.[17]

17. *See* Marina Sharpe, *The Regional Law of Refugee Protection in Africa* 73-74 (2018).

Second, UNHCR has determined that the principle of *non-refoulement* "unequivocally encompasses non-rejection at the frontier."[18] UNHCR's views are of particular significance because States are legally obliged to cooperate with it to "facilitate its duty of supervising the application of the provisions" of the Refugee Convention and 1967 Protocol. *See* Refugee Convention, art. 35(1); 1967 Protocol, art. II(1). The Court has recognized the views set out in the UNHCR Handbook as providing "significant guidance in construing the 1967 Protocol." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 436 n.22 (1987).

UNHCR's Executive Committee (ExCom), its governing body of State representatives (including from the U.S.), has consistently endorsed the application of *non-refoulement* at the border. ExCom Conclusions, which serve as a valuable source of interpretive guidance, refer consistently to "the fundamental principle of *non-refoulement*" as including "non-rejection at frontiers."[19] ExCom, Conclusion No. 6 (1977); ExCom, Conclusion No. 99 (2004) ¶ 1; *see also* ExCom, Conclusion No. 22 (1981) ¶ IIA(2); ExCom, Conclusion No. 81 (1997), ¶ (h); ExCom, Conclusion No. 82 (1997), ¶ (d)(iii); ExCom, Conclusion No. 85 (1998), ¶ (q); ExCom, Conclusion No. 108 (2008), ¶ (q).

Additional authoritative UNHCR legal statements similarly recognize Article 33(1)'s application at the border. UNHCR, *Handbook on Procedures and Criteria*

18. Goodwin-Gill & McAdam, *supra* note 6, at 245 (citing UNHCR, *Note on International Protection*, UN Doc. A/AC.96/1145 (Jul. 2, 2015), ¶ 39); *see also* UNHCR, *Note on International Protection*, UN Doc. A/AC.96/1098 (Jun. 28, 2011), ¶30.

19. Kälin, Caroni & Heim, *supra* note 5, at ¶¶ 31, 89, 1501 and 1519-1520; Hathaway, *supra* note 8, at 145.

for Determining Refugee Status (reissued February 2019), ¶ 192 (explaining that "[t]he competent official (e.g. immigration officer *or border police officer*) to whom the applicant addresses himself *at the border* or in the territory of a Contracting State should… be required to act in accordance with the principle of *non-refoulement*") (emphasis added). UNHCR advisory opinions have consistently provided a similar interpretation. *See e.g.* U.N. High Comm'r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* at 12, ¶ 24 (Jan. 26, 2007) (Article 33(1) "applies wherever a State exercises jurisdiction, including at the frontier"); UNHCR, *Note on International Protection*, UN Doc. A/AC.96/1110 (Jul. 4, 2012), ¶ 13 ("[t]he obligation of *non-refoulement* includes non-rejection at the frontier"); U.N. High Comm'r for Refugees, Annex to UNHCR Note on the "Externalization" of International Protection: Policies and Practices Related to the Externalization of International Protection ¶ 15 (May 28, 2021) (denial of access to territory or to asylum procedures "creates a risk of *refoulement*"); and U.N. High Comm'r for Refugees, Legal Considerations on Asylum and Non-Refoulement in the Context of "Instrumentalization" ¶ 10 (Sept. 26, 2024). (affirming *non-refoulement* obligations are "engaged as soon as individuals present themselves at the border"). Multiple UNHCR interventions before supranational courts, such as the ECtHR, similarly confirm the principle of *non-refoulement*'s application to "pushback practices and non-admission at the border." Intervention in *S.A.A. & Others v. Greece* (App. No. 22146/21, July 2022), ¶ 3.2.2; *see also* Intervention in *Hirsi Jamaa*, *supra,* ¶ 4.2.1.

Third, academic commentary consistently affirms that Article 33(1) encompasses rejection at the border. For example, Sir Elihu Lauterpacht and Daniel Bethlehem explain that "the principle of *non-refoulement* . . . will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs . . . [including] at border posts or other points of entry."[20] Professor Kälin likewise observes that "it does not make any difference whether [a refugee] is ejected at the land border of a country adjacent to the country of persecution, sent there by plane from the airport after arrival, or sent back after admission to the territory."[21] Professors Goodwin-Gill and McAdam concur: *non-refoulement* "unequivocally encompasses non-rejection at the frontier."[22] Finally, UNHCR experts Wouters and Shilton affirm: "[a] state is responsible for ensuring protection against *refoulement* to all individuals who are . . . at its borders."[23]

III. Related international legal norms confirm that the principle of *non-refoulement* applies at the border.

A proper interpretation of Article 33(1) must consider the meaning of *non-refoulement* under relevant rules

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20. Lauterpacht & 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* 87, 111 (Erika Feller, Volker Türk & Frances Nicholson eds. 2003).

21. Kälin, Caroni & Heim, *supra* note 5, at 1519, 1525.

22. Goodwin-Gill & McAdam, *supra* note 6, at 245-248.

23. Cornelis Wouters and Cameron Shilton, *Non-refoulement*, *in* Elgar Concise Encyclopedia of Migration and Asylum Law, 376-377 (Vincent Chetail ed., 2025); *see also* Wouters, *supra* note 6, at 52; Hathaway, *supra* note 8, at 342, 356-359.

stemming from general principles of international law, customary international law, and rules on other relevant multilateral treaties "applicable in the relations between the parties." VCLT art. 31(3).[24] This approach ensures coherence among applicable sources of international law and is an "integral part of the task of interpretation." *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment*, I.C.J. Rep. 2003, at 161 (Nov. 6, 2003) ¶¶ 182–83. In all cases, the principle of *non-refoulement* has been interpreted as applying at the border.

Most significantly, UNCAT[25] art. 3(1) provides: "[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." The UN Committee Against Torture has clarified that this obligation applies "in any territory under [a State party's] jurisdiction or any area under its control or authority." Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶ 10, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018). The Committee further emphasized that States parties "should not adopt

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24. Campbell McLachlan, *The Principle of Systemic Integration in International Law* (2024), ¶3.233 ("[I]t is accepted that 'the other treaty obligation may still be applicable to the interpretation of the obligations of the treaty parties, even if not all of them are also parties to the other treaty rule. The other rule may evidence the common understanding of the parties as to the meaning of a term, pursuant to the overall requirement of Article 31(1) to consider the object and purpose of the treaty."); *see also* McAdam and Dunlop, *supra* note 6, at ¶¶66, 69.

25. Of the 149 State parties to the Refugee Convention and/or its 1967 Protocol, only nine have not signed and ratified UNCAT: Haiti, Iran, Jamaica, Papua New Guinea, the Solomon Islands, Trinidad and Tobago, Tanzania, and Zimbabwe.

dissuasive measures or policies, such as . . . refusing to process claims for asylum . . . which would compel persons in need of protection under Article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment there." *Id*, ¶ 14. This is particularly significant given that U.S. obligations under Article 3 of UNCAT have been incorporated into U.S. law. *See* 8 C.F.R. § 208.16(c).

The International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (ICCPR)[26] – to which the U.S. is also a party[27] – similarly gives rise to the interpretation that *non-refoulement* obligations apply at the border. *Obligations of States in Respect of Climate Change, Advisory* Opinion, 2025 I.C.J. ___ (23 July 2025), ¶ 378; U.N. Human Rights Comm., General Comment 31, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). Furthermore,

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26. Of the 149 State parties to the Refugee Convention and/or its 1967 Protocol, only six have not signed and ratified the ICCPR: China, Nauru, the Holy See, the Solomon Islands, St Kitts and Nevis, and Tuvalu. On the relevance of the ICCPR, see Hathaway, *supra* note 6, at 146-147.

27. Although Congress has not passed independent implementing legislation, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992), the Executive Branch has repeatedly assured the Senate that the U.S. could and would fulfil its treaty commitments by applying existing federal constitutional and statutory law in a manner commensurate with its treaty obligations. *See* ICCPR, S. Exec. Rep. No. 102-23, at 5, 19, 26-27 (1992) (existing laws obviate the need for further implementing legislation).

non-refoulement is regarded as a norm of customary international law[28] that applies at the border.[29]

Finally, the close relationship between international refugee law and human rights law makes interpretations of regional human rights treaties relevant to the application of *non-refoulement* at the border. As discussed in Sec. I, *supra*, the ECtHR has proceeded on the basis that the prohibition on *refoulement* "includes the protection of asylum-seekers in cases of both non-admission and rejection at the border." N.D. & N.T. v. Spain, supra, ¶178 (recognizing the State's exercise of jurisdiction over applicants at the border); see also D.A. & Others v. Poland (App. No. 51246/17, Nov. 22, 2021), ¶¶ 33-34, 64, 69, 79, 81-84, and M.K. & Others v. Poland (App. Nos. 40503/17, 42902/17 and 43643/17, Dec. 14, 2020), ¶¶ 129-132, 174-186, 204-211.

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28. *See* Cathryn Costello & Michelle Foster, *Non-refoulement* as Custom and *Jus Cogens*? *Putting the Prohibition to the Test*, *in Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* 273, 282-305 (Maarten den Heijer & Harmen van der Wilt eds., 2016), and the judicial authorities cited therein; Goodwin-Gill & McAdam, *supra* note 6, 300-306. Subsequent case law accepting the customary character of *non-refoulement* includes *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others*, Case CCT 51/23, [2023] ZACC 45 (Const. Ct. of S. Afr.), ¶ 31; *Mason v Minister of Citizenship* [2023] SCC 21, ¶ 108; Decision SU-543 of 2023 (Colom. Const. Ct.); Decision SU-397 of 2021 (Colom. Const. Ct.).

29. This is principally because the norm is rooted in widely ratified human rights treaties and other international instruments, including those discussed in this section, which uniformly recognize that *non-refoulement* obligations apply at the border.

Similarly, Article 22(8) of the American Convention on Human Rights 1969 ("ACHR") specifically prohibits *refoulement* of an individual "whose life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion." The Inter-American Court of Human Rights (IACtHR) has recognized: "it is widely accepted that the principle of *non-refoulement* applies not only in the territory of a State, but also at the border," adding that *refoulement* can include "rejection at the border" and "non-admission." The Institution of Asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the ACHR), Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (ser. A) No. 25, ¶¶187, 190 (May 30, 2018); *see also* Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶210 (Aug. 19, 2014).

Additional international and regional instruments similarly affirm – and expressly provide for – the application of *non-refoulement* obligations at the border. *See e.g.* Org. of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa, art. 2(3), Sept. 10, 1969, 1001 U.N.T.S. 45; Cartagena Declaration, adopted Nov. 22, 1984, § III(5); Asian-African Legal Consultative Org. (AALCO), Bangkok Principles on the Status and Treatment of Refugees, art. III(l), adopted Dec. 31, 1966, as revised June 24, 2001. This position also received unanimous support from the U.N. General Assembly, which emphasized that the principle of *non-refoulement* ensures that no asylum-seeker "*shall be subjected to measures such as rejection at the frontier.*" Declaration on Territorial Asylum, U.N. Gen. Assemb.

Res. 2312 (XXII), art. 3(1), U.N. Doc. A/RES/2312(XXII) (Dec. 14, 1967) (emphasis added).

IV. The application of Article 33(1) at the border obliges states to provide access to fair and effective procedures.

Because *non-refoulement* protects individuals from exposure to certain threats or risks, the principle entails an obligation to establish and conduct proper procedures to assess those risks. Without such procedures, protection would be illusory. Accordingly, wherever Article 33(1) applies – including at the border – States must provide access to fair and effective procedures before taking any action that might result in *refoulement*, whether direct or indirect.[30] Any other approach would be incompatible with the obligation under Articles 26 and 31(1) of VCLT to interpret and perform Article 33(1) in good faith, and consistent with the requirement that the U.S. act in a manner consistent with its treaty obligations.

These essential procedural obligations have been recognized by courts, UNHCR, and eminent commentators in various contexts. The U.K. House of Lords has recognized them in *R (European Roma Rights Centre),* 2004 UKHL 55, ¶26 ("a person who … applies to the authorities of another state for asylum, whether at the

30. Even where an individual fears persecution in a third country, rejection at the frontier may result in indirect *refoulement* if there is a real risk that the country they are left in or returned to will not itself provide access to fair and effective asylum procedures capable of protecting them against onward removal. *See* Kälin, Caroni & Heim, *supra* note 5, at ¶ 111, 1527; *see also* Goodwin-Gill & McAdam, *supra* note 6, at 307; *R. v. Sec'y of State for the Home Dep't ex parte Bugdaycay* [1987] A.C. 514, 532 (H.L.).

frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claims to have a well-founded fear.").[31] The South African Constitutional Court has held that "the 'shield of *non-refoulement*' may be lifted only after a proper determination has been completed." *Ruta v. Minister of Home Affairs* [2018] ZACC 52, ¶ 54.[32] The Canadian Supreme Court has upheld a statutory "safe third country" agreement only on the basis that it contained adequate procedural protections against both direct and indirect *refoulement*. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17. All of this is consistent with the Court's approach in *Sale*, which treated former INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) as inapplicable on the High Seas because, *inter alia*, the statute did not expressly authorize the executive branch to conduct the requisite risk-assessment proceedings *in international waters*, as opposed to at the border or in the interior. *Sale*, 509 U.S. at 172-73.

Similarly, the IACtHR has made clear that asylum seekers "cannot be turned back at the border or expelled without an adequate and individualized analysis of their application." *Case of the Pacheco Tineo Family v. Bolivia*, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 153 (Nov. 25, 2013). The ECtHR has likewise held that a State contemplating removal, including to a third country, has a duty to "examine thoroughly the question

31. *See also Saad v. Sec'y of State for the Home Dep't*, [2002] Imm. A.R. 471, ¶12.

32. Similarly, the High Court has held that the State could comply with its *non-refoulement* obligations "only. . . if it assesses, on its merits, any claim by an individual that returning them to a country would place them at real risk of irreparable harm." *Scalabrini Centre of Cape Town,* [2023] ZACC 45, ¶¶53, 55-56.

whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement*"; and that this duty can only be discharged "by means of a legal procedure resulting in a legal decision." *Ilias & Ahmed v. Hungary*, App. No. 47287/15, 71 Eur. Ct. H.R. Rep. 6, ¶¶ 134-137 (Eur. Ct. H.R. 2019).[33] It has also confirmed the applicability of this principle at the border, concluding that "pending an application for international protection, a State cannot deny access to its territory to a person presenting himself or herself at a border checkpoint who alleges that he or she may be subjected to ill-treatment . . . unless adequate measures are taken to eliminate such a risk." *M.K.,* App. No. 40503/17. ¶ 179. *See also D.A.,* App. No. 51246/17, ¶ 69 (concluding that the notion of "expulsion" in ECHR art. 4 Protocol No. 4 included conduct "by which a foreigner is compelled to leave the territory . . . if his or her personal circumstances have not been examined, *including the situations in which persons who arrived at the border of the respondent State* were stopped and returned to the originating State") (emphasis added); *M.A. & Z.R. v. Cyprus*, App. No. 39090/20, ¶¶ 89-90 (Eur. Ct. H.R. Jan. 8, 2025) (in returning Syrian asylum-seekers from Cypriot territorial waters to Lebanon, Cyprus had unlawfully failed to assess whether they would have access in Lebanon to fair and effective safeguards against return to Syria); *A.R.E. v. Greece*, App. No. 15783/21, ¶¶ 280-

33. The U.K. Supreme Court has endorsed the position of the ECtHR in *Ilias & Ahmed*, emphasizing that "if asylum seekers do not have access to such a procedure there will be a real risk of genuine refugees being refouled, either because their claims are not considered at all or because they are not determined properly": *R. (AAA) v. Sec'y of State for the Home Dep't* [2023] UKSC 42 ¶¶ 24, 44–45, 63.

283 (Eur. Ct. H.R. Jan. 7, 2025) (systematic turnbacks to Turkey without affording access to an asylum procedure violated Greece's ECHR obligations).

Recent guidance from UNHCR has further stressed that "States may not reject individuals at the border without an individual assessment of their protection needs." UNHCR, *Legal Considerations on Asylum and Non-Refoulement in the Context of 'Instrumentalization'*, ¶¶ 10, 23 (Sept. 26, 2024). ExCom has likewise stated that the application of *non-refoulement* at the border requires "access to fair and effective procedures for determining status and protection needs"[34] – a view reflected in academic commentary.[35]

CONCLUSION

Non-refoulement is recognized globally as the cornerstone of international refugee law and protection. The principle of *non-refoulement* as enshrined in Article 33(1) applies to States' conduct at the border and therefore to the Turnback Policy. This bedrock principle requires the provision of access to fair and effective procedures to determine asylum seekers' entitlement to protection against *refoulement*. As the Ninth Circuit recognized,

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34. UNHCR ExCom Conclusion No. 6 (1977). *See* also ExCom Conclusions No. 81 (XLVIII), 1997, ¶ (h); No. 82 (XLVIII), 1997, ¶ (d)(ii) and (iii); No. 85 (XLIX), 1998, ¶ (q).

35. Goodwin-Gill & McAdam, *supra* note 6, at 308 (in order to respect *non-refoulement*, an asylum seeker "must not be sent to any place in which they may face a real chance of persecution or other serious harm before their status has been assessed in accordance with the law."); *see also* 244-245; Kälin, Caroni & Heim, *supra* note 5, at ¶ 180 (art.33(1) "provides a basis for procedural rights to refugee status determination.").

adoption of the Government's position would "reflect a radical contraction of the right to apply for asylum because it would give the Executive Branch vast discretion to prevent people from applying by blocking them at the border." *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102, 1117 (9th Cir. 2025), cert. granted sub nom. *Noem v. Al Otro Lado*, 223 L. Ed. 2d 225 (Nov. 17, 2025). The Government's interpretation would also constitute an unjustified departure from the settled understanding of *non-refoulement*, undermining the core protection of international refugee law.

Respectfully submitted,

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APPENDIX

APPENDIX — COMPLETE LIST OF SIGNATORIES

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Association for Legal Intervention (Poland)

AsyLex (Switzerland)

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Coalición por Venezuela (United States)

Corporación Alianza Migrante (Mexico)

Corporación Opción Legal (Colombia)

Cristosal (El Salvador, Guatemala, and Honduras)

Appendix

DIGNITY Kwanza (Tanzania)

European Center for Constitutional and Human Rights (Germany)

Front-LEX (Netherlands)

Fundación Crea Tu Espacio (Ecuador)

Fundación Refugiados Unidos (Colombia)

Global Rights Advocacy (United States)

Global Strategic Litigation Council (United States)

Haitian Bridge Alliance (United States)

Helsinki Foundation for Human Rights (Poland)

Humans For Rights Network (United Kingdom)

The Institute for Women in Migration (Mexico)

International Refugee Assistance Project (United States)

Jesuit Refugee Service (United States)

Justice Centre Hong Kong (Hong Kong)

Lebanese Center for Human Rights (Lebanon)

Appendix

Legal Advice Center / Kituo Cha Sheria (Kenya)

Migrant and Immigrant Community Action Project (United States)

New Women Connectors (Netherlands)

Refugees International (United States)

Refugee Legal Networks (Kenya)

Refugee Solidarity Network (United States)

Refugees Seeking Equal Access at the Table (Canada)

RefuSHE (Kenya)

Robert & Ethel Kennedy Human Rights Center (United States)

Rohingya Justice Initiative (United States)

The Rule of Law Institute (Poland)

Save My Identity (Switzerland)

Sin Fronteras I.A.P. (Mexico)

Servicio Jesuita A Migrantes (Spain)

South Africa Refugee Led Network (South Africa)

Appendix

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