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# The Nature of Global Commitments and Obligations: Limits on State Sovereignty in the Area of Asylum

HEATHER A. LEARY\*

## INTRODUCTION

The plight of the refugee is global in nature, but the alleviation of this plight requires individual states to meet their commitments to international treaties. The nature of this commitment, however, is complex because of the ever present issue of state sovereignty. One area of traditional and well-established national power is that of states to limit the number of persons who will enter their country and the number of persons who will qualify for benefits. At some point, however, creating limits on refugees and asylum seekers may compromise international commitments. This note focuses on one numerical limitation that may compromise the ability of the United States to fulfill its commitment to the refugee.

The United States amended the Immigration and National Interest Act with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This amendment changes the law to allow persons persecuted under coercive family planning policies to qualify for refugee or asylum status.<sup>1</sup> Congress specifically targeted a group of persons and made an affirmative commitment to consider their claims. The legislation, however, contains a stipulation that is unique to immigration law; it limits the number of persons<sup>2</sup> who can

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1. Illegal Immigration Reform and National Interest Act (IIRIRA) § 501, 8 U.S.C. §1101(a)(42) (1997) (amending Immigration and Nationality Act § 208, 8 U.S.C. §1101(a)(42)). Any alien present in the United States may apply for asylum status. 8 U.S.C. § 1158(a)(1).

2. The number of refugees who may gain refugee status, which is defined as those refugees who apply for entry into the United States before they leave their nation or a third nation, is limited to 50,000 per fiscal year. 8 C.F.R. § 207.1 (1997). There is no corresponding limitation to the number of persons who may be granted asylum status. See 8 U.S.C. § 1558. The number of refugees or asylees who may get their status adjusted to permanent resident is limited to 10,000 per fiscal year. 8 U.S.C. § 1159(b).

successfully gain refugee or asylum status<sup>3</sup> for persecution under coercive family planning policies to one thousand.<sup>4</sup>

The IIRIRA provides a useful example for thinking about the nature of nations' commitments to refugees and asylum seekers. With increasing concerns about the numbers of immigrants and refugees from war-torn countries, it is important to analyze the way in which we *should* limit the number of persons who can claim refugee or asylum status. The question that follows is whether it is possible to limit state sovereignty by limiting state discretion concerning who should and should not be admitted.

There may be some benefits to the type of numerical limitation in the IIRIRA.<sup>5</sup> Policies enforcing numerical limitations may encourage countries to expand traditional definitions of asylum and allow persons to gain asylum status under unique circumstances. Also, these policies may help a country "protect themselves against what they regard as threats to their security, economic well-being, political stability and cultural identity."<sup>6</sup> These may or may not be desirable goals. Even if they are worthy ends, however, their means are in conflict with international commitments to alleviate the plight of the refugee. Nations volunteered to maintain their commitments regardless of how narrowly they interpret the domestic laws. Considering the increasing global nature of our commitments, this note proposes that the numerical limitation exemplified by the IIRIRA is not consistent with our international commitments.

The first part of this note briefly examines the legal frameworks within which our discussion will take place. It discusses both the basic structure of international treaties relating to asylum and how they are mirrored in domestic law. It also includes a brief discussion on U.S. asylum law. Second, this note examines the relationship between law and morality as it relates to asylum. It discusses to what extent international legal commitments should bind countries. Finally, this note demonstrates that our international legal

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3. The qualifications for meeting the status of refugee and asylum status are the same. 8 U.S.C. § 1158(b)(1). Asylum status, however, may be terminated at the discretion of the Attorney General. *Id.* § 1158(c)(2). When the statute refers to refugees who are admitted, it is referring to the overseas refugee programs by which persons are granted protection by the United States before they enter the country. For a general description of this program see THOMAS A. ALEINIKOFF ET AL., *IMMIGRATION PROCESS AND POLICY* 735-57 (3d ed. 1995).

4. 8 U.S.C. § 1157(a)(5).

5. *Id.*

6. Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, 30 *INT'L MIGRATION REV.* 171, 172 (1996).

commitment precludes the numerical limitation contained in U.S. legislation because it interferes with our obligation to place global concerns before absolute sovereignty.

## I. LEGAL PROVISIONS

### A. *International Treaties*

Individual states traditionally have been the masters over asylum and refugee status and have enjoyed unlimited sovereignty.<sup>7</sup> After World War II, the United Nations decided to make a commitment to displaced persons fleeing political persecution.<sup>8</sup> The result of this commitment was the 1951 Convention Relating to the Status of Refugees.<sup>9</sup> It provided for the protection of those in Europe afraid of persecution as a result of events occurring before January 1, 1951.<sup>10</sup> Because it recognized that the refugee problem was global and enduring, the United Nations, in 1967, drafted a new international agreement removing the time and location limitations of the 1951 Convention, but otherwise adopted the same definition.<sup>11</sup> This new treaty is called the 1967 United Nations Protocol Relating to the Status of Refugees, and it defines a refugee as follows:

[A person] 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

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7. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 101-02 (1983).

8. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1254 (1990). "[The prior] framework shamed itself in the world's woefully inadequate response in the 1930s and 1940s to those who were fleeing Nazi persecution." *Id.*

9. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

10. *Id.* at art. 1, § A(2).

[T]he term refugee shall apply to any person who: As a result of events occurring before 1 January 1951 and 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 his nationality and is unable, or owing to such fear, is unwilling to avail himself to the protection of that country. *Id.*

11. The United States did not sign the 1951 Convention but did sign the 1967 Protocol. See Martin, *supra* note 8, at 1257 (explaining that, although the United States played a role in the 1951 Convention, national political conflicts prevented the treaty from being ratified in the Senate).

country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>12</sup>

The one right that refugee status confers to refugees against individual countries under the 1951 Convention and the 1967 Protocol is non-refoulement.<sup>13</sup> This means that a refugee cannot be returned to the place from which he or she fled if he or she would be persecuted. Unlike asylum, non-refoulement is a protection guaranteed to refugees.<sup>14</sup> Article 33 of the 1951 Convention states that:

No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>15</sup>

It is important to note that this provision does not exclude a country deporting a refugee to a hospitable third country.<sup>16</sup>

One last provision relevant to this note that was adopted by the 1967 Protocol is Article 34. This provision states that, “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.”<sup>17</sup> Although courts in the United States focus only on the provisional nature of this article,<sup>18</sup> the 1967 Protocol makes it clear that states *shall* (not shall try or may) facilitate assimilation and naturalization. Therefore, although this provision may seem provisional, one could easily read a mandate into the plain language.

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12. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, § 2, 19 U.S.T. 6261, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

13. Some argue that, “[n]on-refoulement is a peremptory norm of international law and binds all states regardless of whether they have signed the 1951 Convention or the 1967 Protocol.” Yen Tran, *The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws*, 17 HOUS. J. INT’L L. 463, 508 (1995).

14. *Id.* See also Martin, *supra* note 8, at 1256.

15. 1951 Convention, *supra* note 9, at art. 33.

16. *Id.*

17. 1967 Protocol, *supra* note 12, at art. 34.

18. See, e.g., *INS v. Stevic*, 467 U.S. 407, 428 (1984). “[T]he language of Article 34 was precatory and not self-executing.”

None of these regulations establish a right to asylum; and despite international treaties, state sovereignty remains strong in the area of refugee and asylum law.<sup>19</sup> Individual contracting states are not required to follow any procedure for determining what particular protection refugees should be eligible for in each country, such as qualifying for asylum.<sup>20</sup> In other words, states do not have a defined international legal obligation to grant persons asylum, even if they qualify under national standards.

### *B. The United States' Asylum Law*

Individual countries, in attempts to follow the mandates of the 1967 Protocol,<sup>21</sup> have voluntarily created asylum standards that mirror the international standard for determining refugee status.<sup>22</sup> There are three procedures relevant to the 1967 Protocol in U.S. law: stay of deportation,<sup>23</sup> refugee status,<sup>24</sup> and asylum.<sup>25</sup>

Before the 1967 Protocol, the United States had a provision in its law that provided refugee status for those from communist countries or the Middle East.<sup>26</sup> There was also a provision for a stay of deportation.<sup>27</sup> This provision was discretionary, meaning that persons had no rights against the government.<sup>28</sup>

In 1980, the United States changed the definition with the adoption of the Refugee Act. This act changed three parts of the Immigration and Nationality Act that are relevant to this note. First, it amended the definition of refugee so that it came to mirror the definition in the Protocol's definition of refugee.<sup>29</sup>

19. *Id.*

20. See generally OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (2d. ed. 1992).

21. "The Contracting States shall as far as possible facilitate the assimilation and naturalization of the refugees." 1951 Convention, *supra* note 9, at art. 34. See also Martin, *supra* note 8, at 1256. ("[S]ince 1951 most Western countries, to their credit, have set up asylum claims systems that essentially combine the determination of refugee status under the 1951 Convention definition . . .").

22. See, e.g., 8 U.S.C. § 1158. See also Martin, *supra* note 8, at 1259-66.

23. 8 U.S.C. § 1253(h).

24. 8 U.S.C. § 1157.

25. 8 U.S.C. § 1158.

26. 8 U.S.C. § 1153(a)(7)(A) (1970) (amended 1980).

27. 8 U.S.C. § 1253(h) (1964 ed.) (amended 1978).

28. *Id.*

29. "[A person outside his or her country] who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. § 1101(a)(42)(A). For an account of the U.S. enactment and how it

Second, it created a standard for granting asylum based on the amended definition of a refugee.<sup>30</sup> This remained completely discretionary although, prior to the IIRIRA, there was no upper numerical limitation. Finally, the stay of deportation provision was amended. Stay of deportation became mandatory rather than discretionary.<sup>31</sup> However, the legal standard for determining who qualified for a stay of deportation remained the same.<sup>32</sup>

For some time commentators thought that, subsequent to the 1980 Refugee Act, there was no substantial difference between non-refoulement and asylum. For example, in his article, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, David A. Martin revealed the complexities and ambiguities of the connection between asylum and non-refoulement. As the system in nations has developed, asylum law "guarantees an individual right of asylum to those who somehow establish physical presence on the soil of such Western countries and also prove that they satisfy the 1951 Convention definition."<sup>33</sup> Therefore, commentators believed there had been an amalgamation of the definitions of refugee and asylum causing difficulty in distinguishing the right of non-refoulement from the discretionary granting of asylum.<sup>34</sup>

This, however, is not the case. The Supreme Court in the *Stevic* and *Cardoza-Fonseca* line of cases cited the language of the statutes to conclude that the stay of deportation provision contained a higher standard than asylum.<sup>35</sup> The stay of deportation provision states that a stay may only be granted if a person "would face" persecution<sup>36</sup> rather than if the person only had a "well-founded fear" of persecution,<sup>37</sup> the standard under asylum law and the refugee definition.<sup>38</sup> The Supreme Court in *Stevic* decided that the stay of deportation required a "clear probability" (fifty-one percent chance) rather than a reasonable belief.<sup>39</sup>

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changed U.S. policy see Martin, *supra* note 8, at 1259-66.

30. 8 U.S.C. §1158. See also Martin, *supra* note 8, at 1259-66.

31. See 8 U.S.C. §1253(h).

32. *Id.* See generally *INS v. Stevic*, 467 U.S. 407, 413-20 (explaining the history of deportation and asylum standards).

33. Martin, *supra* note 8, at 1256.

34. *Id.*

35. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440-41 (1987).

36. 8 U.S.C. §1253(h).

37. 8 U.S.C. §1158.

38. See *INS v. Stevic*, 467 U.S. 407, 424-25.

39. *Id.*

The Supreme Court argued that the difference between the asylum and deportation standard was consistent with the 1967 Protocol because the standard for non-refoulement requires that a "refugee . . . would be" persecuted and that asylum is discretionary.<sup>40</sup> The Court noted that the 1967 Protocol defines refugee as a person with a well-founded fear of persecution<sup>41</sup> but nevertheless argued its way out of this contradiction.<sup>42</sup>

The Supreme Court concluded from the legislative history that the asylum provision was drafted to comply with Article 34 of the 1967 Protocol, and that the stay of deportation procedure was amended to better comply with Article 33.<sup>43</sup> The Court maintained in *Cardoza-Fonseca* that U.S. law at the time of the 1967 Protocol was already sufficient to meet the standards.<sup>44</sup> However, "[i]f one thing is clear from the legislative history of the new definition of refugee and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring the United State's Refugee law into conformance with the 1967 Protocol relating to the Status of Refugees."<sup>45</sup> Therefore, although it is important that the provisions may have been aimed at different parts of the treaty, it is reasonable to believe that the provisions were not directed solely at one article of the treaty. In other words, the Court need not have interpreted the provisions as narrowly as it did.

There are two other provisions in the U.S. law that facilitate compliance with the 1967 Protocol. One is a procedure by which a person may be deported to a third country.<sup>46</sup> Even if this person were a refugee, it would not violate a refugee's right of non-refoulement because non-refoulement only prohibits sending back a refugee to a country in which he or she would fear persecution.<sup>47</sup> An additional section of the stay of deportation provision provides that the Attorney General may grant a stay of deportation at her discretion if she finds that there would be a violation of the 1967 Protocol.<sup>48</sup>

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40. *Id.* at 421-22.

41. *Id.* at 422.

42. *Id.* at 423-24.

43. *Id.* at 417.

44. *Id.*

45. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436.

46. *See* 8 U.S.C. §1253(a).

47. *See, e.g., supra* note 12 and accompanying text.

48. 8 U.S.C. §1253(h)(3)(B).

2. *New Development: Asylum for Persecution for Coercive Family Planning Policies.*<sup>49</sup>

The IIRIRA amended the definition of the Immigration and Nationality Act further, not to comply with a treaty provision, but to resolve a debate in United States policy concerning China's family planning policies. There has been much debate in the United States concerning China's family planning or population control policies. The following is a general description of China's policy:

In June of 1979, supporting nearly a quarter of the world's population with less than eight percent of the world's farmland, China adopted a population control policy. The policy included a goal of zero growth by the turn of the century. Confronted with mass starvation as well as economic and social stagnation, the Chinese government established a policy primarily focused on limiting each couple to one child. The policy is enforced by a combination of incentives and punishments. Asylum applicants often complain of the most extreme punishments, namely forced abortion or sterilization.<sup>50</sup>

In addition to the debate concerning the merits of the family planning policies and how they are enforced, there has also been indecisiveness about whether to allow persons to claim asylum for persecution under population control schemes.<sup>51</sup> The Board of Immigration Appeals decided that coercive family planning programs are a matter of policy and influenced by concerns for population growth; therefore, persecution under these policies was not grounds for asylum.<sup>52</sup> Recently, the U.S. Congress passed amendments to the

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49. This note does not discuss whether this should be a legitimate claim or not. For the purposes of this note, I assume that it is, although this is not a representation one way or another about my beliefs. For an article discussing whether this is a legitimate claim see, e.g., Charles E. Schulman, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313 (1996).

50. *Id.* at 316.

51. See, e.g., *id.* at 320-23 (discussing the history of asylum claims for persons claiming persecution under China's family planning policies).

52. *Matter of Chen*, 20 I. & N. Dec. 16 (1989).

Immigration Act<sup>53</sup> allowing persons to be declared a refugee or claim asylum for fear of persecution because of coercive family planning policies:

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.<sup>54</sup>

The amendment to the Immigration Act is aimed at China's practices<sup>55</sup> and limits the number of persons who may be granted refugee or asylum<sup>56</sup> status to one thousand:

[N]ot more than a total of 1,000 refugees may be admitted under this subsection or granted asylum . . . pursuant to a determination under the third sentence of section 1101(a)(42) of this title (relating to persecution for resistance to coercive population control methods).<sup>57</sup>

Although legislative history shows that Congress expressed a concern for the population control methods of China, Congress also showed concern that

53. 8 U.S.C. § 1101(a)(42).

54. *Id.*

55. In a House Report, Congress cited China's policies in support for the legislation that has overruled previous decisions of the Board of Immigration Appeals. "In the People's Republic of China, some women with 'unauthorized' second or third pregnancies are subjected to involuntary abortions, often late in their pregnancies. Both men and women who have met their quota for children may be forcibly sterilized." H.R. REP. NO. 104-96, pt. I (1996) [hereinafter H.R. REPORT].

56. "Political commentators also considered the order a response to domestic pressure to conform the United States' foreign policy, if not its domestic law, to the views of anti-abortion groups." John D. Griffin, *The Chinese Student Protection Act and 'Enhanced Consideration' for PRC Nationals: Legitimizing Foreign Policy While Averting False Positives in Asylum Law*, 66 U. COLO. L. REV. 1105, 1125 (1995).

57. 8 U.S.C. § 1157(a).

persons arriving on United States soil would doctor false claims based upon coercion under family planning policies.<sup>58</sup> However:

The Committee emphasizes that the burden of proof remains on the applicant, as in every other case to establish by credible evidence that he or she has been the subject of persecution. The Committee is aware that asylum claims based on coercive family planning are often made by entire groups of smuggled aliens, thus suggesting that at least some claims, if not the majority have been “coached”.<sup>59</sup>

If there were concerns that it was too easy for asylum seekers to prove their claims, then Congress may have been able to increase the evidentiary standard and declare that a person must prove that they are a refugee beyond any reasonable doubt. The Supreme Court had already decided that asylum claims were pursuant to Article 34 and were therefore only subject to a “as far as practicable”<sup>60</sup> standard under the treaty.<sup>61</sup> Rather than giving judges the tools to help decide individual cases with more precision and thereby providing for a higher probability of weeding out the false claims, Congress instead decided to limit the numbers. Thus, it seems as if the importance has shifted from distinguishing legitimate from illegitimate claims to limiting the number of accepted claims. Although the United States traditionally limits the number of refugee applicants it will accept from overseas<sup>62</sup> and the number of persons it will allow to adjust from asylee or refugee status to permanent resident status,<sup>63</sup> it is unusual for the United States to limit the number of applicants for one particular class of persecution.

#### *D. Understanding the Relationship Between Legislation and Treaties*

In order to analyze this legislation thoroughly, one must understand the basic dynamic between legislation and treaties:

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58. H.R. REPORT, *supra* note 55.

59. *Id.*

60. *INS v. Cordoza-Fonseca*, 408 U.S. 421, 439.

61. This paper is not advocating that this is a good choice or a proper choice in light of my current thesis. I use this point to show the motivations behind the U.S. law and I am not advocating this particular solution.

62. *See* 8 U.S.C. § 1101.

63. *Id.*

By the Constitution laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land and no paramount authority is given to one over the other . . . . [T]he last expression of the sovereign will must control.<sup>64</sup>

The last word of the sovereign is law. In addition, “[t]here is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law.”<sup>65</sup> However, the Supreme Court does look to the treaty to clarify provisions of United States law that mirror the treaty.<sup>66</sup>

The legislation concerning persons fleeing persecution for family planning policies in China is unique because the law was enacted in pursuance of a treaty obligation.<sup>67</sup> The later-in-time approach, meaning that any conflicts between the IIRIRA or the INA and the Protocol would be resolved in favor of the statute if it was subsequent to the treaty, does not make much sense as this law is in pursuance of the Protocol. Thus, it is only logical that the Court in the *Chinese Exclusion Case* may not have intended to create an unbendable rule that subsequent legislation would overrule treaty commitments. In *Tag v. Rogers*, the D.C. Circuit expressed a concern that the last statement of the sovereign and the intent of the sovereign should be considered when deciding if legislation trumps a provision in a treaty: “[i]f the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular case only the equivalent of a legislative act, to be repealed or modified *at the pleasure* of Congress.”<sup>68</sup>

However, this interpretation is squarely contrary to current statutory interpretation with regard to treaties regarding the 1967 Protocol. “The language in section 208(a) specifying the discretionary nature of asylum relief is clear, and since that section was enacted subsequent to the 1967 Protocol it controls over any conflicting language in the protocol under the applicable rules of statutory interpretation.”<sup>69</sup>

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64. *Chae Chan Ping v. United States*, 130 U.S. 581, 627-28 (1889) (hereinafter *Chinese Exclusion Case*).

65. *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959).

66. *See, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

67. *Id.*

68. *Tag*, 267 F.2d at 668 n.12 (emphasis added).

69. *Matter of Salim*, 18 I & N Dec. 311, 314.

Both immigration and asylum are deemed to be within the power of Congress. With this law, however, there should be a strong presumption that Congress did not wish to repeal any part of its obligation under the treaty because the law as well as the amendments to the law are made in furtherance and under the direction of the treaty. In other words, the United States voluntarily made this commitment and should be held to it. Therefore, the interpretation of the treaty should control subsequent legislation.

The reality is, however, that the Supreme Court arguably has taken a narrow approach to treaty interpretation to preserve state sovereignty:

According to past concepts of state sovereignty and to contemporary views regarding the undertaking of international obligations, international agreements were to be strictly construed. Limitations on the sovereignty of states were not to be presumed. In cases of doubt or ambiguity, international agreements were to be interpreted to preserve a state's maximum freedom of action. There is even authority supporting the view that the presumption against the derogation of sovereignty may be applied more stringently when a national court . . . is faced with a question of treaty interpretation. From this point of view, the Supreme Court in [recent] cases . . . is following a well established and time-sanctioned tradition of interpretation of international agreements. United States courts, however, have traditionally not taken a restrictive approach, but rather have liberally construed United States treaty obligations. Thus, the [Supreme] Court's recent trend toward restrictive interpretation of treaties is a disturbing innovation in American jurisprudence.<sup>70</sup>

This trend may be more disturbing in the area of refugee law because states already maintain a great deal of sovereignty by setting numerical limitations on refugees.

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70. Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 559, 564-66 (1996).

## II. MORAL OBLIGATIONS AND GLOBAL COMMITMENTS

To determine if this law is a legal way to limit asylum, it is necessary to discuss the nature of the respective nations' commitments. Asylum law speaks about morality<sup>71</sup> in a very direct and meaningful way.<sup>72</sup> In addition, in order to comply with the treaty, nations have enacted laws that grant more protection than does the treaty. This places refugee and asylum law beyond the strict confines of legal analysis and also requires a "moral analysis". To state it less dramatically, an analysis of the type of commitment that nations have toward the treaty provisions concerning asylum is appropriate.

There are two alternatives that may determine how nations respond when they have made international and domestic commitments. I have labeled them cursory and visionary commitments. I will first describe these two commitments. Second, I will discuss the benefits to adopting a visionary commitment, at least in the area of asylum.

### A. Cursory Commitments

The first type of commitment of a nation to an international document is a cursory commitment. It describes a commitment that is expressed in the words of the law alone. Once a nation complies with the words, the commitment has been met. It does not require any consideration of the *international* sentiment with regard to the morality of the adopted policies. Considering the case of asylum, countries may adopt the regulations and then feel that their obligations to international and global commitments are satisfied.

One example of this type of commitment is the United States' response to Haitian boat immigrants.<sup>73</sup> The United States has adopted a policy of turning

71. This is not to say that there are no serious moral flaws with the 1951 Convention. First, it emphasized a Western point of view to the exclusion of granting asylum for violations of socioeconomic rights. Second, it only addressed events before 1951, until the adoption of the 1967 Protocol. Martin, *supra* note 8, at 1338-65. Third, it overlooks that "wars and natural disasters frequently mask political persecution." Frederick B. Baer, *International Refugees as Political Weapons*, 37 HARV. INT'L L.J. 243 (1996).

72. "[T]he United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms . . . ." 1951 Convention, *supra* note 9, at 1 (Preamble).

73. See generally Terry Coonan, *America Adrift: Refoulment on the High Seas*, 63 U. CIN. L. REV. 1241 (1995) (discussing Haitian refugees and how interdiction in the water violates the 1967 Protocol).

the asylum seekers away before they enter U.S. territory. Preventing the refugees from landing on U.S. territory may not violate our technical obligation toward non-refoulement because one cannot technically send the refugees out of the country and back to where they may be persecuted if they are never allowed to land.

The Supreme Court recently discussed this issue in *Sale v. Haitian Centers Council, Inc.*<sup>74</sup> A group of Haitians seeking refuge in the United States by boat were turned away before they reached national waters.<sup>75</sup> This policy was challenged as a violation of the non-refoulement provision. The Court held that it did not violate non-refoulement because a nation cannot refouler someone who never enters the country. In other words, the treaty "cannot impose unanticipated extraterritorial obligations on those who ratify it . . ."<sup>76</sup> Some have criticized the United States for taking a "narrow, some would say hypertechnical view of its international obligations in order to forestall mass attempts at immigration . . . [and by doing so] the United States has avoided the spirit, if not the letter, of non-refoulement."<sup>77</sup>

The Court did look toward the 1967 Protocol and the 1951 Convention for clues about the meaning of refouler.<sup>78</sup> However, it did not go beyond that to consider, as Blackmun did in his dissent, that we made a commitment not to "return [refouler] a refugee in any manner whatsoever" to a place where he would face political persecution.<sup>79</sup> The Court was determined to read the treaty narrowly and stated explicitly that:

The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.<sup>80</sup>

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74. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

75. *Id.* at 166-67.

76. *Id.* at 183.

77. Michael J. Churgin, *Mass Exoduses: The Response of the United States*, 30 INT'L MIGRATION REV. 310 (1996).

78. *Sale*, 509 U.S. at 180-81.

79. *Id.* at 188-89 (Blackmun dissenting).

80. *Id.* at 183.

The result of this is a shifting of the moral paradigm.<sup>81</sup> The real and deeply pondered questions about asylum policy concern the moral ramifications as perceived by and affecting the individual nation rather than the international community. As Blackmun noted in his dissent in *Sale*, "the Court relies almost entirely on the fact that *American* law makes a general distinction between *deportation* and *exclusion*."<sup>82</sup> The IIRIRA conducts a similar feat. This is not to say that Congress ignored moral concerns when reforming the Immigration Act. The moral issues, however, mostly concerned our own nation. There is a concern with the ability of immigration judges to distinguish true from false claims. Congress also showed foreign policy concerns.<sup>83</sup> Congress, granted, may have also had concerns about human rights violations.<sup>84</sup> This explains the expansion of grounds for asylum but does little to explain the numerical limitation.<sup>85</sup> In short, there is no indication in the legislative history as to any thought about our international commitments.

### *B. Visionary Commitments*

The second commitment is what I have labeled a visionary commitment. Obligations are not met when we merely adopt moral language and analyze it within our own national moral paradigm. Obligations are only met when the intent of our collective vision is consistent with our policy. Here, I believe it is helpful to draw on an analysis put forth by Sanford Levinson in his book *Constitutional Faith*.<sup>86</sup> Although it is clear by the title of his book that he is discussing constitutional interpretation, his book also focuses on how morality and law are related. He postulates that from an alien, or outside perspective, law is distinguishable from moral commands. In his view, there is knowledge that the protocol is about morality, but morality is discussed most when it concerns the United States' perspective. However, when the moral perspective

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81. It is interesting to note that the United States' own Refugee Act was a reflection on its tradition in responding to refugees. The purpose of the Act states that it is the policy of the United States to protect refugees. Griffin, *supra* note 56, at 1147.

82. *Sale*, 509 U.S. at 191 (emphasis added).

83. It is useful to note that foreign policy concerns do transcend national boundaries in that they deal with the relationship between two countries. It necessarily implies global or international concerns, especially as foreign policy is often conducted with a nation's own best interests at heart.

84. H.R. REPORT, *supra* note 55.

85. 8 C.F.R. § 207 (1997).

86. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988)

concerns the global community, it is boiled away and all that remains are legal provisions.<sup>87</sup> However, borrowing Levinson's observation:

As we move to a perspective inside our own culture and, in particular, take some responsibility for defining that culture, including its legal element, the separation makes less and less sense. To adopt the same kind of detached perspective that is suitable to analysis of a foreign society would (by definition) be to alienate ourselves from our own.<sup>88</sup>

Although the United States is amending its own laws with the IIRIRA, the fact that the initial law was in pursuance of a treaty is an acknowledgment of global society and that the United States has become a greater part of it. Furthermore, the fact that the treaty recognizes that international cooperation is required to alleviate refugee problems also defines a global community. If it is our goal to deny that we are in a global community, it is too late. The United States has already become connected to it by this treaty. Given the barriers of language and culture, the words may not always clearly express the exact intent of the global community.<sup>89</sup> It is not always realistic to expect states to allow global policy to control their own powers. A discussion of when our international commitments should limit our asylum policy is the subject of the next section.

### III. MORAL COMMITMENTS AS FORMULATING A LEGAL LIMIT TO NATIONAL SOVEREIGNTY IN ASYLUM CASES

Determining to what degree our visionary commitment should limit our legislative powers is a difficult task. It would be a rare occurrence indeed that nations would sign an international commitment and with the same stroke of the pen sign away control and sovereignty.<sup>90</sup> The reality today is that "issues

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87. See, e.g., *Sale*, 509 U.S. 155.

88. LEVINSON, *supra* note 86, at 74-75.

89. See, e.g., *Sale*, 509 U.S. at 155 (discussing the different meanings of *refouler*).

90. C.S. Milligan stated three principles in refugee law that combine ethics and political realities:

1. A nation has the right as well as the need to regulate immigration. . . .
2. Politicians and administrations make administrative decisions and will bring their own moral principles to bear on their judgements.
3. People become refugees for a variety of reasons . . . wanting to improve one's life is not enough reason to apply for refugee status. W. GUNTHER PLAUT,

of international migration remain largely in the province of state discretion, including issues even pertaining to refugees despite the articulation of international standards and the existence of international institutions concerned with the subject.<sup>91</sup>

I postulate that legal obligations follow when a nation makes an affirmative commitment to asylum seekers in pursuance of a treaty obligation. It is irrelevant that the asylum statute gives more benefits than simply that of non-refoulement.<sup>92</sup> The other alternative, stay of detention,<sup>93</sup> does not comply with the mandate in Article 34 which states that "contracting states shall as far as possible facilitate the assimilation and naturalization of the refugees."<sup>94</sup> Under a cursory commitment, "as far as possible" may be interpreted as simply a matter for the state to decide. Considering that we have voluntarily come into a community in which we acknowledge that intergovernmental cooperation is necessary,<sup>95</sup> I propose that the United States view its commitments as visionary. This would, at the very least, preclude the United States from attempting to limit the number of persons using methods that "violate the spirit" of the treaty with no justification due to concerns for the national welfare.

States may determine the numbers of persons that come into their territory.<sup>96</sup> The 1967 Protocol did not specify a minimum number of refugees that countries were required to accept. The global community does not have the ability at this time to tread upon this sovereignty. A country's resources and its capability of taking on new persons who have gained asylum is one that the individual country can best estimate. In addition, allowing this would give disincentives for the countries to sign the treaty at all and would give states incentives to set a low number for the overall number of refugees it will select.

ASYLUM: A MORAL DECISION 54-55 (1995).

91. Arthur Helton, *The Role of the International Law in the Twenty-First Century: Forced International Migration: A Need for New Approaches by the International Community*, 18 FORDHAM INT'L L.J. 1623, 1627 (1995).

92. Martin argues "[t]hat these admirable features of the system [that countries have created asylum provisions] go beyond the strict requirements of international law, however, should remind us of their fragility. They cannot be taken as inevitable constants. Instead it must be an ever-present concern of wise policy to shape asylum measures, including adjudication systems, so as to maximize continued domestic support. The systems' inability to cope effectively with growing numbers of asylum seekers over the last decade now threatens that foundation." Martin, *supra* note 8, at 1257.

93. See 8 C.F.R. § 208.14 (1997).

94. 1951 Convention, *supra* note 9, at art. 34.

95. *Id.* at 1 (Preamble).

96. For example, the U.S. President determines the number of refugees allowed into the United States. See 8 U.S.C. § 1157; 8 C.F.R. § 207.1.

The IIRIRA legislation is different because it sets a limit on a very particular group of asylum seekers. In addition, it limits the number it will allow in, not out of a concern for our national resources, but rather because Congress believes that there will be false claims.<sup>97</sup> Preventing false claims is a legitimate state interest, however, the legislation has very little to do with protecting our national interests. It does not attempt to limit the false claims for other groups of asylum seekers, just this one group. In addition, the law does not require a change in the evidentiary standards<sup>98</sup> and it seems that if an applicant is number 1,005, even with a highly credible claim, he or she is denied refugee or asylum status.

If the person is denied asylum status, they move to deportation proceedings. The technical obligation of non-refoulement may be met.<sup>99</sup> The treaty, however, does not envision states essentially leaving a refugee stranded after a State has made a moral commitment. Article 34 of the Convention states that: "Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."<sup>100</sup> Rather than simply taking a "last in time approach"<sup>101</sup> and justifying this by claiming that our law meets the treaty requirements we need to think of solutions to limiting the number of asylum claims that is consistent with both the treaty obligation and at the same time recognize state sovereignty and concerns of false asylum claims. The solution may be as simple as limiting the number of asylum claims generally or changing the procedures to ensure more accuracy in the adjudication.

In enacting the IIRIRA, the legislature ignored moral obligations and failed to exhibit a visionary commitment to the goals of the international community. The result is unfair. For example, it is unfair to announce a new ground for asylum and then deny adjudication of the refugees' claims for asylum on that ground. It is unfair to purport to make a new specific moral commitment to a class of individuals when the overriding concerns were our own laws and policies. Given that state sovereignty is not threatened by the

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97. H.R. REPORT, *supra* note 55.

98. *See* 8 C.F.R. § 208.13.

99. *See id.* § 208.16.

100. 1951 Convention, *supra* note 9, at art. 34.

101. *See supra* note 11 and accompanying text.

IRIRA, it is only just that the United States be consistent with its voluntary global obligations.

