

**LIMITATIONS OF THE CUSTOMARY INTERNATIONAL
PRINCIPLE OF NON-REFOULEMENT ON NON-PARTY
STATES: THAILAND REPATRIATES THE REMAINING
HMONG-LAO REGARDLESS OF INTERNATIONAL
NORMS**

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Introduction	102
II. History & Background	104
A. The Hmong	104
B. The “Secret War.” The Hmong’s Fight against Communism during the Vietnam War	104
C. United States Withdraws from Laos	105
D. Hmong-Lao Seeking Asylum in Thailand	106
E. The Closing of the Thai Refugee Camps and the Start of Repatriation.....	108
III. The International Legal Framework for Protecting Refugees.....	111
A. The Definition of Refugee under the Refugee Convention	112
B. Refugee Status under the United Nations High Commissioner for Refugees.....	116
C. The Customary International Legal Principle of Non- Refoulement	117
IV. Thailand Violated the Non-Refoulement Principle when It Repatriated Thousands of Hmong-Las from its Border in 2009 ...	119
A. Many Hmong-Lao Satisfied the Criteria under the Inclusion Clause of the Refugee Definition	119
B. Many Hmong-Lao Maintained Their Refugee Status.....	122
C. Many Hmong-Lao Did Not Voluntarily Repatriate to Laos.....	124
V. Limitations in Making Non-Party States Abide by the Non- Refoulement Principle	126
VI. Conclusion	129

INTRODUCTION

During the Vietnam War, the United States Central Intelligence Agency (“CIA”) enlisted the Hmong in Laos (“Hmong-Lao”) to fight against the uprising communist Lao regime in an attempt to stop the spread of communism to Laos.¹ After the United States withdrew from Laos and Vietnam at the end of the war, many Hmong-Lao fled to Thailand fearing persecution from the newly established communist Lao government.² In Thailand, the United Nations High Commissioner on Refugee (“UNHCR”) with support from the United States and the Thai government, established refugee camps to house the thousands of Hmong-Lao seeking asylum.³ As decades passed, many of these Hmong-Lao resettled in the United States and other Western countries.⁴ But, even after all the resettlements, many remained in Thailand.⁵ Because of declining financial support and Thailand’s developing relationship with Laos, the Thai government eventually closed all the refugee camps housing the Hmong-Lao and shifted its efforts to repatriating⁶ the remaining Hmong-Lao.⁷

This note focuses on the period when the Thai government, amid international pressures, repatriated more than four thousand Hmong-Lao from its borders to the country of Laos in December of 2009 (“2009 Repatriation”).⁸ Among those repatriated were 158 Hmong-Lao already recognized as refugees by the UNHCR and many others who satisfied the refugee definition under the 1951 United Nations Convention Relating to the Status of Refugees (“Refugee Convention”)⁹ and its 1967

¹ JO ANN KOLTYK, *NEW PIONEERS IN THE HEARTLAND: HMONG LIFE IN WISCONSIN*, 3 (1998).

² KEITH QUINCY, *HMONG: HISTORY OF A PEOPLE*, 213–14 (1988); JANE HAMILTON-MERRITT, *TRAGIC MOUNTAINS: THE HMONG, THE AMERICANS, AND THE SECRET WARS FOR LAOS, 1942–1992* at 355 (1993).

³ *See infra* Part II.D.

⁴ *Id.*

⁵ *See infra* Part II.E.

⁶ Repatriate means to send back, usually a refugee or a prisoner of war, to the country of his or her citizenship.

⁷ *See infra* Part II.E.

⁸ *Id.*

⁹ *See* Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*].

Protocol Relating to the Status of Refugees (“1967 Protocol”).¹⁰ Although Thailand is not a state party to either the Refugee Convention or its 1967 Protocol, it is still bound by the non-refoulement principal under these documents because this principal is recognized as customary international law.¹¹ The non-refoulement principal forbids a state from returning a refugee to the territory where “his life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹² This note argues that Thailand violated the Refugee Convention and its 1967 Protocol when it forcibly repatriated the thousands of Hmong-Lao asylum seekers in 2009 because many of these individuals were recognized as refugees by UNHCR or satisfied the refugee definition.

Part II of this note discusses the complex history of the Hmong-Lao, from when they were first enlisted by the CIA to when the United States withdrew from Laos, which led to their persecution by the newly-established communist Lao government. Part III discusses the international legal framework for protecting refugees under the Refugee Convention and its 1967 Protocol.¹³ Part IV analyzes and discusses why Thailand has violated the non-refoulement principal when it repatriated the thousands of Hmong-Lao in 2009. Finally, Part V discusses the limitations of customary international law on Thailand, a non-party state to either the Refugee Convention or its 1967 Protocol.

¹⁰ Protocol Relating to the Status of Refugees, *approved* Dec. 16, 1966, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; *See infra* Part IV.A.

¹¹ U.N. High Comm’r for Refugees, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, 5, U.N. DOC. UNHCR/DIP.195./Q&AA.8/ENG1, (Sept. 2011) (by António Guterres) [hereinafter Refugee Q&A], *available at* <http://www.unhcr.org/4ec262df9.pdf> (explaining the principle of non-refoulement prohibiting the return of a refugee to a territory where his/her life or freedom is threatened is considered a rule of customary international law, and thus binding on all states regardless if it has acceded to the Refugee Convention or its 1967 Protocol).

¹² Refugee Convention, *supra* note 9, art. 33, §1.

¹³ *The 1951 Refugee Convention*, UNHCR.ORG (Sept. 6, 2012), <http://www.unhcr.org/pages/49da0e466.html>. (last visited Mar. 29, 2014).

II. HISTORY & BACKGROUND

A. THE HMONG

The Hmong are an ethnic group from the remote mountains of Laos.¹⁴ The origin of the Hmong is still obscure and under debate,¹⁵ however, the Hmong can be traced to settlements in the plains along the Yellow River more than five thousand years ago.¹⁶ The Hmong lived in southern China until the 1800's;¹⁷ but, because of war, persecution, and oppression under the Han Chinese, half a million Hmong migrated from China to the northern mountainous regions of Vietnam, Laos, Thailand, and Burma.¹⁸ There, the Hmong lived a relatively peaceful and autonomous life in the highlands¹⁹ as farmers and hunters in isolated villages until the Vietnam War.²⁰

B. THE "SECRET WAR:" THE HMONG'S FIGHT AGAINST COMMUNISM DURING THE VIETNAM WAR

The Geneva Accords of 1954 declared Laos a neutral state,²¹ but, around this time, a new communist party called the Pathet Lao rose to power in Laos.²² The Pathet Lao was aided by Ho Chi Minh's North Vietnamese military forces and became entangled with the anticommunist Royal Lao government for control of Laos.²³

Fearing the spread of communism, the United States increased its involvement in Laos during the 1960s.²⁴ The United States was concerned that if Laos was to fall to communism, then it would only be a matter of time before South Vietnam, Cambodia, Thailand, and Burma

¹⁴ LILLIAN FADERMAN WITH GHIA XIONG, *I BEGIN MY LIFE ALL OVER: THE HMONG AND THE AMERICAN IMMIGRANT EXPERIENCE* 2 (1998).

¹⁵ Nengher Vang, *Political Transmigrants: Rethinking Hmong Political Activism in America*, 12 *HMONG STUD. J.* 1, 6 (2011), available at <http://hmongstudies.org/NHVangHSJ12.pdf>.

¹⁶ Faderman, *supra* note 14, at 1.

¹⁷ Vang, *supra* note 15, at 7.

¹⁸ *Id.* at 7.

¹⁹ *Id.*

²⁰ FADERMAN WITH XIONG, *supra* note 14, at 2–3.

²¹ ANNE FADIMAN, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES* 125 (1997).

²² *Id.*

²³ *Id.*

²⁴ *Id.* (the United States feared the "Domino Theory").

followed suit.²⁵ The United States could not, however, openly send troops into Laos to resist the communist movement because of the ceasefire under the 1954 Accords, and the United States signed a new set of accords that reaffirmed the neutrality of Laos at the 1962 Geneva Conference.²⁶ The new set of accords also prevented all signatories from sending “any foreign troops or military personnel” into Laos.²⁷ Soon after signing the new set of accords, the United States realized that the North Vietnamese had no intention of leaving Laos, and, as a result, the CIA pursued counterinsurgency and guerrilla warfare.²⁸

The Hmong-Lao involvement in the “Secret War” began in 1959 when the CIA met with Vang Pao, the military leader of a Royal Lao Army Battalion, which was then fighting against the communist insurgents.²⁹ The Hmong-Lao were recruited by the CIA as a special guerilla force to control the mountainous regions between Laos and North Vietnam and to block the movement of communist forces and supplies.³⁰ In exchange for their alliance, the CIA supplied the Hmong-Lao with necessary weapons such as arms, ammunition, and food.³¹ The Hmong-Lao’s participation included rescuing American pilots whose planes were shot down and assisting the US military in navigating the Laos jungles in an attempt to block military supplies on the Ho Chi Minh trail.³²

C. UNITED STATES WITHDRAWS FROM LAOS

In 1973, the United States signed the Paris Agreement, pledging to withdraw all its forces from Vietnam,³³ and the Vientiane Agreement, declaring a cease-fire in Laos.³⁴ By 1975, with the departure of the US military and the rise of the communist Pathet Lao government,³⁵ the

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (“the United States, the Soviet Union, North and South Vietnam and ten other nations agreed to a new set of accords”).

²⁸ HAMILTON-MERRITT, *supra* note 2, at 123.

²⁹ Vang, *supra* note 15, at 1–2, 9.

³⁰ KOLTYK, *supra* note 1, at 3.

³¹ *Id.*

³² FADERMAN WITH XIONG, *supra* note 14, at 6.

³³ FADIMAN, *supra* note 21, at 137.

³⁴ *Id.* at 138.

³⁵ NORMA J. LIVO & DIA CHA, *FOLK STORIES OF THE HMONG: PEOPLE OF LAOS, THAILAND, AND VIETNAM* 2 (1991).

United States abruptly terminated its support to General Vang Pao and his Hmong-Lao guerrilla force.³⁶ One month after the United States withdrew from Laos, the Pathet Lao overcame the Royal Lao Army.³⁷ As a result, the Pathet Lao succeeded the Lao monarchy and formed the Lao People's Democratic Republic ("LPDR").³⁸

Shortly after these events, the LPDR-sponsored newspaper announced, "The Meo [Hmong] must be exterminated down to the root of the tribe."³⁹ Within days after this announcement, the United States airlifted General Vang Pao to Thailand.⁴⁰ For several days the United States also sent cargo planes to assist Vang Pao's supporters in their escape from the LPDR.⁴¹ Over forty thousand Hmong-Lao headed towards Long Cheng, the former CIA headquarter, hoping to escape,⁴² but no more than fifteen thousand were able to get on the planes, leaving the rest to fend for themselves.⁴³

D. HMONG-LAO SEEKING ASYLUM IN THAILAND

Physical and genocidal attacks against the Hmong-Lao by the LPDR caused many Hmong-Lao associated with the US military operations to flee to Thailand.⁴⁴ In late 1975, nearly forty thousand Hmong-Lao fled to Thailand, which includes the many who were unable to escape in Long Cheng.⁴⁵ Thailand allowed the UNHCR to set up temporary camps that provided food, clothing, shelter, and medical care for the influx of asylum seekers.⁴⁶ The Thai government, however, provided less than minimal assistance to the camps to dissuade continued immigration.⁴⁷ The Thai government also listed the asylum seekers as

³⁶ KOLTYK, *supra* note 1, at 3.

³⁷ *Id.* (Not sure if the author meant to cite FADERMAN WITH XIONG, *supra* note 14, at 7. Will ask the author)

³⁸ Fadiman, *supra* note 22, at 138.

³⁹ *Id.*

⁴⁰ FADERMAN WITH XIONG, *supra* note 14, at 7.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 7–8.

⁴⁴ KOLTYK, *supra* note 1, at 3–4.

⁴⁵ QUINCY, *supra* note 2, at 215.

⁴⁶ Brian W. Jacobs, *No-Win Situation: The Plight of the Hmong – America's Former Ally*, 16 B.C. THIRD WORLD L.J. 139, 143 (1996).

⁴⁷ QUINCY, *supra* note 2, at 215.

illegal immigrants,⁴⁸ subject to imprisonment, fines, and expulsion.⁴⁹ However, its efforts were in vain as by 1978 the camps held almost fifty thousand Hmong-Lao.⁵⁰

Further refugee flows into Thailand resulted when the LPDR instituted reeducation camps, land reform policies, and forced settlement.⁵¹ Reeducation camps were concentration camps replete with hard labor, starvation, and torture.⁵² Farm and work cooperatives were established in which the majority of the Hmong-Lao's rice crops were taken to support the government taxes and village rice banks.⁵³ The fear of being sent to the reeducation camps and the economic consequences of not having sufficient amounts of food to feed their families created yet a second wave of refugees out of Laos.⁵⁴ Thus, because of near famine conditions in Laos, the low level assistance in the Thai refugee camps failed to deter continued immigration.⁵⁵ As such, Thailand continued to experience an increase in Hmong-Lao asylum-seekers.⁵⁶

Consequently, after the fall of Laos to the Pathet Lao, the United States began resettling Hmong-Lao refugees within its borders.⁵⁷ The US government announced that it would take one hundred sixty-eight thousand refugees from Indochina in the year 1979, but Thailand was still left with more than two hundred fifty thousand refugees and asylum seekers from Laos.⁵⁸ The largest proportion of the Hmong-Lao refugees in Thailand came to the United States, with smaller numbers going to France, Australia, and Canada.⁵⁹ Many Hmong-Lao refugees continued to be resettled in the United States throughout the 1980s and 1990s,⁶⁰ and, by 1997, approximately one hundred thirty thousand Hmong-Lao resettled in the United States.⁶¹

⁴⁸ L. Catherine Currie, *The Vanishing Hmong: Forced Repatriation to an Uncertain Future*, 34 N.C. J. INT'L L. & COM. REG. 325, 342 (2008).

⁴⁹ Jacobs, *supra* note 46, at 143.

⁵⁰ QUINCY, *supra* note 2, at 215.

⁵¹ KOLTYK, *supra* note 1, at 4.

⁵² FADERMAN WITH XIONG, *supra* note 14, at 8.

⁵³ KOLTYK, *supra* note 1, at 4.

⁵⁴ *Id.*

⁵⁵ QUINCY, *supra* note 2, at 215.

⁵⁶ Currie, *supra* note 48, at 343.

⁵⁷ Jacobs, *supra* note 46, at 143–44.

⁵⁸ Currie, *supra* note 48.

⁵⁹ SUCHENG CHAN, *HONG MEANS FREE: LIFE IN LAOS AND AMERICA* 48 (1994).

⁶⁰ FADERMAN WITH XIONG, *supra* note 14, at 10.

⁶¹ *Id.*

E. THE CLOSING OF THE THAI REFUGEE CAMPS AND THE START OF REPATRIATION

To build relations with Laos and seek its assistance in locating Americans still missing from the Secret War, the United States agreed to work with Laos and Thailand to shut down all the Thai refugee camps.⁶² In 1989, Thailand, Laos, and the United States met with 67 other governments at the Second Conference on Indochinese Refugees in Geneva and adopted a new regional approach known as the Comprehensive Plan of Action (“CPA”).⁶³ The CPA proposed repatriating all Hmong-Lao who were determined not to be refugees to Laos and resettling all those classified as refugees in Western countries.⁶⁴ In June 1991, Thailand, Laos, and the UNHCR signed the Luang Prabang Tripartite Agreement, which the United States helped financed in an attempt to repatriate the remaining Laotian refugees from Thailand.⁶⁵

The voluntary approach to repatriation would be problematic for the parties to the 1991 agreement as many of the Hmong-Lao refugees refused to return to Laos.⁶⁶ To encourage voluntary repatriation, the United States recruited a well-respected Hmong leader, Vue Mai, to be the first to repatriate to Laos.⁶⁷ In 1992, Vue Mai repatriated to Laos.⁶⁸ Vue Mai’s repatriation was to convince him and the remaining Hmong-Lao refugees that it was safe to return to Laos.⁶⁹ Vue Mai was assured by the United States and the UNHCR that his return to Laos would be safe, and his clan agreed to follow him.⁷⁰ Unfortunately, ten months after returning to Laos, Vue Mai was reported missing and has not been heard from since.⁷¹

Despite the suspicious circumstances surrounding Vue Mai’s repatriation, between 1992 and 1994, more than fourteen thousand Hmong-Lao refugees were repatriated under the terms of the Luang

⁶² Vang, *supra* note 15, at 19–20.

⁶³ *Id.* at 20.

⁶⁴ REFUGEE POLICY GROUP (RPG), THE SECOND INTERNATIONAL CONFERENCE ON INDOCHINESE REFUGEES: A NEW HUMANITARIAN CONSENSUS? 30 (1989).

⁶⁵ Vang, *supra* note 15, at 20.

⁶⁶ Jacobs, *supra* note 46 at 148.

⁶⁷ Joseph Davy, *Repatriation: How Safe is it?*, 2 HMONG STUD. J. 1, ¶¶ 3–4 (1998).

⁶⁸ *Id.* at ¶ 4.

⁶⁹ *Id.*

⁷⁰ Jacobs, *supra* note 46 at 8.

⁷¹ *Id.*

Prabang Tripartite Agreement.⁷² During the same time, more than twenty-five thousand Hmong-Lao were resettled in the United States.⁷³ Meanwhile, ten thousand Hmong-Lao, who rejected resettlement and repatriation, moved to Wat Thamkrabok, a Buddhist monastery in Saraburi Province of Thailand.⁷⁴ By the end of 1995, all the refugee camps set up to accommodate refugees from Laos were closed.⁷⁵ Despite the intention to resolve the Laotian refugee issue in Thailand, the LPDR's human rights record showed that about twenty-five thousand Hmong and Lao people were arrested, imprisoned, and killed by the communist government from 1990 to 1997.⁷⁶

The number of Hmong-Lao refugees who found their way to Wat Thamkrabok soon swelled to almost thirty thousand.⁷⁷ At Wat Thamkrabok, the Hmong-Lao received protection and support by the abbot, Luangphaw Chamroon Parnchard.⁷⁸ To protect the Hmong-Lao from repatriation, abbot Parnchard claimed that the Hmong-Lao at Wat Thamkrabok were in fact Hmong-Thai, Hmong who were citizens of Thailand.⁷⁹ Outside of the protections of Wat Thamkrabok, however, the Hmong-Lao were considered illegal immigrants subject to deportation.⁸⁰ This protection eventually ended with the passing of abbot Parnchard, and in 2003 the Thai government closed Wat Thamkrabok.⁸¹

In response, the US House of Representatives passed House Resolution 402 in May 2004,⁸² and shortly thereafter agreed to resettle more Hmong-Lao in the United States.⁸³ As a result, about fifteen thousand Hmong-Lao refugees from Wat Thamkrabok resettled in the

⁷² Vang, *supra* note 15, at 22–23.

⁷³ *Id.*

⁷⁴ *Id.* at 22.

⁷⁵ *Id.* at 23.

⁷⁶ *Id.* at 24.

⁷⁷ Davy, *supra* note 67, at ¶ 10.

⁷⁸ Grit Grigoleit, *Coming Home? The Integration of Hmong Refugees from Wat Tham Krabok, Thailand, into American Society*, 7 *HMONG STUD. J.* 1, 4 (2006).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 6.

⁸² Brian McCartan, *The Wrong Way to End a Secret War*, *ASIA TIMES* (June 13, 2008), http://www.atimes.com/atimes/Southeast_Asia/JF13Ae01.html (“Congress passed House Resolution 402, which acted to urge the Lao regime to cease military attacks on the Hmong and allow for humanitarian aid groups and human rights monitors access to the remote jungle areas where they are in hiding.”).

⁸³ *See* H.R. res. 402, 108th Cong. (2004).

United States in June 2004.⁸⁴ Immediately, and perhaps encouraged by the resettlements, a new wave of Hmong-Lao fled from Laos to Thailand seeking refuge.⁸⁵ Once in Thailand, many lived on the edges of the forests near Thai villages.⁸⁶ In June of 2005, the Thai government forced the Hmong-Lao to leave the forests and pressured Thai residents into not helping these individuals.⁸⁷ Though the United States made arrangements to resettle another group of Hmong-Lao, it later decided it was unable to do so.⁸⁸

From 2004 to 2009, Thailand has forcibly repatriated thousands of Hmong-Lao in Thailand.⁸⁹ In May 2007, Thailand and Laos signed the Lao–Thai Committee Border Security Agreement, allowing Thailand to repatriate 7,500 Hmong-Lao seeking asylum at the Hauj Nam Khao camp and those held in Thailand’s Nong Khai Immigration Detention Center.⁹⁰ Finally, during the 2009 Repatriation, the remaining four thousand or so Hmong-Lao asylum seekers were rounded up by Thai authorities and forcibly repatriated back to Laos.⁹¹ Panitan Wattanayagorn, the spokesman for the Thai Prime Minister, told TIME Magazine that Thailand “based these actions on [its] immigration law, which considers them [Hmong-Lao] to be illegal migrants, so they were dealt with accordingly.”⁹² This sparked an international furor with countries, including the United States and Australia, who condemned Thailand for refusing to protect the Hmong-Lao.⁹³ According to Time Magazine: “[a]lthough Thailand never signed the Refugee Convention or its 1967 Protocol, the United Nations was outraged that Thailand had sent back unwilling refugees.”⁹⁴

⁸⁴ Currie, *supra* note 48, at 345; Grigoleit, *supra* note 78, at 8.

⁸⁵ Currie, *supra* note 48, at 345.

⁸⁶ *Id.*

⁸⁷ *Id.* at 346.

⁸⁸ *Id.*

⁸⁹ Currie, *supra* note 48, at 346–49.

⁹⁰ *MSF Calls on Thailand to Halt Forcible Return of Hmong Refugees to Laos*, MEDECINS SANS FRONTIERS (Oct. 31, 2007), <http://www.doctorswithoutborders.org/article/msf-calls-thailand-halt-forcible-return-hmong-refugees-laos>; See Brian McCartan, *Fallen Pawns in US’s Strategic Game*, ASIA TIMES (Jan 8, 2010), http://www.atimes.com/atimes/Southeast_Asia/LA08Ae01.html.

⁹¹ William Lloyd George & Chiang Mai, *Hmong Refugees Live in Fear in Laos and Thailand*, TIME.COM (Sept. 6, 2012), available at <http://www.time.com/time/world/article/0,8599,2005706,00.html#ixzz25GYQrIVH>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

III. THE INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTING REFUGEES

The centerpiece of international refugee protection today is found in the Refugee Convention⁹⁵ and its 1967 Protocol.⁹⁶ In response to the millions of people forcibly displaced by the Second World War, a diplomatic conference in Geneva adopted the Refugee Convention in July of 1951, which entered into force on April 22, 1954.⁹⁷ As a post-Second World War instrument, the Refugee Convention was originally limited in scope to persons fleeing events occurring within Europe before January 1, 1951.⁹⁸ Considering that new refugee situations have arisen since the Refugee Convention was adopted, the 1967 Protocol amended the Refugee Convention to remove the geographic and temporal limits to give the Refugee Convention universal coverage.⁹⁹ These documents are the key legal instruments defining who is a refugee, refugee rights, and the legal obligations of states.¹⁰⁰ As of today, 147 states are a party to one or both of these documents.¹⁰¹

This section examines and discusses the essential state obligation incorporated into these two documents: the customary international legal principle of “non-refoulement.”¹⁰² However, doing so will first require discussion and analysis of the refugee definition under these two documents because the non-refoulement principle is applicable only to

⁹⁵ Refugee Convention, *supra* note 9.

⁹⁶ 1967 Protocol, *supra* note 10.

⁹⁷ Refugee Convention, *supra* note 9.

⁹⁸ *Id.* at art. 1 § A(2) (“For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who . . . As a result of events occurring before 1 January 1951 and owing to a 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 of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

⁹⁹ 1967 Protocol, *supra* note 10, at art. 1, § 2 (“For the purposes of the present Protocol, the term ‘refugee’ shall . . . mean any person within the definition of article 1 of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and . . .’ ‘and the words’ . . . ‘a result of such events’, in article 1 A (2) were omitted.”)

¹⁰⁰ Refugee Convention, *supra* note 9; 1967 Protocol, *supra* note 10; Refugee Q&A, *supra* note 11, at 1.

¹⁰¹ U.N. High Comm’r for Refugees, *Introductory Note*, Geneva Conference, 19 U.S.T. 6259, 189 U.N.T.S. 150, (Dec. 2010), ¶ 9 [hereinafter *Introductory Note*].

¹⁰² See Refugee Convention, *supra* note 9; see 1967 Protocol, *supra* note 10; see Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT’L L.J. 1, 6 (2004).

individuals who satisfy this definition.¹⁰³ In discussing this state obligation, this section also examines the handbook promulgated by the High Commissioner for Refugees in 1979 (“UNHCR Handbook”).¹⁰⁴ The UNHCR Handbook does not have the same legal authority as the Refugee Convention and its 1967 Protocol, but has been recognized as an authoritative guide and persuasive authority in some states.¹⁰⁵

A. THE DEFINITION OF REFUGEE UNDER THE REFUGEE CONVENTION

According to the UNHCR Handbook, a person can be a refugee under the Refugee Convention and or its 1967 Protocol by being in a country that is not bound by either of these documents.¹⁰⁶ The UNHCR Handbook recognizes that seeking asylum can require refugees to breach state immigration rules.¹⁰⁷ However, these documents contain various safeguards against the expulsion of refugees.¹⁰⁸ The Refugee Convention stipulates that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay.¹⁰⁹

The Refugee Convention contains a refugee definition that consists of three relevant clauses, termed respectively as the “inclusion clause,” the “cessation clause” and the “exclusion clause.”¹¹⁰ The inclusion clause defines the criteria that a person must satisfy in order to be a refugee.¹¹¹ The cessation clause provides conditions under which a

¹⁰³ See Refugee Convention, *supra* note 9; see 1967 Protocol, *supra* note 10.

¹⁰⁴ U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/Rev.1 (1979) [hereinafter UNHCR Handbook].

¹⁰⁵ See generally *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the [Board of Immigration Appeals], or United States courts.”), and *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (noting that, although the *Handbook* does not carry the force of law, it does provide significant guidance on the interpretation of the Refugee Convention and the 1967 Protocol); see also *Chan v. Minister of Employment & Immigration*, [1995] 3 S.C.R. 593, 620 (Can.) (“This much-cited guide has been endorsed by the Executive Committee of the UNHCR, including Canada, and has been relied upon for guidance by the courts of signatory nations. Accordingly, the UNHCR Handbook must be treated as a highly relevant authority in considering refugee admission practices.”).

¹⁰⁶ UNHCR Handbook, *supra* note 104, at ¶ 17.

¹⁰⁷ *Id.*

¹⁰⁸ Introductory Note, *supra* note 101.

¹⁰⁹ Refugee Convention, *supra* note 9, at art. 31(1).

¹¹⁰ *Id.* at ¶ 30.

¹¹¹ *Id.* at ¶ 31.

refugee ceases to be a refugee.¹¹² The exclusion clause enumerates the circumstances in which a person is excluded from the application of the refugee definition even if the person meets the criteria under the inclusion clause.¹¹³

Under the inclusion clause of the refugee definition, a “refugee” is:

someone who is unable or unwilling to return to their country of origin “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”¹¹⁴

According to the UNHCR Handbook, a “well-founded fear of being persecuted” requires a subjective element of “fear” in the person applying for recognition as a refugee that must also be supported by an objective element situation.¹¹⁵ For the subjective element, the fear must be reasonable.¹¹⁶ Exaggerated fear may be well-founded, if in all the circumstances of the case, such a state of mind can be regarded as justified.¹¹⁷ In regard to the objective element, the applicant’s statements must be viewed in the context of the relevant background situation.¹¹⁸ In general, fear should be considered well-founded if the applicant can establish to a reasonable degree that continued stay in the applicant’s country of origin has become intolerable to him or her.¹¹⁹ These considerations need not necessarily be based on personal experience.¹²⁰ For example, what happened to the applicant’s friends and relatives and

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Introductory Note, *supra* note 101, at ¶ 2; *See also* Refugee Convention, *supra* note 9, at art. 1, § A(2) (“For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who . . . As a result of events occurring before 1 January 1951 and owing to a 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 of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”); *See also* 1967 Protocol, *supra* note 10, at art. 1, § 2 (“For the purposes of the present Protocol, the term ‘refugee’ shall . . . mean any person within the definition of article 1 of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and . . .’ and the words ‘. . . a result of such events,’ in article 1 A (2) were omitted”).

¹¹⁵ UNHCR Handbook, *supra* note 104, at ¶¶ 37–38.

¹¹⁶ *Id.* ¶ 41.

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶ 42.

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶ 43.

other members of the same racial or social group may well show that the applicant's fear that sooner or later he or she will also become a victim of persecution is well-founded.¹²¹

Apart from the situations described above, the applicant for refugee status must normally show good reason why the applicant individually fears persecution.¹²² It may be assumed that a person has a well-founded fear of being persecuted if the person has already been the victim of persecution for one of the reasons enumerated in the inclusion clause.¹²³ The word "fear," however, refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.¹²⁴

According to the UNHCR Handbook, a person is a refugee under the Refugee Convention as soon as he or she fulfills the criteria contained in the inclusion clause of the refugee definition.¹²⁵ This occurs even though a person is in a country that is not bound by either the Refugee Convention or its 1967 Protocol.¹²⁶ Moreover, this occurs before a person is formally determined to be a refugee.¹²⁷ The UNHCR Handbook states that formal recognition of refugee status does not make a person a refugee, but simply declares a person to be one.¹²⁸

Under the cessation clause of the refugee definition, there are several instances where a refugee will lose his or her refugee status. A person's refugee status may cease under two conditions: 1) when the refugee has taken steps indicating that international protection is no longer necessary;¹²⁹ or, 2) when conditions in the country of origin have changed so that there is no longer a basis for claimed persecution.¹³⁰ The first condition ceases refugee status: (i) when a person has voluntarily resumed the protection of his or her country of nationality;¹³¹ (ii) when a person has voluntarily reacquired prior nationality;¹³² (iii) when a person has acquired a new nationality and enjoys protection in the new

¹²¹ *Id.*

¹²² *Id.* ¶ 45.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* ¶ 28.

¹²⁶ *Id.* ¶ 17.

¹²⁷ *Id.* ¶ 28.

¹²⁸ *Id.*

¹²⁹ See generally Refugee Convention, *supra* note 9, at art. 1, § C.

¹³⁰ UNHCR Handbook, *supra* note 104, ¶ 115.

¹³¹ Refugee Convention, *supra* note 9, at art. 1, § C(1).

¹³² *Id.* at § C(2).

state;¹³³ or (iv) when a person has voluntarily reestablished themselves in a country they fled or refused to return to due to persecution.¹³⁴ The second condition ceases refugee status when the refugee's home state has changed such that the reasons for claimed persecution no longer exist.¹³⁵ Refugee status does not cease, however, if there are compelling reasons based on past persecution for such person to refuse the protection of his or her home state.¹³⁶

Under the exclusion clause of the refugee definition, the Refugee Convention excludes people who benefit from the protection or assistance of a United Nations agency other than the UNHCR.¹³⁷ The Refugee Convention also excludes refugees who have a status equivalent to nationals in their country of asylum.¹³⁸ Finally, the Refugee Convention excludes refugees who have committed criminal acts.

Refugees excluded under criminal acts include: 1) people who have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime outside their country of refuge;¹³⁹ or, 2) people who are guilty of acts contrary to the purposes and principles of the United Nations.¹⁴⁰ War crimes are violations of the laws or customs of war and include, but are not limited to: murder, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.¹⁴¹ Crimes against humanity include, but are not limited to: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war.¹⁴²

A "serious non-political crime" must be a capital crime or a very grave punishable act.¹⁴³ Minor offences punishable by moderate sentences are not grounds for exclusion under the exclusion clause.¹⁴⁴

¹³³ *Id.* at § C(3).

¹³⁴ *Id.* at § C(4).

¹³⁵ *Id.* at § C(5).

¹³⁶ *Id.*

¹³⁷ *Id.* at art. 1, § D; Introductory Note, *supra* note 101, at para. 5 (the Refugee Convention does not apply to refugees from Palestine who fall under the auspices of the United Nations Relief and Works Agency for Palestine Refugees in the Near East).

¹³⁸ Refugee Convention, *supra* note 9, at art 1, § E.

¹³⁹ *Id.* § F(a)–(b).

¹⁴⁰ *Id.* at § F(c).

¹⁴¹ UNHCR Handbook, *supra* note 104, at annex V.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

The exclusion clause only excludes an applicant for a crime committed or presumed to have been committed by the applicant “outside the country of refuge prior to his [or her] admission to that country as a refugee.”¹⁴⁵ In applying the exclusion clause, it is necessary to strike a balance between the nature of the offense presumed to have been committed by the applicant and the degree of persecution feared.¹⁴⁶

B. REFUGEE STATUS UNDER THE UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES

The Office of the United Nations High Commissioner for Refugees is designated as the authority charged with providing international protection to refugees.¹⁴⁷ The UNHCR is required, amongst other things, to promote the conclusion and ratification of international conventions for the protection of refugees, and to supervise their application.¹⁴⁸ Persons to whom the UNHCR’s competence extends to are very close to, though not identical with, the definition contained in the Refugee Convention.¹⁴⁹ A person who meets the criteria of the UNHCR statute qualifies for the protection of the UNHCR.¹⁵⁰ This is regardless of whether or not this person is in a country that is a party to the Refugee Convention or its 1967 Protocol, or whether or not the person has been recognized by his or her host country as a refugee under either of these documents.¹⁵¹

The UNHCR’s preferred solution for refugees is voluntary repatriation of refugees to their country of origin when conditions in the country of origin permit safe return.¹⁵² It is recognized both in principle and state practice as the most appropriate solution to refugee flows.¹⁵³ The UNHCR has emphasized that the durability of a refugee solution is

¹⁴⁵ *Id.* ¶ 153.

¹⁴⁶ *Id.* ¶ 156.

¹⁴⁷ *Id.* ¶ 18.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶ 15.

¹⁵⁰ *Id.* ¶ 16.

¹⁵¹ *Id.*

¹⁵² U.N. High Comm’r for Refugees, *The Wall Behind Which Refugees Can Shelter: The 1951 Geneva Convention*, 2 REFUGEES 1, 17 (2001) [hereinafter *Geneva Convention*]; See generally Akram & Rempel, *supra* note 102, at 7.

¹⁵³ Akram & Rempel, *supra* note 102, at 7–8.

based on voluntariness.¹⁵⁴ The principle of voluntariness can be incorporated 1) in individual UNHCR-state agreements;¹⁵⁵ 2) through multiparty peace agreements involving refugee flows;¹⁵⁶ or 3) through UNHCR mechanisms for verification of refugee choice.¹⁵⁷

C. THE CUSTOMARY INTERNATIONAL LEGAL PRINCIPLE OF NON-REFOULEMENT

The principle of non-refoulement has become a matter of customary international law,¹⁵⁸ meaning that it applies even to states that are not yet a party to the Refugee Convention and or its 1967 Protocol. Article 38(1)(b) of the Statute of the International Court of Justice lists “‘international custom, as evidence of a general practice accepted as law’, as one of the sources of law which it applies when deciding disputes in accordance with international law.”¹⁵⁹ For a rule to become part of customary international law, two elements are required: 1) consistent state practice and 2) *opinio juris*, which means an understanding held by states that the practice at issue is obligatory due to the existence of a rule requiring it.¹⁶⁰

The UNHCR’s position is of the view that the prohibition of refoulement of refugees satisfies these criteria and thus constitutes a rule of customary international law.¹⁶¹ Furthermore, in 2001, 147 state parties issued a declaration reaffirming their commitment to the Refugee Convention and its 1967 Protocol, and recognized that the core principle

¹⁵⁴ U.N. HIGH COMM’R FOR REFUGEES, VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION 10–11 (1996) [hereinafter Handbook on Voluntary Repatriation] (the voluntary nature of a refugee’s choice of solutions is considered by UNHCR to be “a pragmatic and sensible approach” to implementing durable solutions).

¹⁵⁵ Akram & Rempel, *supra* note 102, at 8.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; See generally Handbook on Voluntary Repatriation, *supra* note 168, at 30–39 (giving examples of UNHCR verification mechanisms).

¹⁵⁸ See Introductory Note, *supra* note 101, at para. 8. (State parties issued a declaration in 2001 reaffirming their commitment to the 1951 Convention and its 1967 Protocol, and recognized that the core principle of non-refoulement is embedded in customary international law).

¹⁵⁹ Statute of the International Court of Justice art. 38, para. 1, June 26, 1945, 59 Stat. 1031.

¹⁶⁰ See North Sea Continental Shelf (Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. Reports 3, para. 74; See also Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction & Admissibility, 1984 I.C.J. Reports 392, para. 77.

¹⁶¹ 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*, Geneva (Jan. 26, 2007) (as enshrined in Article 33 of the Refugee Convention and complemented by non-refoulement obligations under international human rights law).

of non-refoulement is embedded in customary international law.¹⁶² Therefore, the legal principle of non-refoulement is binding on all states, including those which have not yet become party to the Refugee Convention and or its 1967 Protocol.

Refoulement is prohibited explicitly in Article 33(1) of the Refugee Convention, which provides 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.¹⁶³

Refoulement is also prohibited explicitly or through interpretation by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the Fourth Geneva Convention of 1949 (Art. 45, para. 4), the International Covenant on Civil and Political Rights (Article 7), the Declaration on the Protection of All Persons from Enforced Disappearance (Article 8), and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5).¹⁶⁴ In addition, refoulement is prohibited explicitly or through interpretation in a number of regional human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human Rights (Article 22), the OAU Refugee Convention (Article II), and the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Article 2).¹⁶⁵

A non-party State does not violate the non-refoulement principle for refugee repatriations under two situations. First, the protections under the Refugee Convention exclude individuals who meet the conditions under the exclusion clause or cease to apply to individuals meeting the conditions under the cessation clause.¹⁶⁶ Thus, the non-refoulement principle pertains only to a person satisfying the inclusion clause of the

¹⁶² Introductory Note, *supra* note 101, at para. 9; Ministerial Meeting of States Parties, Geneva, Switz., Dec. 12–13, 2001, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002). The U.N. General assembly later welcomed the declaration. G.A. Res. 57/187, ¶ 4, U.N. Doc. A/RES/57/187 (Dec. 18, 2002).

¹⁶³ Refugee Convention, *supra* note 9, at art. 33, § 1.

¹⁶⁴ U.N. HIGH COMM'R FOR REFUGEES, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 14 (2001).

¹⁶⁵ *Id.*

¹⁶⁶ See generally Refugee Convention, *supra* note 9, at art. 1, §§ C, F.

refugee definition because this person would be a “refugee” covered under the non-refoulment principle.¹⁶⁷

Second, a non-party state does not violate the non-refoulement principle if the refugee voluntarily repatriated. Meaning, states do not take “measures which push the refugee to repatriate.”¹⁶⁸ Accordingly, a non-state party would violate the Refugee Convention if it repatriated individuals satisfying the inclusion clause who had not lost or were excluded from such protection, or if it pushed individuals, who had not lost or were excluded from such protection, to repatriate.

IV. THAILAND VIOLATED THE NON-REFOULEMENT PRINCIPLE WHEN IT REPATRIATED THOUSANDS OF HMONG-LAO FROM ITS BORDER IN 2009

Thailand has violated the non-refoulement principle because many repatriated Hmong-Lao satisfied and maintained their refugee status under the refugee definition and did not voluntarily repatriate. Thailand does not, however, violate the non-refoulement principle for the Hmong-Lao who lost refugee status or were excluded from such protection. Thailand also is not in violation for the Hmong-Lao who voluntarily repatriated. This section discusses the grounds for why Thailand has violated the non-refoulement principle. It does so by first analyzing and discussing why many of the Hmong-Lao satisfied and maintained their refugee status under the refugee definition, and then discussing why the 2009 Repatriation was not voluntary.

A. MANY HMONG-LAO SATISFIED THE CRITERIA UNDER THE INCLUSION CLAUSE OF THE REFUGEE DEFINITION

It is clear that many Hmong-Lao involved in the 2009 Repatriation satisfied the criteria under the inclusion clause of the refugee definition. Those satisfying the criteria include the 158 Hmong-Lao already recognized by the UNHCR as “persons of concern due to fears of government reprisals for their past involvement with the Hmong insurgency.”¹⁶⁹ These 158 have all been assessed by UNHCR as genuine refugees facing persecution if returned to Laos, which qualifies them for

¹⁶⁷ See *id.* at art. 1, § A(2); See 1967 Protocol, *supra* note 10, at art. 1, § 2.

¹⁶⁸ Handbook on Voluntary Repatriation, *supra* note 168, at 10.

¹⁶⁹ McCartan, *supra* note 82.

refugee protection under the Refugee Convention and its 1967 protocol.¹⁷⁰ Those satisfying the criteria also included many of the Hmong-Lao who were never assessed;¹⁷¹ a person is a refugee by simply meeting the criteria of the inclusion clause of the refugee definition.¹⁷²

Though many of the Hmong-Lao have not been assessed, the following facts affirm that these people have met the criteria of the inclusion clause. First, the subjective element of fear is satisfied because the Hmong-Lao have claimed to have fled to Thailand in order to escape from the violence and persecution of Laos.¹⁷³ Historically, the Hmong-Lao in Thailand have suffered violence and persecution by the Lao government because of their involvement in the Secret War.¹⁷⁴ Furthermore, human rights workers and observers have stated that several hundred Hmong-Lao in addition to the 158 recognized by UNHCR, “would be at clear risk of government reprisals if they were repatriated to Laos.”¹⁷⁵

Finally, the McClatchy Company Newspapers have indicated that 4,500 of the repatriated Hmong-Lao include political refugees that may face dangers if returned to Laos.¹⁷⁶ The McClatchy Company is the third largest newspaper publisher by circulation in the United States, with 30 daily newspapers, 43 non-dailies marketing and direct mail operations located in 29 markets across the country.¹⁷⁷ The McClatchy Company provides both print and digital news and advertising services in the states of California, Washington, South Carolina, and North Carolina,

¹⁷⁰ See Ben Doherty, *Deported Hmong Held by Lao Army in Squalid Camp*, SYDNEY MORNING HERALD (Jan. 13, 2010), <http://www.smh.com.au/action/printArticle?id=1032715>.

¹⁷¹ See Doherty, *supra* note 170; See also Seth Mydans, *Thailand Begins Repatriation of Hmong to Laos*, N.Y. TIMES (Dec. 28, 2009), http://www.nytimes.com/2009/12/28/world/asia/28hmong.html?_r=0 (“Refugee experts say the camp residents are a mix of refugees who fear persecution and economic migrants who left Laos over the past few years”).

¹⁷² UNHCR Handbook, *supra* note 104.

¹⁷³ DOCTORS WITHOUT BORDERS, *supra* note 90; see Oratai Singhananth, *Missing Lao Hmong Girls Back in Thailand, Lao Official Says*, RADIO FREE ASIA (June 30, 2007), www.rfa.org/english/news/laos/lao_hmong-20070630.html-09202007210221.html.

¹⁷⁴ See Doherty, *supra* note 170 (the Hmong were secretly recruited by the CIA to fight for the U.S. in the Vietnam War and “secret war” in Laos).

¹⁷⁵ McCartan, *supra* note 82.

¹⁷⁶ Sananda Sahoo, *Laos Continues to Block Public Access to Deported Hmong Tribesmen*, MCCLATCHY NEWSPAPERS (Mar. 5, 2010), www.mcclatchydc.com/2010/03/05/v-print/89921/laos-continues-to-block-public.html.

¹⁷⁷ UNITED STATES SECURITIES AND EXCHANGE COMMISSION, THE MCCLATCHY COMPANY (2009), available at: http://www.sec.gov/Archives/edgar/data/1056087/000119312510046124/d10k.htm#toc98681_2.

and Minnesota.¹⁷⁸ The McClatchy Company's owned newspapers include, among others, The Fort Worth Star-Telegram, The Sacramento Bee, The Kansas City Star, The Charlotte Observer, and The (Raleigh) News & Observer.¹⁷⁹

Second, the objective element of fear is also satisfied. There are well-documented events that suggest that the Hmong-Lao are at risk if repatriated to Laos. In 2005, twenty-eight Hmong-Lao who were forcibly repatriated to Laos disappeared after repatriation.¹⁸⁰ Eight young girls from this group eventually fled back to Thailand,¹⁸¹ who, upon their return, shared horrific stories "of imprisonment, interrogation, torture and sexual abuse."¹⁸² In 2008, Hmong-Lao camp leaders were sent back to Laos, only to be held for several months in a prison.¹⁸³ These individuals were only released later that same year after the Human Rights Watch issued a report critical of their detention.¹⁸⁴ Recognizing the risk of persecution, many states, human rights organizations, and aid organizations have complained to Thailand to cease repatriation.¹⁸⁵ For example, the acting president of Refugees International stated that the "forced repatriation would place the refugees in serious danger of persecution at the hands of the Lao authorities, who to this day have not forgiven the Hmong for being dedicated allies of the United States during the Vietnam War."¹⁸⁶

Third, many Hmong-Lao were improperly screened by the Thai government when determining refugee status.¹⁸⁷ Thailand lacked a proper screening process to determine whether a person met the refugee definition under the Refugee Convention or its 1967 Protocol. Different groups and organizations have observed such improper screening. Doctors Without Borders have urged the Thai government to carry out a proper objective screening process controlled by an independent third

¹⁷⁸ *McClatchy Company*, N.Y. TIMES (Mar. 2, 2014), <http://topics.nytimes.com/top/news/business/companies/mcclatchy-company/>.

¹⁷⁹ *Id.*

¹⁸⁰ McCartan, *supra* note 82.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Mydans, *supra* note 171; See also *Thailand: Deportation of Lao Hmong Refugees*, Asian Forum for Human Rights and Development (Dec. 29, 2011), <http://www.forum-asia.org/?p=11808>.

¹⁸⁶ Mydans, *supra* note 171.

¹⁸⁷ See DOCTORS WITHOUT BORDERS, *supra* note 90; See also McCartan, *supra* note 82.

party, such as the UNHCR.¹⁸⁸ This third party would then assess the legitimacy of fears, verify the claims to refugee status, and assure that any repatriation to Laos would be voluntary.¹⁸⁹ Similarly, nine US senators wrote to Thailand's Prime Minister Abhisit Vejjajiva before the 2009 Repatriation to protest against it.¹⁹⁰ In this letter, the senators decried Thailand's lack of transparency in screening refugees and urged Thailand to involve a third party to ensure it followed international norms.¹⁹¹

However, there is evidence that indicate that some Hmong-Lao did not satisfy the criteria under the inclusion clause. This group mainly includes economic migrants¹⁹² Thailand and Laos have claimed that the Hmong-Lao were "economic migrants' with no legitimate asylum claims."¹⁹³ Additionally, human rights workers and other observers, including the McClatchy Newspapers, have assessed and confirmed that there were also economic migrants among the Hmong-Lao.¹⁹⁴

B. MANY HMONG-LAO MAINTAINED THEIR REFUGEE STATUS

The Hmong-Lao satisfying the inclusion clause of the refugee definition have not lost such protection under the cessation clause. In general, the Hmong-Lao have not taken steps to indicate international protection is no longer necessary.¹⁹⁵ They have not voluntarily resumed the protection of Laos, reacquired prior nationality, acquired any new nationality, or re-established themselves in Thailand, the country of asylum.¹⁹⁶

Although the conditions in Laos have changed, there is still a basis for claimed persecution.¹⁹⁷ First, there are compelling reasons based on past persecution as to why the Hmong-Lao are refusing the protection

¹⁸⁸ DOCTORS WITHOUT BORDERS, *supra* note 90.

¹⁸⁹ *Id.*

¹⁹⁰ McCartan, *supra* note 90.

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *See* Doherty, *supra* note 170.

¹⁹⁴ *See* McCartan, *supra* note 90; *See* Mydans, *supra* note 171 ("Refugee experts say the camp residents are a mix of refugees who fear persecution and economic migrants who left Laos over the past few years").

¹⁹⁵ *See* Akram & Rempel, *supra* note 102, at 8.

¹⁹⁶ *See* Refugee Convention, *supra* note 9, art. 1, § C.

¹⁹⁷ *See* UNHCR Handbook, *supra* note 104, ¶ 164.

of Laos.¹⁹⁸ This can be seen from prior persecutions of the Hmong-Lao for their involvement in the Secret War. Second, there is evidence of violence and persecution of the Hmong-Lao who were repatriated earlier.¹⁹⁹ Additionally, the remaining criteria under the exclusion clause do not pertain to the Hmong-Lao. The Hmong-Lao have not benefitted from the protection or assistance of a United Nations agency other than the UNHCR,²⁰⁰ nor do the Hmong-Lao have a status equivalent to nationals in Thailand, the country of asylum.²⁰¹ As such, the Hmong-Lao have not lost their refugee status under the inclusion clause.

Thailand, however, has argued that it has a bilateral agreement with Laos, which provides that Laos will not persecute any repatriated Hmong-Lao.²⁰² Laos agrees to this statement, but has prevented the international community from contacting the Hmong-Lao involved in the 2009 Repatriation.²⁰³ Ever since the Hmong-Lao were repatriated, there has been little to no news about their conditions and their whereabouts.²⁰⁴ Only a select few diplomats were given some access to these Hmong-Lao, but even then this visit was very limited.²⁰⁵ The visit was tightly controlled and cut short after Hmong residents expressed their fears to the diplomats.²⁰⁶ The diplomats were only given a short tour of the village by van instead of a more comprehensive visit that was originally planned.²⁰⁷ With such limitations, there seems to be something that Laos does not want the international community to learn about.²⁰⁸ Current news has also not been supportive of Laos's position, reporting that

¹⁹⁸ See Refugee Convention, *supra* note 9.

¹⁹⁹ See McCartan, *supra* note 82.

²⁰⁰ See Refugee Convention, *supra* note 9, art. 1, § D; Introductory Note, *supra* note 101, at para. 5 (for example, the Refugee Convention does not apply to refugees from Palestine who fall under the auspices of the United Nations Relief and Works Agency for Palestine Refugees in the Near East).

²⁰¹ See Refugee Convention, *supra* note 9, art. 1, § E.

²⁰² See DOCTORS WITHOUT BORDERS, *supra* note 90.

²⁰³ See Doherty, *supra* note 170; see Mark Zdechlik, *Franken Visits Laos to See Repatriated Hmong Refugees*, MINNESOTA PUBLIC RADIO (July 6, 2010), available at <http://minnesota.publicradio.org/display/web/2010/07/06/franken-in-laos>.

²⁰⁴ See Doherty, *supra* note 170; see Zdechlik, *supra* note 206.

²⁰⁵ Oratal Singhananth, *Resettled Hmong Feel Unsafe*, RADIO FREE ASIA (Mar. 28, 2010), <http://www.rfa.org/english/news/laos/resettledhmong-03282010163246.html>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *id.*

Laotian soldiers have recently fired machine guns at ten Hmong-Lao in Laos, killing four and wounding another.²⁰⁹

Nevertheless, there are some Hmong-Lao excludible under the exclusion clause of the refugee definition. Some Hmong-Lao are suspected of committing war crimes, non-political crimes, or are guilty of acts contrary to the purposes and principles of the United Nations.²¹⁰ There have been reports of small Hmong-Lao resistance groups made up of a hundred or so Hmong-Lao who have taken part in mainly hit and run operations against Laos.²¹¹ Many of these resistance groups are reported to include remnants of the secret army enlisted by the CIA to fight in the Secret War.²¹² Reports indicated that some of the Hmong-Lao from these resistance groups have surrendered to Laos in 2005 and 2007, with others fleeing to Thailand.²¹³ Reports also indicate that those fleeing to Thailand were joined by other Hmong-Lao in claiming persecution by Laos in order to resettle in the United States or other Western countries.²¹⁴ The Thai government suspects that many of the Hmong-Lao in Thailand were helping these resistance groups and have stated that such attacks have harmed its bilateral relations with Laos.²¹⁵ Such attacks against Laos may be considered acts contrary to the purposes and principles of the United Nations,²¹⁶ especially since these resistance groups were attacking Laos and then fleeing to Thailand to escape arrest by the Lao government.

C. MANY HMONG-LAO DID NOT VOLUNTARILY REPATRIATE TO LAOS

Thailand is in violation of the non-refoulement principle because many of the Hmong-Lao were forced or coerced to repatriate. In May 2007, the Thai and Lao governments signed the Lao-Thai Committee on Border Security agreement allowing Thailand to repatriate Hmong-Lao

²⁰⁹ *Laos: Attacks Intensify Against Lao, Hmong People*, CENTER FOR PUBLIC POLICY ANALYSIS (Mar. 4, 2013), <http://www.businesswire.com/news/home/20130304006755/en/Laos-Attacks-Intensify-Hmong-Lao-People>.

²¹⁰ See Refugee Convention, *supra* note 9.

²¹¹ McCartan, *supra* note 90 (Hmong rebels in hit-and-run conflicts in Laos were fighting an ideologically muddled struggle for survival and Hmong identity).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See Singhananth, *supra* note 173.

²¹⁶ See Refugee Convention, *supra* note 9, art. 1, § F(C).

asylum seekers upon arrival.²¹⁷ In September 2007, the Thai and Lao government announced their intention to “forcibly repatriate the Hmong refugees before the end of 2008 without any independent screening process.”²¹⁸ This repatriation occurred roughly a year before the 2009 Repatriation. Additionally, there has been no international guarantee for the safety of the Hmong-Lao upon their return to Laos.²¹⁹ The only thing close to a guarantee of safety is a statement from Laos to Thailand “that the returnees would be treated well” and Thailand’s own statement to the international community that “there is no reason to believe that they [the Hmong-Lao] will be harmed.”²²⁰

Although some Hmong-Lao voluntarily repatriated, there is strong evidence that many were forced and or coerced to repatriate.²²¹ In the 2009 Repatriation, Thailand’s military officers were armed with riot shields and batons to forcibly return the more than four thousand Hmong-Lao asylum seekers to Laos.²²² Prior to this repatriation, the Thai military had removed mobile telephones and halted medical services and food provided by aid groups, apparently “to physically and mentally break their resistance to their deportation.”²²³ Even Doctors Without Borders, one of the main aid group assisting the Hmong-Lao, withdrew their services because they could “no longer work in a camp where the military uses arbitrary imprisonment of influential leaders to pressure refugees into a ‘voluntary’ return to Laos.”²²⁴ These are clearly not signs of a voluntary repatriation free of coercion or force. Thus, Thailand has violated the non-refoulement principle when it forcibly repatriated the Hmong-Lao even though it was informed by human rights groups that many were eligible for refugee status.²²⁵

²¹⁷ See DOCTORS WITHOUT BORDERS, *supra* note 90.

²¹⁸ *Id.*

²¹⁹ See *id.*

²²⁰ Mydans, *supra* note 171. (statements from Panitan Wattanayagorn, Thailand’s government spokesman).

²²¹ See George, *supra* note 91 (Thailand refused Hmong-Lao determined as refugees to resettle in other countries).

²²² Mydans, *supra* note 171.

²²³ *Id.* (statements of the Thailand representative of Human Rights Watch).

²²⁴ *Id.*

²²⁵ See Mydans, *supra* note 171; see McCartan, *supra* note 82.

V. LIMITATIONS IN MAKING NON-PARTY STATES ABIDE BY THE NON-REFOULEMENT PRINCIPLE

The hosting state is primarily responsible for protecting refugees within its borders.²²⁶ States party to the Refugee Convention and or its 1967 Protocol are obligated to carry out all its provisions.²²⁷ Non-party states, on the other hand, are obligated to abide only by the non-refoulement principle of these documents because it is considered a rule of customary international law.²²⁸ States party to the documents have the right and duty to ensure that other states, including non-party states, actually live up to their obligations under these documents.²²⁹ Some of the outcomes that states can potentially face for breaching the non-refoulement principle include judgments of international courts condemning its act, countermeasures from other members of the international community, and intense criticism from the UNHCR and grassroots organizations.²³⁰

The protection of civilians is primarily a responsibility of states, although not all governments respect this.²³¹ The UNHCR works with states and intervenes if necessary to ensure that individuals satisfying the refugee definition are not forcibly repatriated to countries where their lives may be in danger.²³² Party states are more likely to cooperate with the UNHCR than non-party states. When a non-party state breaches the non-refoulement principle, the UNHCR can intervene by working with this state to enhance border and detention monitoring.²³³ It can do this by training border police, immigration officials, and/or non-governmental

²²⁶ Geneva Convention, *supra* note 152, at 16.

²²⁷ *Id.*

²²⁸ Refugee Q&A, *supra* note 11, at 5 (the principle of non-refoulement prohibiting the return of a refugee to a territory where his/her life or freedom is threatened is considered a rule of customary international law, and thus binding on all States regardless if it has acceded to the Refugee Convention or its 1967 Protocol).

²²⁹ James C. Hathaway, *Who Should Watch Over Refugee Law?*, IARLJ CONFERENCE, 393, 394 (2002).

²³⁰ PARIS TZOUMAS, THE PRINCIPLE OF NON-REFOULEMENT, SUBSIDIARY PROTECTION AND LEGAL LIMBOS, ESPECIALLY IN THE EU CONTEXT 1, 36, available at http://www.academia.edu/2326541/The_principle_of_non-refoulement_subsidary_protection_and_legal_limbo_especially_in_the_EU_Context (last visited Mar. 6, 2013).

²³¹ See Report by the High Commissioner, Note on International Protection, A/AC.96/1066, ¶ 16 (June 26 2009).

²³² *Id.* at 16.

²³³ *Id.* at 21.

organization partner officials on a state's non-refoulement obligation, or by training such individuals on how to identify international protection needs and ensure access to territory for persons of concern.²³⁴ In general, however, the UNHCR has limited capacity to provide physical security for persons of concern and in some instances is only able to do so with the support of peacekeepers.²³⁵ There are multiple cases where the non-refoulement principle is breached and a state has forcibly repatriated asylum seekers after the UNCHR has repeatedly advocated not to.²³⁶

Under Article 35 of the Statute of the International Court of Justice ("ICJ"), the ICJ is open to states party to the statute, and Article 93 of the United Nations Charter provides that all members of the United Nations are *ipso facto* parties to the statute.²³⁷ Thailand became a member of the United Nations on December 16, 1946.²³⁸ Additionally, Article 38 of the Refugee Convention provides that "any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."²³⁹

There are, however, a few limitations in using the ICJ. First, the ICJ is only open to states and only states may appear before the ICJ.²⁴⁰ International organizations, other collectivities, and private persons are not entitled to institute proceedings before the ICJ.²⁴¹ Second, Article 35 of the Statute of the ICJ provides that the ICJ can only deal with a dispute when the states concerned have recognized its jurisdiction.²⁴² This means that no state can therefore be a party to proceedings before the ICJ unless it has in some manner or another consented.²⁴³

Accordingly, it is difficult to bring a claim against Thailand for its violation of the non-refoulement principle. First, a claim can only be

²³⁴ *Id.* at 21.

²³⁵ Report by the High Commissioner, Note on International Protection, A/AC.96/1066, ¶ 16 (June 26 2009).

²³⁶ See *id.* at ¶ 20 (hundreds of Eritreans were repatriated despite repeated advocacy by UNHCR to refrain from forcible return).

²³⁷ *States Entitled to Appear Before the Court*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a> (last visited on Mar. 7, 2013).

²³⁸ *Id.*

²³⁹ Refugee Convention, *supra* note 9, at art. 38.

²⁴⁰ *Contentious Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> (last visited on Mar. 7, 2013).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

brought by another state, which leaves the Hmong-Lao powerless to file a claim against Thailand through the ICJ. Second, if a state were to file this case with the ICJ, Thailand still has the right not to consent to its jurisdiction. It is unlikely that Thailand will consent and be subject to the ICJ's jurisdiction because Thailand has no incentive to do so. Though some states have made declarations recognizing ICJ's jurisdiction as compulsory, Thailand is not one of them.²⁴⁴ As such, the ICJ is not a proper forum to deal with Thailand's violation.

Additionally, Thailand is a non-party state to the Refugee Convention and its 1967 Protocol, and will continue to be a non-party state because of the limited incentives to become a party state. In repatriating the Hmong-Lao, Thailand's interest is to control the large number of individuals migrating to its borders. Thailand is worried that if people in nearby states hear that Thailand is accepting non-citizens or assisting in the resettlement of non-citizens to other Western countries, this could act as a catalyst causing more migrants to enter Thailand.²⁴⁵ As a result, it may be cheaper for Thailand to control the immigration flow within its borders by not abiding by the non-refoulment principle.²⁴⁶

It is also costly for Thailand to continue hosting the Hmong-Lao when there is little assistance from other developed nations.²⁴⁷ There are various expenses involved when providing refugee protection under the Refugee Convention, which includes food, living expenses, employment, and education.²⁴⁸ Additionally, the cost of establishing and maintaining a mechanism to process refugee claims is also costly.²⁴⁹ The financial incentives from the UNHCR and other countries are not persuasive because nothing ensures that Thailand will break even. Accordingly, it is more likely that Thailand will continue being a non-party state because of the expenses associated in maintaining large refugee populations and in the interest of controlling the immigration flow.

²⁴⁴ See ICJ, *supra* note 237.

²⁴⁵ See generally Currie, *supra* note 48, at 345.

²⁴⁶ See Geneva Convention, *supra* note 152, at 22.

²⁴⁷ *Id.* (many developing countries hosting large refugees populations for long periods of time say they receive little assistance from the developed world).

²⁴⁸ See Refugee Convention, *supra* note 9, at art. 17–24.

²⁴⁹ See Geneva Convention, *supra* note 152, at 22 (Iran and Pakistan host twice as many refugees as do all the countries of western Europe combined; but the world's wealthiest nations contributed less than \$1 billion to fund UNHCR's protection work around the world, which is one-tenth the amount Iran and Pakistan spent on maintaining their own asylum systems).

VI. CONCLUSION

Although the non-refoulement principle is a matter of customary international law, it is limited in refugee protection when a non-party state has chosen not to abide by it. Under the Refugee Convention and its 1967 Protocol, Thailand is responsible for upholding the non-refoulement clause of these documents and in enforcing such protections. However, Thailand chose not to when it repatriated the thousands of Hmong-Lao in 2009. Penalties and incentives were not available to induce Thailand to do otherwise. Additionally, Thailand has sovereign immunity and in general cannot be tried under the ICJ or other international tribunals without consent. As such, the United Nations, the UNHCR, and party states should provide more forms of incentives to persuade non-party states to cooperate and respect the non-refoulement principle.